



ILLINOIS DEPARTMENT OF TRANSPORTATION /
ILLINOIS TOLLWAY DISADVANTAGED BUSINESS ENTERPRISES

Disparity Study

2

VOLUME

ILLINOIS
DEPARTMENT OF
TRANSPORTATION

FINAL REPORT | AUGUST 2011

Submitted by: Mason Tillman Associates, Ltd.



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EXECUTIVE SUMMARY

I. STUDY OVERVIEW

A. Study Purpose

In 2009, the Illinois Department of Transportation (IDOT) commissioned Mason Tillman to determine whether or not a statistically significant disparity existed between the number of Disadvantaged Business Enterprises (DBEs) that were ready, willing, and able to provide construction and architecture and engineering services to IDOT and the number of DBEs that were actually providing the services to IDOT. The Disadvantaged Business Enterprise Disparity Study (Disparity Study) focused on two industries—construction and architecture and engineering. The Disparity Study reviewed the award of prime contracts during the study period of January 1, 2006 through December 31, 2008.

B. Study Team

Mason Tillman Associates, Ltd., a public policy consulting firm based in Oakland, California, was selected to perform the Disparity Study. Mason Tillman also subcontracted with the Bronner Group and the Winston/Terrell Group to perform data collection and anecdotal interviews.

C. Industries Studied

The Disparity Study included a statistical analysis and evaluation of construction and architecture and engineering prime contracts and subcontracts awarded in the two industries.

Construction includes building, altering, repairing, improving, and demolishing of any public structure or building, or other improvements to public real property.

Architecture and Engineering is defined in Section 5 of the Illinois Architecture Practice Act of 1989 as well as any professional service defined in Section 4 of the Professional



Engineering Practice Act of 1989 or Section 5 of the Structural Engineering Practice Act of 1989.

D. Prime Contract Data

IDOT prime contract records in the two industries were analyzed to determine the utilization of available DBEs and non-DBEs. The analysis of formal contracts was capped at \$500,000 to ensure that the contracts examined in the disparity analysis were within the capacity level of available DBEs.

- **Prime Contract Data Sources**

The prime contracts analyzed were purchase orders and payments issued by IDOT during the study period. A unique list of transactions was created by grouping the purchase orders by unique number and the vendor number. The transactions are referred to as contracts in this Study.

The contract records were extracted from IDOT's financial management system. The dataset included contracts awarded between January 1, 2006 and December 31, 2008. Mason Tillman, in collaboration with IDOT, verified and cleaned the data to remove duplicates and complete the contract records with missing and incomplete data. Contracts with non-profits, government agencies, and utilities were marked for exclusion.

Each contract was classified into either construction and/or architecture and engineering. The industry classifications were reviewed and approved by IDOT.

The DBE status information for prime contractors was incomplete and some data had to be reconstructed. Therefore, Mason Tillman conducted research to verify the DBE status for each contractor. Prime contractor names were cross-referenced with certification lists, and websites were reviewed for the DBE status of the owner(s). Prime contractors whose DBE status could not be verified through published sources were surveyed. The DBE status of the prime contractors were completed except for five, which were not verified as to whether they were owned by a DBE or non-DBE.

Once the contract records were cleaned and the DBE status verified, the utilization analysis was performed.

E. Subcontractor Data

For the subcontract analysis of the utilization of available DBEs and non-DBEs, Mason Tillman gathered information on prime construction and architecture and engineering contracts awarded by IDOT.



- **Subcontractor Data Sources**

Extensive research was undertaken to compile the subcontracts awarded by IDOT's prime contractors during the study period. Mason Tillman worked closely with IDOT's staff to reconstruct the subcontractor data for construction and architecture and engineering prime contracts.

Two sources were used to reconstruct the subcontractor data. First, IDOT provided Mason Tillman with subcontractor records extracted from its subcontractor tracking database. Mason Tillman compiled IDOT's data into a relational database.

The second source was the prime and subcontractor expenditure surveys. IDOT's prime contractors that received one or more contracts were contacted by mail to request their subcontractors. For each of their relevant contracts, the prime contractors were asked to provide the subcontractor name, award, and total payment amount. After mailing the prime contractors their list of prime contracts, Mason Tillman conducted reminder telephone calls to encourage prime contractors to respond. IDOT's project managers and engineers assisted with the prime survey in an effort to maximize the expenditure survey response by contacting the non-responsive prime contractors to request their subcontract data.

All subcontractors identified from either IDOT's records or the prime contractor survey were contacted to verify their participation and payment on each prime contract.

The extraordinary effort of our project manager and other staff at IDOT made it possible to successfully reconstruct the subcontracts for most prime contracts. For some prime contracts, the subcontract records reconstructed were only DBE subcontractors. The disparity analysis requires the compilation of DBE and non-DBE subcontracts. There were, however, sufficient subcontract records compiled through this research to perform the subcontractor analysis for the period of January 1, 2006 to December 31, 2008.

F. Contract Thresholds

In the procurement process, there are two contract dollar thresholds. The first threshold is formal contracts, which require advertising and competitive solicitations, valued at over \$25,000 for construction and \$25,000 and over for architecture and engineering. The second threshold is informal contracts, which do not require advertising and competitive solicitations valued at \$25,000 and under for construction and \$25,000 and under for architecture and engineering.



II. METHODOLOGY AND STRUCTURE

A. Methodology

The review of *Crososon* and related case law provided the legal framework for conducting the Disparity Study. A legal review was the **first step** in the Disparity Study. Case law sets the standard for the methodology employed in a disparity study. **Step two** was to collect utilization records and determine the extent to which IDOT had used DBEs and non-DBEs to secure its needed construction and architecture and engineering services. Utilization records were also used to determine the geographical area in which companies that had received IDOT contracts were located. In **step three**, IDOT’s market area was identified. Once the market area was defined, the **fourth step**, the availability analysis, identified businesses willing and able to provide construction and architecture and engineering

services needed by IDOT. In the **fifth step**, the utilization and availability analyses were used to determine whether there was a statistically significant underutilization within the two industries. In **step six**, the anecdotal analysis, the contemporary experiences of 40 business owners in IDOT’s market area were collected. In addition to the 40 anecdotal interviews, an anecdotal survey was conducted to provide an opportunity for additional business owners to express their experience working with or seeking work from IDOT. In **step seven**, IDOT’s race-neutral efforts were reviewed to determine their scope and effectiveness in including DBEs in its contracting. In **step eight**, the statistical and anecdotal analyses were reviewed and recommendations were written to enhance IDOT’s efforts in

**Disparity Study:
Critical Components**

1. Legal Framework
2. Utilization Analysis
3. Market Area Analysis
4. Availability Analysis
5. Disparity Analysis
6. Anecdotal Analysis
7. Race-Neutral Assessment
8. Recommendations

contracting with DBEs in its market area. Additionally, a Private Sector/Regression Analysis was conducted to determine if factors other than discrimination could account for any statistically significant disparity.

B. Structure

The Disparity Study findings are presented in twelve chapters. The contents of each chapter are briefly described below:



Disparity Study Report

- *Chapter 1: Executive Summary* presents a summary of the legal, procurement, and anecdotal analyses as well as the statistical findings of the Disparity Study
- *Chapter 2: Legal Analysis* presents the legal cases applicable to business affirmative action programs and the methodology based on those cases required for the Disparity Study
- *Chapter 3: Contracting and Procurement Analysis* presents IDOT's contracting and procurement practices
- *Chapter 4: Prime Contractor Utilization Analysis* presents the distribution of prime contracts by industry and DBE status
- *Chapter 5: Subcontractor Utilization Analysis* presents the distribution of subcontracts by industry and DBE status
- *Chapter 6: Market Area Analysis* presents the legal basis for geographical market area determination and defines IDOT's market area
- *Chapter 7: Prime Contractor and Subcontractor Availability Analysis* presents the distribution of available businesses in IDOT's market area
- *Chapter 8: Prime Contractor Disparity Analysis* presents prime contractor utilization compared to prime contractor availability by industry and DBE status and determines whether the comparison is statistically significant
- *Chapter 9: Subcontractor Disparity Analysis* presents subcontractor utilization compared to subcontractor availability by industry and DBE status and determines whether the comparison is statistically significant
- *Chapter 10: Anecdotal Analysis* presents the business community's experiences and perceptions of barriers encountered in contracting or attempting to contract with IDOT
- *Chapter 11: Private Sector and Regression Analysis* presents an examination of whether there are private sector economic indicators of discrimination in IDOT's market area that could impact the formation and development of DBEs
- *Chapter 12: Recommendations* presents best management practices to enhance IDOT's contracting and procurement activities with DBEs and other small businesses
- *Appendix A: Anecdotal Questionnaire Report* presents an anecdotal assessment of DBEs and non-DBEs' experiences working with or seeking work from IDOT



- *Appendix B: Dun & Bradstreet Study* presents an Availability Study utilizing data secured from Dun & Bradstreet. The Study describes and calculates the number of M/WBEs and non-M/WBEs in the state of Illinois listed in D&B Business Selectory that perform the construction and architecture and engineering services IDOT procures.

III. NOTABLE FINDINGS

A. Prime Contractor Utilization Analysis

IDOT issued 4,129 contracts during the January 1, 2006 to December 31, 2008 study period. The 4,129 contracts included 3,688 for construction and 441 for architecture and engineering.

The payments made by IDOT during the study period for the 4,129 contracts totaled \$4,039,185,639. These expenditures included \$3,784,155,409 for construction and \$255,030,230 for architecture and engineering.

B. Subcontractor Utilization Analysis

Mason Tillman analyzed 5,683 construction subcontracts and 68 architecture and engineering subcontracts for the January 1, 2006 to December 31, 2008 study period.

Of the subcontracts analyzed, \$1,887,635,993 total dollars were expended during the study period for construction subcontracts and \$18,128,221 total dollars were expended during the study period for architecture and engineering.

C. Market Area Analysis

Given the distribution of the contracts awarded by IDOT and the requirements set forth in the applicable case law, the Study's market area is determined to be the State of Illinois. The analysis of discrimination has been limited to that which occurred within this market area.

IDOT awarded a total of 93.95 percent of its contracts and 96.61 percent of its dollars to businesses in the Disparity Study's market area.

D. Disparity Analysis Methodology

The objective of the disparity analysis is to determine if DBEs were underutilized at a statistically significant level on IDOT's contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to DBEs would be



approximate to the proportion of available DBEs¹ in the relevant market area. If a disparity exists between these proportions, a statistical test could determine the probability that the disparity is due to chance. If there is a low probability that the disparity is due to chance,² *Crosby* states that an inference of discrimination can be made. This analysis should be applied to DBEs and non-DBEs.

E. Contract Size Analysis

A size analysis of prime contracts was undertaken to determine the capacity required to perform on IDOT's prime contracts. The size distribution illustrates the fact that limited capacity is needed to perform the overwhelming majority of IDOT's contracts.

The percent of contracts valued at less than \$25,000 was 5.75 percent of all of IDOT's construction prime contracts awarded; those valued less than \$100,000 were 21.42 percent of all construction prime contracts awarded; those less than \$500,000 were 62.39 percent; and those less than \$1,000,000 were 80.26 percent. Construction prime contracts valued at \$3,000,000 or more were 5.99 percent.

The percent of contracts valued at less than \$25,000 was 4.31 percent of all architecture and engineering prime contracts awarded; those less than \$100,000 were 15.65 percent; those less than \$500,000 were 72.79 percent; and those less than \$1,000,000 were 88.66 percent. Architecture and engineering prime contracts valued at \$3,000,000 or more were 2.72 percent. The contract analysis is discussed in depth in *Chapter 7, Availability Analysis*.

F. Statistical Findings

There was a finding of statistically significant underutilization of DBEs in the award of formal and informal prime contracts and the award of subcontracts.

1. Construction Prime Contractor Disparity Summary

As indicated in Table 1.01 below, Disadvantaged Business Enterprises were significantly underutilized at both the formal and informal contract levels.

¹ Availability is defined as willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 7 of the Report.

² When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.



**Table 1.01 Disparity Summary: Construction Prime Contract Dollars,
January 1, 2006 to December 31, 2008**

Group	Construction	
	Contracts under \$500,000	Contracts \$25,000 and under
Disadvantaged Business Enterprises	Yes	Yes

2. Architecture and Engineering Prime Contractor Disparity Summary

As indicated in Table 1.02 below, Disadvantaged Business Enterprises were significantly underutilized at the formal contract level.

Table 1.02 Disparity Summary: Architecture and Engineering Prime Contract Dollars, January 1, 2006 to December 31, 2008

Group	Architecture and Engineering	
	Contracts under \$500,000	Contracts \$25,000 and under
Disadvantaged Business Enterprises	Yes	No

3. Subcontractor Disparity Summary

As indicated in Table 1.03 below, Disadvantaged Business Enterprises were underutilized on construction and architecture and engineering subcontracts at a statistically significant level.



Table 1.03 Subcontractor Disparity Summary, January 1, 2006 to December 31, 2008

Group	Construction	Architecture and Engineering
Disadvantaged Business Enterprises	Yes	Yes

IV. ANECDOTAL FINDINGS

In addition to requiring a statistical analysis, the United States Supreme Court in *Croson* stated that anecdotal findings, “if supported by appropriate statistical proofs, lend support to a [local entity’s] determination that broader remedial relief [be] justified.”³ *Croson* authorizes anecdotal inquiries along two lines. The first approach examines barriers attributed to the local entity. Such action is defined as the active participation of the government entity, while the second approach examines passive participation, which consists of the barriers created by the contractors that are awarded public funds; therefore, the anecdotal accounts may be either active or passive.

A. One-on-One In-depth Interviews

Forty business owners were interviewed about their experiences doing business with IDOT. Members of all ethnic groups were interviewed and the anecdotes provided accounts of active and passive barriers DBEs encountered in dealings with IDOT officials and the business community. The anecdotal data also presents examples of exemplary practices of IDOT. Detailed findings of the anecdotal analysis are presented in *Chapter 10, Anecdotal Analysis*.

Mason Tillman conducted interviews with business owners that were domiciled in IDOT’s geographic Districts 1, 2, 3, 6, 8, and 9. The interviewees were identified from community meetings, media outreach, bidders, and trade and professional business organizations’ membership rosters.

The results of the interviews yielded personal anecdotes from the interviewees regarding their experiences working with or seeking work from IDOT. Interviewees reported on their personal knowledge of barriers that can prevent contractors from successfully competing for

³ *Id.*



public contracts. Recommendations to improve access for DBEs and other small businesses were offered as well.

B. Anecdotal Questionnaire Report

An E-Survey was distributed to 5,248 minority, woman-owned, and Caucasian male-owned construction and construction-related firms that were willing to perform IDOT prime contracts and subcontracts. Detailed findings of the report are presented in *Appendix A, Anecdotal Questionnaire Report*.

The E-Survey findings were presented in the three sections and are summarized below:

1. Profile of the Survey Respondents

Caucasian males and females were the highest responding ethnic group representing 62.5 percent. MBEs represented 19 percent of the total respondents for the E-Survey. Special trades represented the majority of the construction businesses and professional services represented the majority of the construction-related businesses. The majority of respondents had 10 or less employees for construction and construction-related businesses. The businesses, on average, had been established for 11 to 20 years. The gross revenues for the majority of MBE construction and construction-related businesses were reported at \$250,000 and under for 2008 and 2009. The gross revenues for the majority of Caucasian male and Caucasian female construction and construction-related businesses were \$1,000,000 to \$4,999,999 for the same years.

2. Overview of Business Practices

A total of 253 respondents reported that their businesses were formed as an S Corporation pursuant to Subchapter S, Chapter 1 of the Internal Revenue code. The use of a commercial accounting system was reported by 72.08 percent of the businesses. Five accounting systems were used by 73.39 percent of the businesses. The five accounting systems were Deltek™, Quick Books™, Maxwell™, Peachtree™, and Sage Master™. Less than 30 percent of the businesses reported bidding on an IDOT construction prime contract, while less than 50 percent of the businesses bid to IDOT's primes as a subcontractor. And, less than 50 percent of the businesses submitted a proposal as a prime contractor on an IDOT contract.

3. Best Management Practices

A total of 169 respondents recommended several best management practices that they believed would support their effort to obtain work with IDOT. The recommendations included suggestions to dismantle the DBE Program and many others to enhance and expand the Program.



V. PRIVATE SECTOR AND REGRESSION ANALYSIS

A regression analysis was conducted to determine whether there are socio-economic factors in the private sector which might account for the identified statistical disparities between DBE availability and utilization documented in the Disparity Study. It also examined growth indicators for various ethnic groups from the findings of an U. S. Small Business Administration Office of Advocacy report.

Three regression models were considered—the Likelihood of Business Ownership Model, the Earnings Disparity Model, and the Likelihood of Business Loan Denial Model. The findings indicated that even when controlling for race- and gender-neutral factors such as age and education, minorities and women experience discriminatory business conditions in the State of Illinois and in the five states in the East North Central region.⁴ The regression analysis examined the level of disparity in the State of Illinois' construction and architecture and engineering industries when three economic factors were considered.

VI. DUN AND BRADSTREET STUDY

An Availability Study (Study) was performed to describe and calculate the number of M/WBEs and non-M/WBEs in the state of Illinois that perform the construction and architecture and engineering services IDOT procures. Dun & Bradstreet (D&B) MarketPlace, was specified as the source to be used to perform the analysis because it had been used in the 2004 IDOT Disadvantaged Business Enterprise Availability Study (2004 Availability Study). D&B has replaced MarketPlace by the Selectory Business Database (Selectory) which was used for this Study.

Selectory is a D&B sales and marketing product that contains financial records customized by geographical area and industry. For a fee, D&B produces business listings for the specified market area drawn from the D&B Credit Database. The dataset from Selectory is also drawn from the D&B Credit Database, and the only distinction between the two sources is that all records in Selectory are managed online, allowing the client to download directly from the Internet. An acknowledged limitation of both Selectory and its predecessor MarketPlace, as a commercial resource, is the fact that business owner ethnicity and gender are not specified in the vendor record. IDOT's 2004 Availability Study reported that "*as extensive as it is, MarketPlace (D&B itself does not adequately identify businesses owned by minorities or women*").

The Selectory dataset purchased was the construction and architecture and engineering firm domiciled in Illinois that were listed in D&B's Credit Database. This dataset was used to identify willing businesses by the NAICS codes identified in the 2010 IDOT/Tollway

⁴ Counties included Will, Winnebago, DuPage and Cook.



Disadvantaged Business Enterprises Disparity Study (2010 Disparity Study). A sample was drawn from the dataset to survey businesses for their willingness to contract with IDOT/Tollway.

- Study Findings

The Selectory dataset of construction and architecture and engineering businesses purchased from D&B for this Study contained inaccurate contact information, improperly classified businesses, and businesses no longer in business. Flawed records characterize 20.97 percent of the businesses included in the sample of 12,131 businesses surveyed. One out of five of the businesses surveyed had at least one of several flaws:

- Disconnected, wrong number, or a residential telephone number
- Out-of-business establishments, as many as ten years
- Simply inappropriate records such as morticians, food purveyors, and livestock suppliers

Also, 50.17 percent of the M/WBEs in the availability dataset compiled by Mason Tillman for the 2010 Disparity Study were not listed in Selectory, the D&B Dataset from which the sample was drawn. These errors in the Selectory database seriously compromises the validity of any estimate calculated using the D&B survey results. The type of errors identified in the Selectory dataset cause the availability estimates for M/WBEs to be biased downward from the actual availability of the ethnic and gender groups. Given the flaws documented in the survey, the D&B Dataset of Illinois construction and architecture and engineering businesses is determined not to be comprehensive or carefully scrubbed. Extreme caution therefore must be exercised in using this product to estimate the true availability of either M/WBEs or non-M/WBEs.

Selectory is marketed as a current and accurate database of 14 million businesses in the United States. The DUNSRight Process for cleaning and updating the records present in the D&B Credit Database is described as a method to produce accurate, complete, and current information available in the Selectory dataset. However, the survey Mason Tillman performed indicates that there may be a serious problem with one or several aspects of the data cleaning and updating process described in the DUNSRight Process.

There may be any number of explanations for the obvious errors in the Selectory dataset of Illinois construction and architecture and engineering businesses Mason Tillman purchased from D&B. These problems may be that:

- The DUNSRight Process is not as robust as described in the marketing literature
- The processes used to capture the relevant business data incorporated in DUNSRight is flawed
- The relevant data D&B has customarily used to maintain current contact information for large businesses may not be accessible for the small and medium sized businesses in its Credit Database



- D&B’s historical concentration on the manufacturing sector is a business model that may not have been adequately adapted to its current broader business focus.

Also, computerized records in D&B’s Credit Database, which are utilized in its credit operations and sold to others for the purpose of billing, mailing list preparation, and marketing, are still reliant on some of the old data collection models which required the cooperation of the listed businesses to update their D&B record. D&B’s traditional methods of updating its database may not be feasible when applied to the growing pool of small businesses or in the presence of new technologies and standards for assessing credit worthiness.

There is an additional problem when applying the D&B management model to a population of businesses that are overwhelmingly small. Storey reports that the most significant bias in the D&B data stems from its under-reporting of the emergence of new businesses.⁵ In general, a business enters the D&B Credit Database when there is a requirement for their credit information. There is, however, no formal process for the migration from the Credit Database when the business ceases operation.

The M/WBE percentages calculated using the D&B dataset would no doubt be considerably higher but for the understatement of M/WBEs and the other integrity issues with the dataset. The availability findings reported in the 2010 Disparity Study are evidence of the D&B dataset undercount.

VII. DBE-SPECIFIC RECOMMENDATIONS

The following DBE-specific recommendations result from Mason Tillman’s disparity analysis findings and include prime contracting and subcontracting remedies. The recommendations are discussed in detail in *Chapter 12, Recommendations*.

A. Set Overall DBE Goal

IDOT should set overall DBE goals as described in *the Disadvantaged Business Enterprise Overall Goal And Goal Setting Methodology Report FY 2010–2013* (Goal Setting Report) which was previously submitted to IDOT under separate cover. The Goal Setting Report is based on overall contract dollars awarded to both prime contractors and subcontractors. The methodology used to set the goals is pursuant to the two-step process set forth in 49 Code of Federal Regulations Part 26.45.

⁵ Storey, D.J. (2000). *Small Business: Critical Perspectives*.



B. Subcontractor Remedies

- *Contract Specific DBE Goals:* Contract-specific DBE prime contracting goals should be set on all construction and architecture and engineering contracts to address the identified disparity. The goals should reflect the actual availability for each contract that is advertised, or the goals could be set no higher than the actual availability for each advertised contract.
- *Good Faith Efforts:* Detailed and quantifiable good faith effort criteria should be developed and applied to each solicitation with a subcontractor goal. Each criterion, like negotiation in good faith with potential subcontractors, should define and quantify the minimum behavior required to demonstrate an attempt to meet the subcontracting goal.

VIII. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

Race and gender-neutral program recommendations are offered to ensure equity in the contracting process. They incorporate a number of best management practices gleaned from the anecdotal interviews, innovations used in other governmental entities and corporate organizations, and the analysis of IDOT's contracting process. Detailed race and gender-neutral recommendations are presented in *Chapter 12, Recommendations*.

Diversity Program Enhancements

- Unbundle contracts to increase the number of businesses participating at both the prime contracting and subcontracting levels.
- Establish a Direct Purchase Program for construction contracts to reduce the amount of the construction bid subject to a bond.
- Form partnerships with lending institutions to assist DBEs with project financing and start-up costs should be leveraged.
- Refrain from requiring specific brand name products in solicitations because the named supplier may not be available to DBEs.
- Revise insurance requirements to ensure that smaller contracts do not carry a disproportionately high level of coverage.
- Owner-Controlled Insurance Program should be considered to consolidate risk management costs and reduce the burden of the insurance premium for DBEs and small business owners.



- Conduct an extensive DBE outreach campaign to promote the DBE Program which includes strategies and tactics to market to disadvantaged, minority, and woman-owned businesses.
- Utilize the Internet and IDOT's website for online marketing by relaying current information regarding contract opportunities, contracting information, and the procurement program.
- Require prime contractor validation of subcontractor payments prior to receiving final payment.
- Conduct bi-annual review of the DBE Directory to determine the types of goods and services it anticipates procuring over a two to five year period.
- Publish DBE Utilization Reports to measure the effectiveness of the DBE Program.
- Provide debriefing sessions for unsuccessful bidders and provide vital information to assist businesses to prepare more competitive submittals.
- Conduct routine post-award contract compliance monitoring to ensure that the subcontractor participation listed in bids, proposals, and statements of qualification is achieved throughout the duration of a contract.

IX. ADMINISTRATIVE RECOMMENDATIONS

Recommendations are offered to enhance the administration of the procurement process and are race-neutral in nature.

A. Website Enhancements

- Provide contact information for key personnel involved in the bid process including buyers, procurement officers, and business diversity/contract compliance officers.
- List all certified subcontractors on IDOT's website where prime contractors and department staff can conduct a subcontractor search with keywords such as business name, industry, location of the business, and DBE status of the business owner.
- Publish Fiscal Year Reports that reflect the amount of dollars expended on construction and architecture and engineering contracts and list the industry and DBE status of the prime contractors and subcontractors.



- Create an interactive website portal for prime contractors and subcontractors so that all contractors can submit their monthly data in an electronic format using a pin signature system to reduce paperwork requirements.

B. Administrative Data Management Enhancements

- Implement an Oversight Committee to serve as an advisory group with the responsibility of reviewing the relevant documentation concerning the attainment of the DBE goals.
- Establish performance accountability reviews to promote and ensure compliance with revised procurement procedures and the enhanced DBE policy should be developed.
- Develop department-wide manager and staff training manual to provide background on the DBE Program.
- Enhance subcontractor utilization tracking database for all contracts to obtain a more accurate assessment of its subcontractor utilization.





2

LEGAL ANALYSIS

I. INTRODUCTION

This chapter discusses the state of the law applicable to affirmative action programs in the area of public contracting. Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*¹ (*Croson*) and *Adarand v. Peña*² (*Adarand*), raised the standard by which federal courts will review such public contracting programs. In those decisions, the Court announced that the constitutionality of affirmative action programs that employ racial classifications would be subject to “strict scrutiny.” There is also a discussion on the regulations governing affirmative action programs for USDOT recipients.

An understanding of *Croson*, which applies to state and local governments, is necessary in developing sound state and locally funded Minority-Owned Business Enterprise (MBE) and Woman-Owned Business Enterprise (WBE) programs. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of the Equal Protection Clause of the Constitution. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination found in a disparity study, and this remedy must impose a minimal burden upon unprotected classes.

A caveat is appropriate here. The review under strict scrutiny is fact-specific. Nevertheless, three post-*Croson* Federal Court of Appeals opinions provide guidelines for local governments regarding the evidence a disparity study has to adduce if race-conscious remedies are put in place. The Third, Eleventh, and Tenth Circuits assessed the disparity

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

² *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995).



studies in question on their merits instead of disposing of the cases on procedural issues.³

Adarand, which followed *Croson* in 1995, applied the strict scrutiny standard to federal programs. In response to *Adarand*, the U.S. Department of Transportation amended its regulations to focus on outreach to Disadvantaged Business Enterprises (DBEs). Although the Supreme Court heard argument in *Adarand* in the October 2001 term, it subsequently decided that it had improvidently granted *certiorari*. Thus, the amended USDOT regulations continue to be in effect and control IDOT's federally funded programs. Since the Illinois Tollway is not a recipient of federal highway funds, it is not subject to *Adarand*.

II. STANDARDS OF REVIEW

The standard of review represents the measure by which a court evaluates a particular legal issue. This section discusses the standard of review that the Supreme Court set for race-conscious local government programs in *Croson* and federal programs in *Adarand*. It also discusses lower courts' interpretations of these two Supreme Court cases as applied to local and federal programs as well as evaluates the implications for program design that arise from these decisions. It concludes with the standard of review for local business programs that are not race- or gender-conscious.

A. Race-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local MBE programs which are necessarily race-based programs is strict scrutiny.⁴ Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.⁵ The Court recognized that a state or local entity may take action, in the form of an MBE program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.⁶

³ *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors of South Florida v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd, 122 F. 3d 895 (11th Cir. 1997); and *Concrete Works of Colorado v. City and County of Denver*, 823 F. Supp 821 (D. Colo 1993), rev'd 36 F.3d 1513 (10th Cir. 1994) ("*Concrete Works I*"), on remand, 86 F.Supp 2d 1042 (D. Colo. 2000), rev'd 321 F.3d 950 (10th Cir. 2003) ("*Concrete Works II*"). In the federal court system, there are primarily three levels of courts: the Supreme Court, appellate courts, and district courts. The Supreme Court is the highest ranking federal court, and its rulings are binding on all other federal courts. Appellate court rulings are binding on all district courts in their geographical area and are used for guidance in other circuits. District court rulings, while providing insight into an appropriate legal analysis, are not binding on other courts at the district, appellate, or Supreme Court levels.

⁴ *Croson*, 488 U.S. at 493-95.

⁵ *Id.* at 493.

⁶ *Croson*, 488 U.S. at 509.



Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination and set forth guidelines for crafting MBE programs so that they are "narrowly tailored" to address systemic racial discrimination.⁷ The specific evidentiary requirements are detailed in Section IV.

B. Woman-Owned Business Enterprise

Since *Croson*, the Supreme Court has remained silent with respect to the appropriate standard of review for women-owned business enterprise programs and local business enterprise (LBE) programs which are geographically based. *Croson* was limited to the review of a race-conscious plan. In other contexts, however, the Supreme Court has ruled that gender classifications are not subject to the rigorous strict scrutiny standard applied to racial classifications. Instead, gender classifications are subject only to an "intermediate" level of review, regardless of which gender is favored.

Notwithstanding the Supreme Court's failure thus far to rule on a WBE program, the consensus among the Circuit Courts of Appeals is that WBE programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.⁸ Intermediate review requires the governmental entity to demonstrate an "important governmental objective" and a method for achieving this objective which bears a fair and substantial relation to the goal.⁹ The Court has also expressed the test as requiring an "exceedingly persuasive justification" for classifications based on gender.¹⁰

The Supreme Court acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex which are disproportionately burdened.¹¹

The Third Circuit in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)* ruled in 1993 that the standard of review that governs WBE

⁷ *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to "compelling governmental interest" and "narrow tailoring" for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

⁸ See e.g., *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Philadelphia*, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir.1997). *Concrete Works II*, 321 F.3d at 959, is in accord.

⁹ *Craig v. Boren*, 429 U.S. at 198-99 (1976).

¹⁰ *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). See also *Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

¹¹ *Id.* at 728.



programs is different from the standard imposed upon MBE programs.¹² The Third Circuit held that whereas MBE programs must be “narrowly tailored” to a “compelling state interest,” WBE programs must be “substantially related” to “important governmental objectives.”¹³ An MBE program would only survive constitutional scrutiny by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.¹⁴

The Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco (AGCC I)* held that classifications based on gender require an “exceedingly persuasive justification.”¹⁵ The justification is valid only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.¹⁶

The Eleventh Circuit also applies intermediate scrutiny.¹⁷ The district court in *Engineering Contractors Association of South Florida v. Metropolitan Dade County (Dade County)*, which was affirmed by the Eleventh Circuit U.S. Court of Appeals, cited the Third Circuit’s 1993 formulation in *Philadelphia*: “[T]his standard requires the [county] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”¹⁸ Although the *Dade County* district court applied the intermediate scrutiny standard, it queried whether the Supreme Court decision in *United States v. Virginia*,¹⁹ finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny: parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action.²⁰ The *Dade County* appellate court echoed that speculation but likewise concluded that “[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender

¹² *Philadelphia*, 6 F.3d at 1000-01.

¹³ *Id.* at 1009.

¹⁴ *Id.* at 1002.

¹⁵ *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987).

¹⁶ *Id.* at 940.

¹⁷ *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-1580 (11th Cir. 1994).

¹⁸ *Dade County*, 122 F.3d at 909, (citing *Philadelphia*, 6 F.3d at 1010 (3d Cir. 1993)).

¹⁹ *United States v. Virginia*, 116 S.Ct. 2264 (1996).

²⁰ *Dade County*, 943 F.Supp. at 1556.



preference may be upheld so long as it is substantially related to an important governmental objective.”²¹

The *Dade County* appellate court noted that at the time, by articulating the “probative evidence” standard, the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to gender-conscious programs.²² It went on to interpret that standard to mean that “evidence offered in support of a gender preference must not only be ‘probative’ [but] must also be ‘sufficient.’”²³ It also reiterated two principal guidelines of intermediate scrutiny evidentiary analysis: (1) under this test a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself;²⁴ and (2) the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a “last resort”²⁵ but instead ensuring that the affirmative action is “a product of analysis rather than a stereotyped reaction based on habit.”²⁶ This determination turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed.²⁷ The court also stated that “a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”²⁸

C. Local Business Enterprise

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding that a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.²⁹ In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study showed a

²¹ *Dade County*, 122 F.3d at 908.

²² *Id.* at 909.

²³ *Id.*

²⁴ *Id.* at 910 (citing *Ensley Branch*, 31 F.3d at 1580).

²⁵ *Id.* (citing *Hayes v. North State Law Enforcement Officers Ass’n.*, 10 F.3d 207, 217 (4th Cir. 1993), racial discrimination case).

²⁶ *Id.* (citing *Philadelphia*, 6 F.3d at 1010 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-583 (1990))).

²⁷ *Id.* (citing *Ensley Branch*, 31 F.3d at 1581).

²⁸ *Dade County*, 122 F.3d at 929. However, Judge Posner, in *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), questioned why there should be a lesser standard where the discrimination was against women rather than minorities.

²⁹ *AGCC I*, 813 F.2d at 943.



competitive disadvantage in public contracting for businesses located within the City versus businesses from other areas.

San Francisco-based businesses incurred higher administrative costs in doing business within the City. Such costs included higher taxes, rents, wages, insurance rates, and benefits for labor. In upholding the LBE Ordinance, the Ninth Circuit held that “. . . the city may rationally allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the disadvantages.”³⁰

III. BURDEN OF PROOF

The procedural protocol established by *Croson* imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government’s factual predicate on any of the following grounds:³¹

- the disparity exists due to race-neutral reasons
- the methodology is flawed
- the data is statistically insignificant
- controverting data exists.

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.³²

³⁰ *Id.* At 943.

³¹ These were the issues on which the district court in Philadelphia reviewed the disparity study before it.

³² *Croson*, 488 U.S. 469.



A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a “strong basis in evidence” that the objective of the challenged MBE program is to rectify the effects of discrimination.³³ The issue of whether or not the government has produced a strong basis in evidence is a question of law.³⁴ Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.³⁵

The adequacy of the government’s evidence is “evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction].”³⁶ The onus is upon the jurisdiction to provide a factual predicate which is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program. The various factors which must be considered in developing and demonstrating a strong factual predicate in support of MBE programs are discussed in Section IV.

B. Ultimate Burden of Proof

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation despite the government’s obligation to produce a strong factual predicate to support its program.³⁷ The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government’s factual predicate for the program or by demonstrating that the program is overly broad.

Justice O’Connor explained the nature of the plaintiff’s burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.³⁸ She stated that following the production of the factual predicate supporting the program:

[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government’s] evidence did not support an inference of prior discrimination

³³ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 at 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986); see *Croson* 488 U.S. at 509 (1989)).

³⁴ *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

³⁵ *Concrete Works I*, 36 F.3d at 1522.

³⁶ *Id.* (citing *Croson* 488 U.S. at 498).

³⁷ *Id.* (citing *Wygant*, 476 U.S. at 277-278).

³⁸ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).



and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”³⁹

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a “strong basis” in evidence.⁴⁰ That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.⁴¹ If the plaintiff’s theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.⁴²

The situation differs if the plaintiff’s theory is that an agency’s conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, once the agency comes forward with evidence of facts alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue.⁴³

Concrete Works II made clear that the plaintiff’s burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147 (2000): “[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study is of little persuasive value.”⁴⁴

The Supreme Court’s disposition of the plaintiff’s petition for *certiorari* strongly supports the conclusion that plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works* is not the typical instance. Justice Scalia concurred in *Croscon* that strict scrutiny was required of race-conscious contracting

³⁹ *Id.*

⁴⁰ *Philadelphia*, 91 F.3d at 597.

⁴¹ *Id.*

⁴² *Id.*

⁴³ At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the “compelling interest” required by strict scrutiny. That court said the inquiry was factual and would be reversed only if it was “clearly erroneous.” However, the difference in formulation may have had to do with the angle from which the question is approached: If one starts with the disparity study — whether a compelling interest has been shown — factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.

⁴⁴ *Concrete Works II*, 321 F.3d at 979.



programs. However, his antagonism there and over the years to the use of race is clear. Justice Scalia’s view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court’s November 17, 2003 decision not to grant *certiorari* in *Concrete Works*.⁴⁵

Justice Scalia would place the burden of proof squarely on the defendant jurisdiction when a plaintiff pleads unequal treatment. For him, the Tenth Circuit was simply wrong, because the defendant should have to *prove* that there was discrimination. He takes this position despite the case law in equal employment cases, from which *Croson* was derived, that the defendant has the burden of *production*. Once the defendant satisfies that, the burden of *proof* shifts to the plaintiff. Contrary to Scalia, the Tenth Circuit in *Concrete Works II* held that the defendant must show “a strong basis” for concluding that MBEs are being discriminated against. And, the plaintiff has to put in evidence that negates its validity.

IV. CROSON EVIDENTIARY FRAMEWORK

Government entities must construct a strong evidentiary framework to stave off legal challenges and ensure that the adopted MBE programs comport with the requirements of the Equal Protection clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence, and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. Active or Passive Participation

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court’s strict scrutiny review.⁴⁶

An entity will be considered an “active” participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government’s contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing that entity’s contracting opportunities.⁴⁷

⁴⁵ *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, (U.S. Nov. 17, 2003) (No. 02-1673) (“*Concrete Works II*”).

⁴⁶ *Croson*, 488 U.S. at 509.

⁴⁷ *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 275 (1985).



An entity will be considered to be a “passive” participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.⁴⁸ The *Croson* Court emphasized a government’s ability to passively participate in private sector discrimination with monetary involvement, stating, “[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.”⁴⁹ It should be noted that the Illinois Tollway, a state agency, created under the Toll Highway Act⁵⁰ does not receive tax monies for its operations.⁵¹

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned whether purely private sector discrimination is likely to be a fruitful line of inquiry.⁵² On remand, the district court rejected the three disparity studies offered to support the continuation of Denver’s M/WBE program because each focused on purely private sector discrimination. Indeed, Denver’s focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity’s contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted that in the City of Denver’s disparity studies the chosen methodologies failed to address the following six questions:

⁴⁸ *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

⁴⁹ *Croson*, 488 U.S. at 492.

⁵⁰ 605 ILCS 10.

⁵¹ The Illinois Tollway revenue sources include (1) toll revenue collected from toll highway users; (2) evasion recovery fines collected from toll violators; (3) concessions generated from the Illinois Tollway’s Oases which provide fuel, food and other conveniences to toll users; (4) investment income; and (5) miscellaneous income from sources such as overweight truck fines and rental income from assets such as fiber optic.

⁵² *Concrete Works I*, 36 F.3d at 1529. “What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver 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 or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that ‘it had essentially become a “a passive participant” in a system of racial exclusion practiced by elements of the local construction industry’ [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial.”



1. Was there pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)?
2. Were all designated groups equally affected?
3. Was discrimination intentional?
4. Would Denver’s use of such firms constitute “passive participation?”
5. Would the proposed remedy change industry practices?
6. Was the burden of compliance—which was on white male prime contractors in an intensely competitive, low profit margin business—a fair one?

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.⁵³

However, the Tenth Circuit on appeal of that decision completely rejected the district court’s analysis. The district court’s queries required Denver to prove the existence of discrimination. Moreover, the Tenth Circuit explicitly held that “passive” participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,⁵⁴ a post-*Croson* Supreme Court decision, wrote as follows:

The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 910. The City can satisfy this condition by identifying the discrimination “public or private, with some specificity.” *Id.* (quoting *Croson*, 488 U.S. at 504 (emphasis added)). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.*⁵⁵

The Tenth Circuit therefore held that the City was correct in its attempt to show that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business.”⁵⁶ The court emphasized that its reading of *Croson*⁵⁷ and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the

⁵³ *Id.* at 61.

⁵⁴ 517 U.S. at 519.

⁵⁵ *Concrete Works II*, 321 F.3d at 975-76.

⁵⁶ Slip opinion, pg. 20.

⁵⁷ See also *Shaw v. Hunt*, 517 U.S. 899 (1996), which it cited.



burden of proof, failed to introduce controverting evidence and merely *argued* that the private sector was out of bounds and that Denver’s data was flawed.⁵⁸

The courts found that the disparities in MBE private sector participation, demonstrated with the rate of business formation and lack of access to credit which affected MBEs’ ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,⁵⁹ however, the court did not examine whether the consequent public sector remedy — i.e., one involving a goal requirement on the City of Denver’s contracts — was “narrowly tailored.” The court took this position despite the plaintiff’s contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,⁶⁰ the question of whether a public sector remedy is “narrowly tailored” when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago’s MBE subcontracting goal an appropriate remedy, because it was not “narrowly tailored” to address the lack of access to credit for MBEs which was the documented private discrimination. The court also criticized the remedy because it was a “rigid numerical quota,” and there was no individualized review of MBE beneficiaries, citing Justice O’Connor’s opinion in *Gratz v. Bollinger*.⁶¹

The question of whether evidence of private sector practices also arose in *Builders Ass’n of Greater Chicago v. County of Cook*.⁶² In this case the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*⁶³ in throwing out a 1988 County ordinance under

⁵⁸ Whether Denver had the requisite strong basis to conclude that there was discrimination was a question of law; it was for the Tenth Circuit to decide. The standard by which the factual record before it was reviewed was “clearly erroneous.”

⁵⁹ Plaintiff had not preserved the issue on appeal; therefore, it was no longer part of the case.

⁶⁰ 298 F.Supp2d 725 (N.D.Ill. 2003).

⁶¹ 123 S.Ct. 2411, 2431 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment’s prohibitions are directed against “state action.” The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

⁶² 256 F.3d 642 (7th Cir. 2001).

⁶³ 214 F.3d 730 (6th Cir. 2000).



which at least 30 percent of the value of prime contracts were to go to minority subcontractors and at least 10 percent to women owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. However, the court pointed out that the program remedying discrimination in the private-sector would necessarily address only private-sector participation. In order to justify the public-sector remedy, the County would have had to demonstrate that it had been at least a passive participant in the discrimination by showing that it had infused tax dollars into the discriminatory private industry.

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).⁶⁴ Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.⁶⁵ Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.⁶⁶ Broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates several ways an entity may establish the requisite factual predicate. First, 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 an entity or by the entity's prime contractors, may support an inference of

⁶⁴ *Croson*, 488 U.S. 469. See also *Monterey Mechanical v. Pete Wilson*, 125 F.3d 702 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (1999) found that the City's MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). "Had the City adopted particularized findings of discrimination within its various agencies and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department's 15% DBE-participation goal."

In 1996, Houston Metro had adopted a study done for the City of Houston whose statistics were limited to aggregate figures that showed *income* disparity between groups, without making any connection between those statistics and the City's contracting policies. The disadvantages cited that M/WBEs faced in contracting with the City also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied was even less availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled black wages to unskilled white wages established that the correlation between low rates of black self-employment was due to discrimination. Even assuming that nexus, there is nothing in *Croson* that accepts a low number of MBE business formation as a basis for a race-conscious remedy.

⁶⁵ *Id.* at 509.

⁶⁶ *Id.* at 506. As the Court said in *Croson*, "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City's program, citing *Croson*.



discriminatory exclusion.⁶⁷ In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone “may constitute prima facie proof of a pattern or practice of discrimination.”⁶⁸

The *Croson* Court made clear that both prime contract and subcontracting data were relevant. The Court observed that “[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.”⁶⁹ Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level might also be different.

Second, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”⁷⁰ Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.⁷¹ Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.⁷² The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.⁷³

⁶⁷ *Id.* at 509.

⁶⁸ *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

⁶⁹ *Croson*, 488 U.S. at 502-03.

⁷⁰ *Id.* at 509.

⁷¹ *Id.*

⁷² *Coral Construction*, 941 F.2d at 919.

⁷³ *Id.*



Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.⁷⁴ Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”⁷⁵

1. Geographic Market

Croson did not speak directly to how the geographic market is to be determined.⁷⁶ In *Coral Construction*, the Court of Appeals held that “an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction.”⁷⁷ Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.⁷⁸

Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area, which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.⁷⁹ Extra-jurisdictional evidence may be permitted, when it is reasonably related to where the jurisdiction contracts.⁸⁰

2. Current Versus Historical Evidence

In assessing the existence of identified discrimination through demonstration of a disparity between MBE utilization and availability, it may be important to examine disparity data both prior to and after the entity’s current MBE program was enacted. This will be referred to as “pre-program” versus “post-program” data.

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting *International Brotherhood of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 339 (1977)).

⁷⁶ The Study will establish separate market areas for IDOT and the Illinois Tollway based on the agency’s contracting practices.

⁷⁷ *Coral Construction*, 941 F.2d at 925.

⁷⁸ *Concrete Works*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev’d on other grounds, 36 F.3d 1513 (10th Cir. 1994).

⁷⁹ *Cone Corporation V. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

⁸⁰ There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of “minority business” used in King County’s MBE program was over-inclusive. The Court reasoned that the definition was over broad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.



On the one hand, *Croson* requires that an MBE program be “narrowly tailored” to remedy current evidence of discrimination.⁸¹ Thus, a goal which is one remedy, must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity’s utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity’s marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity’s utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an MBE program based upon outdated evidence.⁸² Therefore, the most recent two or three years of an entity’s utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.⁸³

Pre-program data regarding an entity’s utilization of MBEs prior to enacting the MBE program may be relevant to assessing the need for the agency to keep such a program intact. A 1992 opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District (BART)*,⁸⁴ set forth the possible significance of statistical data during an entity’s “pre-program” years. Judge Henderson opined that statistics that provides data on a period when no M/WBE goals were operative is often the most relevant data in evaluating the need for remedial action by an entity. Indeed, “to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted.”⁸⁵ Judge Henderson noted that this is particularly so given the fact that M/WBEs report that they are seldom or never used by a majority prime contractor without M/WBE goals. That this may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

⁸¹ See *Croson*, 488 U.S. at 509-10.

⁸² *Id.* at 499 (stating that “[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination”).

⁸³ See *AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City’s MBE utilization over a one year period). Also in *In Kossman Contracting Co v. The City of Houston*, No. Civ-H-96-3100 (S.D. Tex., filed 1996), the City of Houston’s initial MWBE program was challenged as unconstitutional and the study upon which the Program was based on was ruled to be invalid. A consultant was retained to conduct a new disparity study which became the factual predicate for the City’s MWBE program. The Judge approved the consultant’s study and approved the reinstatement of the City’s MWBE program in January of 2007.

⁸⁴ See November 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

⁸⁵ *Id.*



Similarly, the Eleventh Circuit in *Dade County* cautions that using post-enactment evidence (post-program data) may mask discrimination that might otherwise be occurring in the relevant market. Still, the court agreed with the district court that it was not enough to speculate on what MBE utilization would have been in the absence of the program.⁸⁶

Thus, an entity should look both at pre-program and post-program data in assessing whether discrimination exists currently and analyzes whether it would exist in the absence of an M/WBE program.

3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.⁸⁷ Disparity indexes have found highly probative evidence of discrimination where they ensure that the “relevant statistical pool” of minority or women contractors are being considered.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the “relevant statistical pool” includes those businesses that not only exist in the marketplace, but that are qualified and interested in performing the public agency’s work. In that case, the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this particular statistical disparity did not satisfy *Croson*.⁸⁸

⁸⁶ *Dade County*, 122 F.3d at 912.

⁸⁷ Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).

The Court affirmed the judgment that declared appellant’s affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan’s operation because there was no statistical evidence of past discrimination and appellant failed to consider race and ethnic-neutral alternatives to the plan.

⁸⁸ *Philadelphia*, 91 F.3d 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the “availability” of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.



Statistical evidence demonstrating a disparity between the utilization and availability of M/WBEs can be shown in more than one way. First, the number of M/WBEs utilized by an entity can be compared to the number of available M/WBEs. This is a strict *Croson* “disparity” formula. A significant statistical disparity between the number of MBEs that an entity utilizes in a given product/service category and the number of available MBEs in the relevant market area specializing in the specified product/service category would give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant’s study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.⁸⁹

Whether a disparity index supports an inference that there is discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant. In *Croson*, Justice O’Connor opined, “[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination.”⁹⁰ However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case-by-case basis.⁹¹

Following the dictates of *Croson*, courts may carefully examine whether there is data that shows that MBEs are ready, willing, and able to perform.⁹² *Concrete Works I* made the same point: capacity—i.e., whether the firm is “able to perform”—is a ripe issue when a disparity study is examined on the merits:

[Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstates “the ability of MBEs or WBEs to conduct business relative to the industry as a whole

⁸⁹ *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.

⁹⁰ *Croson*, 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)).

⁹¹ *Concrete Works*, 36 F.3d at 1522.

⁹² The *Philadelphia* study was vulnerable on this issue.



because M/WBEs tend to be smaller and less experienced than non-minority owned firms.” In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.⁹³

Notwithstanding that appellate concern, the disparity studies before the district court on remand did not examine the issue of M/WBE capacity to perform Denver’s public sector contracts. As mentioned above, they were focused on the private sector, using census-based data and Dun & Bradstreet statistical extrapolations.

The Sixth Circuit Court of Appeals, in *Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.⁹⁴ The State’s factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.⁹⁵ The court reasoned as follows:

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.⁹⁶

Further, *Drabik* also pointed out that the State not only relied upon the wrong type of statistical data but that the data was more than twenty years old.

The appellate opinions in *Philadelphia*⁹⁷ and *Dade County*,⁹⁸ regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

⁹³ *Concrete Works*, 36 F.3d at 1528.

⁹⁴ See *Drabik*, 214 F.3d 730. The Court reviewed Ohio’s 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass’n v. Keip*, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

⁹⁵ *Id.*

⁹⁶ *Id.* at 736.

⁹⁷ *Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Penn. 1995), aff’d, 91 F.3d 586 (3rd Cir. 1996).

⁹⁸ *Dade County*, 943 F.Supp. 1546.



First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.⁹⁹ The Third Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that race-based discrimination existed to justify a race-based program and that the program was not narrowly tailored to address past discrimination by the City.¹⁰⁰

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether it is strong enough to infer discrimination is a "close call" which the court "chose not to make."¹⁰¹ It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects more than \$30,000. The consultant determined that no MBEs were used during the study period based upon recollections regarding whether the owners of the utilized firms were MBEs. The court found this evidence insufficient as a basis for finding that prime contractors in the market were discriminating against subcontractors.¹⁰²

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE"; and it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.¹⁰³ Although theoretically it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of "willingness" and stated, "[p]ast discrimination in a marketplace

⁹⁹ *Philadelphia*, 91 F.3d 586.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 605.

¹⁰² Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City's contracts. The court noted, however, that "we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides." The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race-neutral alternatives.

¹⁰³ *Philadelphia*, 91 F.3d at 603.



may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work.”¹⁰⁴

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.¹⁰⁵ In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, “the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects.”¹⁰⁶ The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the availability of MBE firms.¹⁰⁷ Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.¹⁰⁸ The *Dade County* district court accepted the Disparity Study’s limiting of “available” prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, then the results of the bidding process will be biased.¹⁰⁹ In addition, a comprehensive count of bidders is dependent on the adequacy of the agency’s record keeping.¹¹⁰

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in evidence to justify race-conscious affirmative action. The appellate court did not prescribe the district court’s analysis or any other specific analysis for future cases.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).

¹⁰⁹ Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), aff’d, 702 F.2d 221 (D.C. Cir. 1981). (Involving the analysis of available applicants in the employment context).

¹¹⁰ Cf. *EEOC v. American Nat’l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), cert. denied, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).



C. Anecdotal Evidence

In *Croson*, Justice O'Connor opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."¹¹¹ Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community, which are accessible to all segments of the business community regardless of race. They are not intrusive, and in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a larger amount of evidence.¹¹²

As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," the second prong of a *Croson* study.

The following types of anecdotal evidence have been presented and relied upon by the Ninth Circuit, in both *Coral Construction* and *AGCC II*, to justify the existence of an M/WBE program:

- M/WBEs denied contracts despite being the low bidders —Philadelphia¹¹³
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs —*Cone Corporation v. Hillsborough County*¹¹⁴
- M/WBEs' inability to obtain contracts for private sector work — *Coral Construction*¹¹⁵

¹¹¹ *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

¹¹² Cf. *AGCC II*, 950 F.2d at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that "the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]").

¹¹³ *Philadelphia*, 6 F.3d at 1002.

¹¹⁴ *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

¹¹⁵ For instance, where a small percentage of an MBE or WBE's business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Construction*, 941 F.2d 910 at 933 (WBE's affidavit indicated that less than 7 percent of the firm's business came from private contracts and that most of its business resulted from gender-based set-asides).



- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties — *AGCC* ¹¹⁶
- Attempts to circumvent M/WBE project goals — *Concrete Works I*¹¹⁷
- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts — *AGCC*¹¹⁸

Courts must assess the extent to which relief measures disrupt settled “rights and expectations” when determining the appropriate corrective measures.¹¹⁹ Presumably, courts would look more favorably upon anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. Anecdotal accounts, however egregious, would not be evidence of the statistical availability that is necessary to justify a racially limited program.

As noted above, in *Croson*, the Supreme Court found that the City of Richmond’s MBE program was unconstitutional, because the City lacked proof that race-conscious remedies were justified. However, the Court opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”¹²⁰

In part, it was the absence of such evidence that proved lethal to the program. The Supreme Court stated that “[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”¹²¹

This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate records contained the affidavits of “at least 57 minorities or women contractors, each of whom complain in varying degrees of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community.”¹²²

¹¹⁶ *AGCC II*, 950 F.2d at 1415.

¹¹⁷ *Concrete Works*, 36 F.3d at 1530.

¹¹⁸ *AGCC II*, 950 F.2d at 1415.

¹¹⁹ *Wygant*, 476 U.S. at 283.

¹²⁰ *Croson*, 488 U.S. at 509, citing *Teamsters*, 431 U.S. at 338.

¹²¹ *Id.* at 480.

¹²² *Coral Construction*, 941 F.2d at 917-18.



Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County’s MBE program since “[n]otably absent from the record, however, is *any* statistical data in support of the County’s MBE program.”¹²³ After noting the Supreme Court’s reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.¹²⁴

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that “rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”¹²⁵

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Contractors Ass’n*, the Third Circuit Court of Appeals noted that the Philadelphia City Council had “received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination,” which the district court had “discounted” because it deemed this evidence to be “impermissible” for consideration under *Croson*.¹²⁶ The circuit court disapproved of the district court’s actions because in its view the court’s rejection of this evidence betrayed the court’s role in disposing of a motion for summary judgment.¹²⁷ “Yet,” the circuit court stated:

Given *Croson’s* emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, supra]. Although anecdotal evidence alone may, in an exceptional case, be

¹²³ *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court and the case was remanded to the lower court for an examination of the factual predicate).

¹²⁴ *Id.* at 919.

¹²⁵ *Id.*

¹²⁶ *Philadelphia*, 6 F.3d at 1002.

¹²⁷ *Id.* at 1003.



so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.¹²⁸

The District of Columbia Circuit Court echoed the Ninth Circuit’s acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O’Donnell Construction v. District of Columbia*.¹²⁹ The court found that in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.¹³⁰

The Eleventh Circuit is also in accord. In applying the “clearly erroneous” standard to its review of the district court’s decision in *Dade County*, it commented that “[t]he picture painted by the anecdotal evidence is not a good one.”¹³¹ However, it held that this was not the “exceptional case” where, unreinforced by statistics, the anecdotal evidence was enough.¹³²

In *Concrete Works I*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that “[w]hile a fact finder should accord less weight to personal accounts of discrimination that reflects isolated incidents, anecdotal evidence of a municipality’s institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions.”¹³³ The court noted that the City had provided such systemic evidence.

¹²⁸ *Id.*

¹²⁹ 963 F.2d at 427 (D.C. Cir.1992).

¹³⁰ *Id.*

¹³¹ *Engineering Contractors Ass’n of South Florida v. Metropolitan Dade County*, 943 F.Supp 1546 (S.D. Fla. 1996), *aff’d*, 122 F.3d 895 (11th Cir. 1997).

¹³² *Id.* at 926.

¹³³ *Concrete Works I*, 36 F.3d at 1530.



The Ninth Circuit Court of Appeals has articulated what it deems to be permissible anecdotal evidence in *AGCC II*.¹³⁴ There, the court approved a “vast number of individual accounts of discrimination” which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city’s procurement processes; an “old boy’s network” still exists; and racial discrimination is still prevalent within the San Francisco construction industry.¹³⁵ Based on *AGCC II*, it would appear that the Ninth Circuit’s standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.¹³⁶ These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are “qualified”¹³⁷
- concern specific, verifiable instances of discrimination¹³⁸
- involve the actions of governmental officials¹³⁹
- involve events within the relevant jurisdiction’s market area¹⁴⁰
- discuss the harm that the improper conduct has inflicted on the businesses in question¹⁴¹ and

¹³⁴ *AGCC II*, 950 F.2d 1401.

¹³⁵ *Id.* at 1415.

¹³⁶ *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be “dominant or pervasive.”

¹³⁷ *Philadelphia*, 91 F.3d at 603.

¹³⁸ *Coral Construction*, 941 F.2d at 917-18. *But see Concrete Works II*, 321 F.3d at 989. “There is no merit to [plaintiff’s] argument that the witnesses accounts must be verified to provide support for Denver’s burden.”

¹³⁹ *Croson*, 488 U.S. at 509.

¹⁴⁰ *Coral Construction*, 941 F.2d at 925.

¹⁴¹ *O’Donnell*, 963 F.2d at 427.



- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.¹⁴²

Given that neither *Croson* nor its progeny identifies the circumstances under which anecdotal evidence alone will carry the day, it is not surprising that none of these cases explicate bright line rules specifying the quantity of anecdotal evidence needed to support a race-conscious remedy. However, the foregoing cases, and others, provide some guidance by implication.

Philadelphia makes clear that 14 anecdotal accounts will not suffice.¹⁴³ While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver's M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.¹⁴⁴ It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

In addition, as noted above, the quantum of anecdotal evidence that a court would likely find acceptable may depend on the remedy in question. The remedies that are least burdensome to non-targeted groups would likely require a lesser degree of evidence. Those remedies that are more burdensome on the non-targeted groups would require a stronger factual basis likely extending to verification.

V. CONSIDERATION OF RACE-NEUTRAL OPTIONS

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.¹⁴⁵

¹⁴² *Coral Construction*, 941 F.2d at 919.

¹⁴³ *Philadelphia*, 6 F.3d. at 1002-03.

¹⁴⁴ The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. See *Concrete Works of Colorado v. Denver*, 823 F.Supp. 821, 833-34. The disparity study consultant examined all of this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (*see id.* at 833), the number might have been even greater.

¹⁴⁵ *AGCC II*, 950 F.2d at 1404.



On the other hand, an MBE program cannot stand if the sole barrier to minority- or woman-owned business participation is a barrier which is faced by all new businesses, regardless of ownership.¹⁴⁶ If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.¹⁴⁷ In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

The requirement that race-neutral measures be considered does not mean that they must be exhausted before race-conscious remedies can be employed. The district court recently wrote in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*:

The Supreme Court has recently explained that although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative” it “does require serious, good faith consideration of workable race-neutral alternatives that will achieve diversity[.]” *Grutter*, 123 S.Ct. at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.¹⁴⁸

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.¹⁴⁹

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.¹⁵⁰ Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization, it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of

¹⁴⁶ *Croson*, 488 U.S. at 508.

¹⁴⁷ *Id.* at 507.

¹⁴⁸ *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004).

¹⁴⁹ *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

¹⁵⁰ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).



contracts programs that have been implemented to improve MBE utilization should also be measured.¹⁵¹

VI. UNITED STATES DEPARTMENT OF TRANSPORTATION - DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

In response to the United States Supreme Court's decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the U. S. Department of Transportation (USDOT) revised provisions of the DBE rules, effective March 1999. The goal of promulgating the new rule was to modify the DBE program consistent with the "narrow tailoring" requirement of *Adarand*. The new provisions apply only to the airport, transit, and highway financial assistance programs of the USDOT. See Appendix A for the main components of the rules.

The US Department of Transportation promulgated in 1982 its initial DBE regulations, 49 CFR Part 26 in 1982, to enact the contracting affirmative action requirements of the 1982 Surface Transportation Assistance Act. This Act required that a minimum of ten percent of funds be expended with small businesses owned and controlled by socially and economically disadvantaged individuals. The Department's DBE regulations have been amended several times since 1982. Women business enterprises (WBEs) were added to the DBE Program in the 1987 Surface Transportation and Uniform Relocation Assistance Act. The U.S. Congress reauthorized the DBE Program again in 1991 and 1998 respectively. Both the 1991 Intermodal Surface Transportation Efficiency Act and the 1998 Transportation Equity Act for the 21st Century (TEA-21) continued the ten percent DBE set-aside provision.

The DBE regulations, 49 CFR Part 26, were last amended in 1999. The regulations were amended to conform with the issues raised in numerous court cases dealing with the DBE program, including the Supreme Court decision in *Adarand v. Peña*. The regulations set forth a personal net worth standard for DBE Program eligibility and the requirement for setting race-neutral goals in conjunction with race-specific goals.

Recipients of federal financial assistance from the Federal Aviation Administration, effective January 1988, are required to implement an Airport Concession Disadvantaged Business Enterprise Program (ACDBE). On March 22, 2005, the US Department of Transportation published a final rule revising 49 CFR Part 23, the regulation governing ACDBE programs. The rule became effective on April 21, 2005. The rule revised and

¹⁵¹ *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit's caveat in *Dade County* should be kept in mind: "Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment." For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand, County of Cook, and City of Chicago*.



updated the regulation to ensure that ACDBEs are afforded an equal opportunity to receive and participate in concession opportunities.

The revisions to the ACDBE program paralleled in many important aspects the DBE regulation for federally assisted contracts. The revisions addressed issues such as goal-setting, personal net worth, business size standards, and ACDBE participation by car rental companies. It should also be noted that ACDBE program goals must be established in two separate categories. One category for car rental activities and another category for all other airport concession activities not related to car rentals.

There have been challenges to the amended DBE regulations. Two circuit courts, the Eighth and Seventh, approved them. One, the Ninth, did not. Therefore, IDOT being in the Seventh Circuit, is free to follow the amended regulations as written.

1. The Eighth Circuit Analysis

Sherbrooke Turf Inc. v. Minnesota Department of Transportation and *Gross Seed Co. v. Nebraska Dep't of Roads*¹⁵², is a 2003 joint decision. In both cases the district courts found that the revised DBE Program, as amended in 1999, met the strict scrutiny standard prescribed in *Adarand*. On appeal, the Circuit Court held that Congress had a “compelling interest” to enact the legislation because it “had a sufficient evidentiary basis on which to conclude that the persistent racism and discrimination in highway subcontracting warranted a race-conscious procurement program.”

The court’s “narrow tailoring” examination looked at the DBE regulations themselves. The court held that four factors demonstrated that a DBE program was narrowly tailored on its face. Those factors were: (1) the emphasis on the use of race-neutral measures to meet the goals; (2) the substantial flexibility allowed; (3) goals were tied to the local market; and (4) participation was open to all small businesses who could show that they were socially and economically disadvantaged, and given the presumption that minority businesses were less than \$750,000 in net worth.

The Circuit Court then examined whether the program was narrowly tailored *as applied* by Minnesota and Nebraska in their local labor markets. Each state retained a consultant to examine local conditions. In Minnesota, the consultant followed the DBE regulations’ two-step goal setting process. In Nebraska, the consultant determined the DBE availability in the four years before the program was amended to make clear that the ten percent goal was not mandatory. After determining what decisions had been reached on a race neutral basis,

¹⁵² 345 F.3d 964 (8th Cir. 2003).



it predicted the amount of the availability that would require race and gender conscious subcontracting. Therefore, the Eighth Circuit rejected plaintiffs' appeal.¹⁵³

2. Ninth Circuit Analysis

Western States, filed in U.S. District Court in 2000, subjected the State of Washington's Department of Transportation DBE Program to a two-pronged analysis. One aspect of the analysis determined whether the USDOT DBE legislation was facially constitutional and the other assessed whether the State of Washington's application of the DBE regulations was valid.

a. Facial Constitutional Challenge

In *Western States* the plaintiff sought a declaratory judgment arguing that TEA-21's preference program was in violation of the equal protection provision under the Fifth and Fourteenth Amendments of the U.S. Constitution. The TEA-21 DBE Program on its face and as applied by the State of Washington were claimed to be unconstitutional. In addressing *Western States*' facial challenge the Court interpreted the issue as to whether the United States Congress met its burden of demonstrating that the federal statute and regulations satisfied the strict scrutiny's exacting requirements.

The federal government, according to *Croson*, has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination.¹⁵⁴ Thus, the Court evaluated the evidence that Congress considered in enacting the DBE statute to ensure it had a "strong basis in evidence for its conclusion that remedial action was necessary."¹⁵⁵ The Court concluded that a substantial body of statistical and anecdotal evidence was considered by Congress at the time the law was enacted. Therefore the Court found that Congress had a strong basis in evidence for concluding that at least in some parts of the country there was discrimination within the transportation contracting industry which hindered minorities' ability to compete for federally funded contracts.¹⁵⁶

Next, the Court considered whether the DBE regulation's racial classification was narrowly tailored. Citing *Croson*, *Western States* decided that a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a

¹⁵³ The Seventh Circuit is in accord. *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (2007). Consultant's methodology were consistent with the flexible nature of the DBE regulations: (1) use of its 'custom census' was acceptable method to determine Step 1 availability; (2) was not required to separate prime and subcontracting availability; and (3) reasonably determined amount of goal that would use race neutral means.

¹⁵⁴ *Croson*, 488 U.S. 469, 492 (1982).

¹⁵⁵ *Id* at 493.

¹⁵⁶ *Western States* at 983.



particular market in order to be narrowly tailored.¹⁵⁷ The Court referenced *Sherbrooke* noting that the Eighth Circuit in holding that the DBE programs of the Minnesota and Nebraska Departments of Transportation independently satisfied the strict scrutiny’s narrow tailoring requirement, relied upon disparity studies.

The Court notes that the DBE regulations did not establish a mandatory nationwide minority utilization goal in transportation contracting. The Court found that the ten percent DBE utilization goal in the regulation was only “aspirational,” and the regulation provides that each state must establish a DBE utilization goal that is based upon the proportion of ready, willing, and able DBEs in its transportation contracting industry.¹⁵⁸ Because the regulations require each state to set minority utilization goals that reflect the contractor availability in its own labor market, the Court found the DBE regulations to be narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry. The Court ultimately held that they were satisfied that TEA-21’s DBE program was narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry, and thus *Western States’* facial challenge failed.

b. Washington State’s Application of the Narrowly Tailored Standard

The second prong of the Court’s analysis considered whether the utilization goals established by the State of Washington were unconstitutional. The State contended that its DBE program was constitutional because it comported with the federal statute and regulations. The State also proffered that since the proportion of DBEs in the state was 11.17 percent, and the percentage of contracting funds awarded to them on race-neutral contracts was only nine percent, discrimination was demonstrated.¹⁵⁹ The Court disagreed with the rationale. It found that this oversimplified statistical evidence was entitled to little weight, because it did not account for factors that may affect the relative capacity of DBEs to undertake contracting work. DBE firms may be smaller and less experienced than non-DBE firms or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.

Citing *Crososn* the Court opined that recipients of federal funds could not use race-conscious methods to meet their DBE goals without a finding of discrimination. The Court found there was insufficient evidence suggesting that minorities currently or previously suffered discrimination in the Washington Department of Transportation contracting industry. Further, the Court found that the State of Washington failed to provide evidence of discrimination within its own contracting market and thus failed to meet its burden of

¹⁵⁷ *Id.* *Western States*

¹⁵⁸ *Western States.*

¹⁵⁹ *Western States.*



demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest.¹⁶⁰

The Court concluded that the District Court erred when it upheld the State's DBE program simply because the State complied with the federal program's requirement. Washington's DBE program was categorized as an "unconstitutional windfall to minority contractors solely on the basis of their race or sex."

In sum, *Western States* found that Washington's DBE program met the first prong of the test and was held facially constitutional but it did not pass the second prong because the State's application of the DBE regulations was not narrowly tailored to a finding of statistically significant underutilization of the respective minority groups. Therefore, the State's application of the DBE regulations was deemed unconstitutional.

In response to *Western States*, the USDOT issued a Guidance Memorandum titled, *FY 2006 DBE Goal Setting Approval Process and DBE Program Plans - December 21, 2005*, the Memorandum recommended a disparity study as an appropriate method for USDOT recipients in the Ninth Circuit to formulate narrowly tailored DBE goals.¹⁶¹

3. The Seventh Circuit Analysis

In 2000, Northern Contracting, Inc. (NCI) a company specializing in the construction of guardrails and fences for highway construction projects initiated a suit in district court against the Illinois Department of Transportation. The district court concluded that NCI failed to prove a constitutional violation against the Illinois Department of Transportation. Later in 2007, the Seventh Circuit Court of Appeals considered whether the Illinois Department of Transportation (IDOT) violated the United States constitution in administering a Disadvantaged Business Enterprise Program which was designed to increase the participation of socially and economically disadvantaged individuals in Illinois highway construction subcontracts.¹⁶²

IDOT, a USDOT recipient, is required to comply with federal law pertaining to its DBE program. Pursuant to the federal requirements, IDOT had to determine the figure that would constitute an appropriate DBE involvement goal, based on the relative availability of DBEs pursuant to 49 C.F.R. Section 26.45(b). To calculate DBE availability, USDOT recipients must calculate a "base figure" for the relative availability of DBEs, and then examine evidence in its local area to determine whether any adjustments to the base figure are

¹⁶⁰ *Id.*

¹⁶¹ It was noteworthy that the USDOT regulations, as promulgated in 1992 recommends the use of a disparity study among other availability sources for setting the DBE goals.

¹⁶² *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).



needed.¹⁶³ Additionally, recipients are required to maximize the portion of its goal through race-neutral means.¹⁶⁴

NCI filed suit in the district court alleging that: (1) TEA-21 and USDOT's regulations were outside the scope of Congressional power; (2) that the federal provisions violated the Fifth Amendment's guarantee of equal protection; and (3) that the Illinois statute implementing the federal DBE requirement violated 42 U.S.C. §§ 1981, 1983, 2000(d) and the Fourteenth Amendment's Equal Protection Clause.

The district court summarily sided with IDOT concluding that the federal government had demonstrated a compelling interest, i.e., ending the effects of current and past discrimination in highway contracting, and that TEA-21 and its implementing regulations were sufficiently narrowly tailored. The district court reserved only one issue for trial—whether IDOT's DBE program was narrowly tailored.

At trial, the District Court Judge ruled that IDOT's Fiscal Year 2005 DBE Program was narrowly tailored to the compelling interest identified by the federal government to remedy the effects of racial and gender discrimination in the highway construction market. *NCI* appealed the district court decision to the Seventh Circuit Court of Appeals.

The Seventh Circuit was charged with the responsibility of determining whether IDOT's DBE program passed constitutional muster since the program encompassed racial classifications.

IDOT, a state entity implementing a congressionally mandated program, relied on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market. *NCI* relied on *Builders Association of Greater Chicago v. County of Cook*¹⁶⁵ as a basis for its argument on narrow tailoring but the Seventh Circuit surmised that this reliance was misplaced. The Court of Appeals observed that in *Builders Association* the State was required to demonstrate that its program was narrowly tailored to remedy the specific past discrimination perpetrated by the State. But in the case at issue, IDOT was acting as an instrument of federal policy, and therefore, “*NCI* cannot collaterally attack the federal regulations through a challenge to IDOT's program.”

Next, the court considered *NCI*'s final three arguments—(1) that IDOT violated 49 C.F.R. Section 26.45(c) by improperly calculating the relative availability of DBEs in Illinois; (2) that IDOT failed to properly adjust its base figure based on local market conditions; and (3) that IDOT violated 49 C.F.R. Section 26.51 by failing to meet the maximum feasible

¹⁶³ 49 C.F.R. §§ 26.45(c), 26.45(d).

¹⁶⁴ 49 C.F.R. § 26.51(a).

¹⁶⁵ *Builders Ass'n*, 256 F.3d at 646.



portion of its overall goal through race-neutral means. The Seventh Circuit ruled against NCI on each of the proffered arguments.

As to *NCI's* first contention, the Court of Appeals stated that according to 49 CFR Section 25.45(b) "relative availability" means "the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on IDOT-assisted contracts."¹⁶⁶ The Seventh Circuit reasoned that IDOT did not miscalculate the number of DBEs that were "ready, willing, and able" by utilizing the "custom census." *NCI* argued that a simple count of the number of IDOT's registered and pre-qualified DBEs under Illinois law would have been the correct approach. But the Court of Appeals agreed with the lower court which ruled that *NCI* failed to establish its position based on the requisite federal regulations. And the Seventh Circuit held that the "custom census" utilized by IDOT reflected an attempt by the agency to arrive at more accurate numbers than would be possible through use of just a list of IDOT's registered and pre-qualified DBEs.

NCI's second contention that IDOT failed to properly adjust its goal based on local market conditions was determined to be unfounded. IDOT argued that "49 C.F.R. Section 26.45(d) did not require any adjustments to the base figure after the initial calculation, but simply provides recipients with authority to make such adjustments if necessary." *NCI* suggested that IDOT abused its discretion under this regulation by failing to separate the prime contractor availability from the subcontractor availability. However, the court reasoned that "it would make little sense to separate prime contractor and subcontractor availability as suggested by *NCI* when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal."

Finally, the court dismissed *NCI's* argument that IDOT violated 49 C.F.R. Section 26.51 by failing to meet the maximum feasible portion of its overall goal through race-neutral means for DBE participation. IDOT demonstrated that all of the methods described in Section 26.51(b) to maximize the portion of the goal that could be achieved through race-neutral means were utilized by the agency. Additionally, the Court of Appeals noted that IDOT sponsored different types of informational sessions, provided technical and financial training to DBEs and other small businesses, as well as initiating a bond and financial assistance program. Due to these efforts by IDOT, *NCI* failed to demonstrate that IDOT did not maximize the portion of its goal through race-neutral means.

4. Federal Circuit Court Analysis

Rothe Development Corp. v. U.S. Department of Defense had been in litigation since 1998. There were two earlier appeals prior to the Federal Circuit Court of Appeals' holding in November 2008 that the Department of Defense's (DOD) small disadvantaged business program was unconstitutional on its face.

¹⁶⁶ Emphasis added.



On this last appeal, Rothe argued that in granting summary judgment the district court was wrong to rely on six disparity studies because (1) the data analyzed by the studies was stale by the time of the 2006 reenactment, (2) the studies were not truly “before Congress,” (3) the studies were methodologically flawed and therefore unreliable, and (4) the studies did not establish that DOD played any role in the discriminatory exclusion of minority-owned contractors.¹⁶⁷

The primary basis for the Court’s holding rested with the appellant’s second argument—Congress did not have sufficient evidence before it to conclude that racial discrimination in defense contracting existed when it reauthorized the program in 2006.

“[W]e are hesitant to conclude that the mere mention of a statistical study in a speech on the floor of the House of Representatives or the Senate is sufficient to put the study ‘before Congress’ for purposes of Congress’ obligation to amass a ‘strong basis in evidence’ for race-conscious action. We recognize that there is no dispute that these six studies were completed prior to the 2006 reenactment of Section 1207, and in that sense they were indeed ‘before’ the acting legislature. But beyond their mere mention, there is no indication that these studies were debated or reviewed by members of Congress or by any witnesses.”¹⁶⁸

It is of note that this decision does not constrain other federal programs such as those of the Department of Transportation.¹⁶⁹ The federal program was party to the litigation, it was not binding in other federal circuits.¹⁷⁰ Only decisions of a circuit court are binding on district courts within that circuit. They are merely persuasive outside of its circuit so long as there is not an opinion in the particular circuit to the contrary.

¹⁶⁷ The Court declined to adopt a *per se* rule on staleness, noting that other studies had been accepted that were more than five years old, appellant’s first contention. The Court emphatically rejected appellant’s fourth argument that DOD had to make findings of its own discrimination.

¹⁶⁸ Pg.27.

¹⁶⁹ *Dynalantic Corp. v U.S Department of Defense*, 503 F.Supp.2d 262 was a 2007 D.C. District Court memorandum opinion. Plaintiff Dynalantic raised essentially the same issue subsequently decided by the Federal Circuit in Rothe. In this case, plaintiff was challenging the DoD’s policy of using the § 8(a) program, as called for in 10 U.S.C.S. § 2323, and not the § 8(a) program as a whole. The § 8(a) program utilized race-conscious criteria in qualifying applicant firms, and therefore a policy, which employed the program to issue contracts, had to be reviewed using strict scrutiny. Such racial classifications were constitutional only if they were narrowly tailored measures that furthered compelling governmental interests. In order for the government to rely upon such interests, a court had to evaluate the evidence that Congress considered to ensure that it had a strong basis in evidence for its conclusion that remedial action was necessary. This evaluation specifically included reviewing the evidence before Congress prior to the enactment of the racial classification. Because the DoD program was reauthorized in 2006, the court considered the evidence before Congress at the time of the reauthorization. The court could not resolve the fundamental issues raised by the parties’ motions without considering the evidence before Congress in 2006. Most of this evidence was not before the court.

¹⁷⁰ The Federal Circuit, unlike the other eleven circuits, has specific subject matter jurisdiction. This litigation was brought under the Tucker Act – essentially claims for money arising from federal contract disputes -- are appealed there.



The opinion, albeit not binding, does require further comment, because it discussed the availability methodology of six disparity studies—four of which MTA performed (New York City, Alameda County, Cuyahoga County, Dallas), appellant’s third argument.

The court responded favorably to a determination of ‘willing and able’ businesses where “the bulk of the businesses considered in the studies were identified in ways that tend to establish their qualifications, such as their presence on city contract records and bidders lists.” Given that, the court rejected plaintiff’s criticism of the methodology that compiled lists of local business associations, and of community outreach, to identify minority-owned businesses.¹⁷¹

The court’s “biggest concern” involved the issue of capacity. It acknowledged that two of the studies which congress relied upon attempted to deal with that concern. The New York City study limited prime contracts to those valued at \$1 million and under; in Dallas the firms had a “demonstrated capacity to win large competitively bid contracts” and moreover, most contracts were small. Therefore, the court concluded that several studies that were relied upon demonstrated the firms had the capacity to perform a contract. The court expressed an additional concern as to whether the firms could do *more than one contract a time*.¹⁷² Regression analyses was recommended as the corrective for going forward.

VII. CONCLUSION

The 1989 decision of the U.S. Supreme Court in the *Croson* changed the legal landscape for business affirmative action programs and altered the authority of local governments to institute remedial race-conscious public contracting programs.

¹⁷¹ Pg.31. The court, in its words, “was less confident in this aspect” of the other two studies. . The firms either did business within the industry group from which purchases were made; the owner believed the firm is qualified and able; the owner’s actions demonstrated an interest in obtaining work; *all* firms in vendor data are ready, willing and able.

¹⁷² Pgs.34-35.



VIII. LIST OF CASES

- **Cases**

Adarand Constructors, Inc. v. Federico Pena, 115 S.Ct. 2097 (1995).

Associated General Contractors of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco, 950 F.2d 1401 (9th Cir. 1991).

Associated General Contractors of Connecticut v. City of New Haven, 791 F.Supp. 941 (D. Conn. 1992).

Associated General Contractors of Ohio v. Drabik, 50 F.Supp. 741 (S.D. Ohio 1999), 214 F.3d 730 (6th Cir. 2000).

Behavioral Interventions v. Missouri Office of Administration, Case No. 04-0872-CV-W-GAF (W. D. Mo. 2005).

Builders Ass'n of Greater Chicago v. City of Chicago, 298 F.Supp 2d 725 (N.D.Ill. 2003).

Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001).

C&C Construction v. Sacramento Municipal Utility District (SMUD), 122 Cal. App. 4th 284 (Cal. App. 2004).

Cantrell, et al v Granholm, No. 06-15637 (E.D. Mich. Jan 17, 2007).

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

Concrete Works of Colorado v. City and County of Denver, 823 F.Supp. 821 (D. Colo. 1993).

Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994).
“Concrete Works I”

Concrete Works of Colorado v. City and County of Denver, on remand, 86 F.Supp.2d 1042 (D. Colo 2000).

Concrete Works of Colorado v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003),
petition for cert. denied, (U.S. Nov. 17, 2003) (No. 02-1673). “Concrete Works II”



Cone Corporation v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990).

Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993), *on remand*, 893 F.Supp. 419 (E.D. Penn. 1995), *aff'd*, 91 F.3d 586 (3rd Cir. 1996).

Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875 (1992).

Coral Construction v. San Francisco, See 116 Cal. App. 4th 6. (Sup. Ct. 2004)

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

Dynalantic Corp. v U.S Department of Defense, 503 F.Supp.2d 262 (2007).

EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1981).

Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

Ensley Branch N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

Gratz v. Bollinger, 123 S.Ct, 2411 (2003).

Gross Seed v. Nebraska Dept. of Roads, 2002 U.S. Dist LEXIS 27125 (D. Neb. 2002).

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993).

Hazelwood School District v. United States, 433 U.S. 299 (1977).

Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F.Supp. 2d 1305 (S.D.Fla. 2004).

Hi-Voltage v. City of San Jose, 24 Cal. 4th 537 (Cal. 2000).

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

League of United Latin American Citizens v. Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976).

Michigan Road Builders Association v. Milliken, 834 F.2d 583 (6th Cir. 1987).

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).



Monterey Mechanical Co. v. Pete Wilson et al., 125 F.3d 702 (9th Cir. 1997).

North Shore Concrete and Assoc. v. City of New York, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998).

Northern Contracting Inc. v. State of Illinois, 2005 U.S. Dist. LEXIS 19868 (D. Ill. 2005).

Northern Contracting Inc. v. Illinois Department of Transportation, 473 F.3d 715 (2007).

O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992).

Ohio Contractors Ass'n v. Keip, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983).

Parents Involved in Community Schools v. Seattle School District No.1 No. 01-35450 (9th Cir. July 27, 2004)

Reynolds v. Sheet Metal Workers, Local 102, 498 F.Supp 952 (D. D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981).

RGW Construction v. San Francisco Bay Area Rapid Transit District, No. C92-2938 THE (N.D. Cal. Sept. 18, 1992).

Ritchey Produce Co. v. State of Ohio. 707 N.E.2d 871 (1999).

Rothe Development Corporation, Inc. v. U.S. Department of Defense 324 F.Supp.2d. 840 (Fed. Cir., 2005).

Rothe Development Corp. v. Department of Defense, 545 F.3d 1023 (Fed. Cir. 2008).

Shaw v. Hunt, 517 U.S. 899 (1996).

Sherbrooke Turf, Inc. v. MNDOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. 2001).

United States v. Virginia, 116 S.Ct. 2264 (1996).

Ward Connerly v. State Personnel Board, 92 Cal. App. 4th 16 (Cal. 2001).

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

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

- **Statutes**

42 U.S.C. Section 14000e et seq.



Exhibit A

The U.S. Department of Transportation (USDOT) regulations are set forth at 49 CFR Part 26. Their main components are as follows:

1. Goal Setting

Section 26.45 lays out a two-step process for setting goals. Step 1 is establishing a base figure for DBE availability. It specifies three examples: DBE Directories and Census Bureau Data; Bidders List; and Disparity Study Data (but see *Western States Paving*). Step 2 is an adjustment of that base figure if there is evidence available in the jurisdiction that supports one.

2. Meeting Overall Goals

Section 26.51 requires that the “maximum feasible portion” of the overall DBE goal be met through the use of race/gender-neutral mechanisms. To the extent that these means are insufficient to meet overall goals, recipients may use race/gender-conscious mechanisms, such as contract goals. However, contract goals are not required on every USDOT-assisted contract, regardless of whether they were needed to meet overall goals.

If during the year it becomes apparent that the goals will be exceeded, the recipient is to reduce or eliminate the use of goals. Similarly, if it is determined that a goal will not be met, an agency should modify the use of race and gender-neutral and race and gender-conscious measures in order to meet its overall goals.

Set-asides may not be used for DBEs on USDOT contracts subject to Part 26 except, “in limited and extreme circumstances when no other method could be reasonably expected to address egregious instances of discrimination.”

3. Good Faith Efforts

The new regulation emphasizes that when recipients use contract goals, they must award the contract to a bidder that makes good faith efforts to meet the goal. The contract award cannot be denied if the firm has not attained the goal, but has documented good faith efforts to do so. Recipients must provide administrative reconsideration to a bidder who is denied a contract on the basis of a failure to make good faith efforts.



4. DBE Diversification

Section 26.33 is an effort to diversify the types of work in which DBEs participate, as well as to reduce perceived unfair competitive pressure on non-DBE firms attempting to work in certain fields. This provision requires that if agencies determine there is an over-concentration of DBEs in a certain type of work, they must take appropriate measures to address the issue. Remedies may include incentives, technical assistance, business development programs, and other appropriate measures.

5. Alternative Programs

Section 26.15 allows recipients to obtain a waiver of the provisions of the DBE program requirements if they demonstrate that there are “special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rule making that establish this part.”



3

CONTRACTING AND PROCUREMENT ANALYSIS

I. INTRODUCTION

Mason Tillman was commissioned by the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority (Illinois Tollway) to conduct a Disadvantaged Business Enterprise (DBE) Disparity Study. This chapter reviews IDOT's contracting and procurement policies in the areas of highway construction and design services for the study period of January 1, 2006 through December 31, 2008.

A. Governing Laws and Regulations

The laws and regulations that govern IDOT's procurement conform to standards established by State and federal law which include:

1. State of Illinois Law

- a. Architectural, Engineering and Land Surveying Qualifications Based Selection Act 30 ILCS 535¹
- b. Business Enterprise for Minorities, Females, and Persons with Disabilities Act 30 ILCS 575
- c. Illinois Architecture Practice Act of 1989 225 ILCS 305
- d. Illinois Procurement Code 30 ILCS 500
- e. Professional Engineering Practice Act of 1989 225 ILCS 325
- f. Title 44: Government Contracts, Procurement and Property Management



¹ Also known as the Qualification Based Selection law.

2. Federal Laws and Regulations

- a. Federal Aviation Administration Reauthorization Act of 1996
- b. Federal Transit Administration Circular 4220.1F²
- c. Transportation Acquisition Regulation [48 CFR Chapter 12]
- d. United States Department of Transportation Disadvantaged Business Program, 49 CFR Part 26, amended March 1999
- e. Section 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, August 10, 2005
- f. 49 U.S.C. Sec. 47113

B. DEFINITIONS

Services procured by IDOT are classified within the following industries for this Study:

Architectural Services are defined as any professional service defined in Section 5 of the Illinois Architecture Practice Act of 1989.

Construction Services are defined as the building, altering, repairing, improving, and demolishing of any public structure or building, or other improvements to public real property. It does not include the routine operation or maintenance of existing structures, buildings, or real property.

Construction-Related Professional Services are defined as those services including construction design, layout, inspection, support, feasibility, location study, research, development, planning, or other investigative study undertaken by a construction agency concerning construction or potential construction.

Engineering Services are defined as any professional service defined in Section 4 of the Professional Engineering Practice Act of 1989 or Section 5 of the Structural Engineering Practice Act of 1989.



² Enacted on November 1, 2008.

II. OVERVIEW OF THE PROCUREMENT PROCESS

As set forth in the Illinois Procurement Code, the procurement methods utilized by IDOT include competitive sealed bids and competitive sealed proposals. Procurements for construction not exceeding \$30,000 may be made without competitive sealed bidding. For the procurement of construction services estimated at over \$30,000, notice is made through a sealed competitive bid process. Public notice for an invitation for bids is published in the Illinois Procurement Bulletin at least 14 days before the bid opening date.³

Procurements for construction-related professional services and consultant engineering services are subject to the Architectural, Engineering and Land Surveying Qualifications Based Selection Act (QBS law). The public notice, evaluation, and selection provisions of the QBS law do not apply to contracts with an estimated basic professional services fee of less than \$25,000. For services valued at \$25,000 or more, there must be a 14-day advance notice of the request for proposals in a professional services bulletin or advertisement in the official State newspaper.

Procurement for construction services not exceeding \$30,000 may be made without competitive sealed bidding. Other types of procurements include emergency purchases and sole source purchases. Table 3.01 summarizes the procurement requirements, described in Section IV.



³ It should be noted that a 21-day notice of advertisement is required on federally-funded construction contracts valued at more than \$50,000.

Table 3.01 Illinois Department of Transportation Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Construction Services	Valued at \$30,000 or less	None	None	Procurement Officer
	Valued at more than \$30,000	Public notice of the invitation for bids is published in the Illinois Procurement Bulletin at least 14 days before the date set in the invitation for the opening of bids. A 21-day notice of advertisement is required on federally-funded construction contracts valued at more than \$50,000.	Competitive sealed bidding process applies to construction.	Procurement Officer
Construction-Related Professional Services	Valued at \$25,000 or less	None	None	Procurement Officer

Table 3.01 Illinois Department of Transportation Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
<p>Construction-Related Professional Services</p>	<p>Valued at \$25,000 or more</p>	<p>No less than a 14-day advance notice published in a professional services bulletin or advertised within the official State newspaper setting forth the projects and services to be procured.</p> <p>The professional services bulletin is available electronically and may be available in print.</p> <p>The professional services bulletin includes a description of each project and states the time and place for interested firms to submit a letter of interest and, if required by the public notice, a statement of qualifications.</p>	<p>No less than three firms are selected on the basis of evaluations and discussions. They are ranked in order of qualifications. If fewer than 3 firms submit letters of interest and IDOT determines that one or both of those firms are so qualified, IDOT may proceed to negotiate with the selected firm.</p>	<p>Selection Committee</p>

Table 3.01 Illinois Department of Transportation Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Consultant Engineering Services	Valued at \$25,000 or less	None	None	Procurement Officer

Table 3.01 Illinois Department of Transportation Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Valued at \$25,000 or more	<p>No less than a 14-day advance notice published in a professional services bulletin or advertised within the official State newspaper setting forth the projects and services to be procured.</p> <p>The professional services bulletin is available electronically and may be available in print.</p> <p>The professional services bulletin includes a description of each project and states the time and place for interested firms to submit a letter of interest and, if required by the public notice, a statement of qualifications.</p>	No less than three firms are selected on the basis of evaluations and discussions. They are ranked in order of qualifications. If fewer than three firms submit letters of interest, and IDOT determines that one or both of those firms are so qualified, IDOT may proceed to negotiate with the selected firm.	Selection Committee

Table 3.01 Illinois Department of Transportation Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Sole Source	None	Two weeks prior to execution of contract, notice of intent to enter into contract must be published in the Illinois Procurement Bulletin, along with a description of the item to be procured and the intended sole source contractor.	None	Procurement Officer
Emergency Purchases	None	None, unless contract is extended beyond a 90-day term after notice and public hearing.	Emergency procurements must be made with as much competition as practicable under the circumstances. A written description, stating reasons and total cost of the emergency procurement is to be published in the next appropriate volume of the Illinois Procurement Bulletin.	Procurement Officer

III. PROCUREMENT STANDARDS FOR THE ILLINOIS DEPARTMENT OF TRANSPORTATION'S CONTRACTS

IDOT's informal solicitation method includes small purchases. Formal solicitation methods include competitive sealed bidding, competitive sealed proposals, and other procurements.

A. Small Purchases

Small purchases are defined in the Illinois Procurement Code as any single procurement of supplies or services other than professional or artistic services not exceeding \$10,000 and any procurement of construction not exceeding \$30,000. Small purchases are exempt from IDOT's competitive sealed bidding process. The guidelines for relevant industries are listed below:

1. Purchases of Construction Services Valued at \$30,000 or Less

Purchases for construction services of \$30,000 or less are categorized as small purchases. The construction agency's Chief Procurement Officer may increase the \$30,000 limit to reflect increases in the Consumer Price Index.

2. Purchases of Construction-Related Professional Services Valued at Less than \$25,000

Purchases of construction-related professional services valued at less than \$25,000 are categorized as small purchases. Construction-related professional services are procured through a selection committee.

3. Purchases of Consultant Engineering Services Valued at Less than \$25,000

Purchases of consultant engineering and land surveying services valued at less than \$25,000 are also categorized as small purchases. A selection committee is established to select firms to provide consultant engineering and land surveying services.



B. Formal Solicitations

Formal solicitations for construction services require competitive sealed bidding except when the Procurement Officer determines that competitive sealed proposals would be more appropriate.

1. Competitive Sealed Bidding

a. Invitation For Bid

Competitive sealed bidding is the required method of selection for construction procurement. An Invitation For Bid (IFB) is used to initiate a competitive sealed bid and must minimally include:

- Instructions to bidders concerning the bid submission requirements
- Purchase description, evaluation factors, delivery or performance schedule, inspection and acceptance requirements that are not included in the purchase description, and contract terms and conditions.

b. Purchases of Construction Services over \$30,000

The procurement of construction services valued over \$30,000 requires competitive sealed bidding. The procurement approval is handled by the Procurement Officer.

c. Pre-Qualification Requirements

Construction contractors must be pre-qualified prior to being considered for issuance of an Authorization to Bid on contracts.⁴ The applicant submits an application for pre-qualification and the Pre-Qualification Section evaluates the application to determine the responsibility of the applicant and calculates a pre-qualification rating. The pre-qualification rating consists of a financial rating and a work rating. The construction contractor is then permitted to request Authorization to Bid on contracts within the contractor's available bidding capacity.

Construction contractors desiring to bid or quote subcontract work to pre-qualified contractors are required to register annually for inclusion in the participant list. The participant list includes all firms that bid on DOT-assisted contracts as well as bid or quote

⁴ Rules for Prequalifications of Contractors, Authorization to Bid, and Subcontractor Registration, 44 IL ADM. Code Sec. 650, Amended May 8, 2008.



on subcontracts to DOT-assisted contracts. Pre-qualified contractors must solicit or accept bids or quotes from potential subcontractors that are on the participant list.

d. Advertising

A minimum of 14 days is required for public notice unless a shorter time is authorized by the Illinois Procurement Code. A 21-day notice of advertisement is required on federally-funded construction contracts valued at more than \$50,000. Procurement for construction services requiring publication must be publicized in the Illinois Procurement Bulletin.

e. Pre-Bid Conference

A mandatory or optional pre-bid conference may be held as a part of the Invitation for Bid process.

f. Public Information

Invitation for Bid and modifications are opened publicly at the time, date, and place stated in the solicitation notice. Each bidder, bid price, and other information deemed appropriate by the Procurement Officer is recorded, and the name of each bidder is read aloud or otherwise made available.

g. Lowest Responsible Bidder

The contract is awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. All bids must conform in all material respects to the Invitation for Bids. All bids are made available for public inspection after contract award.

The Procurement Officer can make awards to a bidder that is not the lowest responsible and responsive only with written determination that award to another bidder is in the State's best interest.

As an alternative, competitive sealed proposals for construction services may be used on a case-by-case basis when it is determined by the Procurement Officer that competitive sealed bidding is either not practicable or advantageous to the State. The key element in determining whether the use of a proposal is advantageous is the need for flexibility.



2. Competitive Sealed Proposal⁵

IDOT has a separate process for the procurement of consultant engineering services and construction-related professional services. The process is detailed in QBS law. The competitive sealed proposal permits discussions with competing offerors and changes in their proposals, including price. It also allows comparative judgmental evaluations to be made when evaluating the proposals for award of the contract.

Nothing in the QBS law prohibits or restricts affirmative action contracting goals for minorities, women, or small business set asides. The selection committee oversees procurement approval. On the basis of evaluations, discussions, and any presentations, no less than three firms are selected and ranked in order of qualifications.

a. Pre-Qualification Requirements

Consultants must be pre-qualified to provide consultant engineering services in multiple categories of service for transportation. Pre-qualification for engineering consultants are based on firm experience and on the individual's experience. If there is sufficient support staff, the consultant can become pre-qualified in most categories. Consultants are permitted to hire an individual with experience to meet the pre-qualification requirements. The consultant's staff of engineers and/or technicians must be employed full-time and have pertinent experience or training. If the consultant lacks relevant experience or training, the pre-qualification application may be denied. The Bureau of Design and Environment oversees the pre-qualification process.

b. Request for Proposals

Request for proposals (RFPs) are utilized to procure services for competitive sealed proposals. RFPs are awarded to the responsible offeror whose proposal is determined to be the most advantageous, taking into consideration price and the evaluation factors, as set forth in the RFPs.

c. Advertising

Public notice of the RFP is published in the Illinois Procurement Bulletin at least 14 days prior to proposal opening date for contracts valued at \$25,000 or more.

⁵ Competitive sealed proposals are not used for construction procurements, per 30 ILCS 500/30-15, unless provided in other referenced subsections and Code sections which do not include Section 20-15.



d. Public Opening

RFPs are opened publicly in the presence of one or more witnesses at the time and place set forth in the RFP.

IV. OTHER PROCUREMENT METHODS

There are three types of procurements which are exempt from IDOT's competitive bidding procurement process. The three are sole source, emergency, and small purchases. Sole source and emergency procurements are described below:

A. Sole Source Procurements

Sole source procurements are awarded, following a public hearing, without adhering to the competitive solicitation procedures, when there is only one economically feasible source for the item. The sole source contract must be published in the Illinois Procurement Bulletin at least two weeks before a contract is executed.

B. Emergency Procurements

Procurements may be made without competitive sealed bidding or prior notice when there exists a threat to public health or public safety, or when immediate expenditure is necessary for repairs to state property in order to protect against further loss or damage, to prevent or minimize serious disruption in State services, or to ensure the integrity of State records. Emergency procurements must be made with as much competition as is practicable under the circumstances. IDOT must publish in the next appropriate volume of the Illinois Procurement Bulletin a copy of each written description, reasons for the emergency procurement, and the total cost of each emergency procurement made during the previous month.

V. DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

IDOT's DBE Program aims to ensure nondiscrimination in the award and administration of U.S. Department of Transportation (U.S. DOT)-assisted contracts and create a level playing field on which DBEs can compete fairly for U.S. DOT-assisted contracts. IDOT instituted its DBE Program pursuant to 49 CFR Part 26 to promote the utilization of DBEs to the maximum extent feasible in all aspects of its federally-assisted contracting. The



Office of Small Business Services' Bureau of Small Business Enterprises is responsible for administering the federally-mandated DBE Program.

IDOT requires its contractors to ensure that DBEs, as defined in 49 CFR Part 26, have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds.

IDOT's policy is to ensure that its DBE Program is narrowly tailored in accordance with applicable law and that only firms that meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs. IDOT's policy also seeks to help remove barriers to the participation of DBEs in U.S. DOT-assisted contracts and to assist the development of firms to compete successfully in the market place outside the DBE program.

1. DBE Certification

Disadvantaged Business Enterprises that are certified by the Illinois Unified Certification Program (IL UCP), in accordance with the requirements set forth in 49 CFR Part 26, can participate in IDOT's DBE Program.

The DBE certification is effective for a period of five years. If a firm's circumstances changes which affects its DBE eligibility to meet size, disadvantaged status, ownership or control requirements, or any other material change must be submitted in writing to IDOT within 30 days of the occurrence of the change. All certified DBEs must provide a No Change Affidavit each year to IDOT by the anniversary date of its certification.

Certified DBEs are listed in the IL UCP DBE Directory (Directory). The Directory serves as a reference source to assist bidders/proposers in meeting DBE contract goals. The Directory enumerates DBEs in alphabetical order and provides the industry categories/list and the district(s) in which the firms have indicated they are available.

DBEs certified by the IL UCP are eligible to participate on contracts let by IDOT as well as the City of Chicago, Chicago Transit Authority (CTA), Metra, and Pace.

2. DBE Goals

Overall DBE aspirational goals are set to maximize the participation of available DBEs on IDOT's prime and subcontracts, pursuant to 49 CFR Part 26.45. IDOT sets individual DBE goals to meet the overall DBE goal on its federal- and state-funded contracts that have subcontracting opportunities which may be suitable for performance by DBE firms. Individual goals are determined by assessing the type of work, the location of the work, and the availability of DBE firms to do a part of the work.



3. Counting DBE Participation

To be counted toward a contract goal, the DBE firm must perform a commercially useful function. A DBE performs a commercially useful function when the DBE firm is responsible for the work and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. All dollars paid to approved DBE firms who perform a commercially useful function on IDOT projects are eligible to be credited toward fulfillment of IDOT's overall DBE goal.

The following are the specific guidelines for counting DBE participation:⁶

- a. DBE as the Contractor: 100 percent goal credit for that portion of the work performed by the DBE's own forces, including the cost of materials and supplies. Work that a DBE subcontracts to a non-DBE does not count toward the DBE goals.
- b. DBE as a joint venture Contractor: 100 percent goal credit for that portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work performed by the DBE's own forces.
- c. DBE as a subcontractor: 100 percent goal credit for the work of the subcontract performed by the DBE's own forces, including the cost of materials and supplies, excluding the purchase of materials and supplies or the lease of equipment by the DBE subcontractor from the prime Contractor or its affiliates. Work that a DBE subcontractor in turn subcontracts to a non-DBE does not count toward the DBE goal.
- d. DBE as a trucker: 100 percent goal credit for trucking participation, provided the DBE is responsible for the management and supervision of the entire trucking operation for which it is responsible. At least one truck owned, operated, licensed, and insured by the DBE must be used on the contract. Credit will be given for the full value of all such DBE trucks operated using DBE-employed drivers. Goal credit will be limited to the value of the reasonable fee or commission received by the DBE if trucks are leased from a non-DBE company.
- e. DBE as a material supplier:

⁶ As set forth in 49 CFR Part 26.55.



- 1) 60 percent goal credit for the cost of the materials or supplies purchased from a DBE regular dealer.
- 2) 100 percent goal credit for the cost of materials or supplies obtained from a DBE manufacturer.
- 3) 100 percent credit for the value of reasonable fees and commissions for the procurement of materials and supplies if not a regular dealer or manufacturer.

4. Good Faith Efforts

Bidders are required to take all necessary and reasonable steps to achieve the project DBE goal. Contractors that cannot obtain sufficient DBE commitments to meet a contract goal must document, in their Utilization Plan, the good faith efforts made in the attempt to meet the goal. Examples of good faith efforts that must be documented in the Utilization Plan include:

- a. Solicitation through reasonable and available means to certified DBEs that have the capability to perform the work of the contract, allowing sufficient time to allow the DBE to respond to the solicitation.
- b. Unbundling selected portions of the solicited work to increase the likelihood that the DBE goals will be achieved.
- c. Provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner.
- d. Negotiate in good faith with interested DBEs by recording the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
- e. Assurance that DBEs were not rejected as being unqualified without sound reasons based on a thorough investigation of their capabilities.
- f. Make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or prime contractor.
- g. Make efforts to assist interested DBEs in obtaining the necessary equipment, supplies, materials, or related assistance or services.



- h. Engage the services of available minority and women community organizations; minority and women contractors' groups; local, state, and federal minority, women business assistance offices; and other organizations to provide assistance in the recruitment and placement of DBEs.

If a determination is made that a good faith effort has not been made, the bidder is notified and provided with reasons why good faith efforts have not been found, and may include additional good faith efforts that the bidder could perform.

The bidder is given five days to cure the deficiencies. If a final decision is made by the Reconsideration Officer that a good faith effort was made, the bidder's Utilization Plan will be approved. Conversely, if the final decision determines that a good faith effort was not made, the bid will be rendered non-responsive.

5. Mentor-Protégé Program

IDOT created a Mentor-Protégé Program (Program) to enhance the capabilities of socially and economically disadvantaged businesses to perform prime and subcontracts and thereby increase the utilization of available DBEs. The Program aims to provide developmental assistance to DBEs to enhance the protégé's business and technical capabilities to perform more complex work. Mentors can be reimbursed for administrative costs incurred as a result of specific projects where the mentor uses the protégé as a subcontractor.

The Mentor-Protégé relationship is managed by a Development Plan. An approved plan outlines the parties' goals and expectations, monitoring and reporting provisions, the duration of the relationship, and the services and resources to be provided by the mentor to the protégé. Some of the training areas included in the plan include:

- a. Business planning
- b. Record keeping
- c. Technical assistance
- d. Capital formation
- e. Loan packaging
- f. Financial counseling
- g. Bonding
- h. Equipment utilization and
- i. Training in new substantive/technical areas for the protégé.



IDOT requires mentors to have at least five years' experience as a contractor on IDOT highway construction contracts. The mentor must agree to devote a minimum of five to ten hours per month working with the protégé. IDOT requires the protégée to have at least three years of experience in the highway construction industry, be a certified DBE, and remain eligible for DBE certification throughout the duration of its participation.

The mentor must provide the protégé with a commercially useful function in the performance of the contract.



4

PRIME CONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

The first step in a disparity study is the analysis of expenditures to document contracting history in the jurisdiction under review. The objective of the prime utilization analysis is to determine the level of Disadvantaged Business Enterprise (DBE) utilization as prime contractors.

This chapter documents the Illinois Department of Transportation's (IDOT's) utilization of prime contractors by group (DBE and non-DBE) from January 1, 2006 to December 31, 2008. The prime contracts analyzed were classified into two industries: construction and architecture and engineering. Construction included the building, altering, repairing, improving, and demolishing of any public structure or building, or other improvements to public real property.¹ Architecture and engineering included professional services defined in Section 5 of the Illinois Architecture Practice Act of 1989, as well as professional services defined in Section 4 of the Professional Engineering Practice Act of 1989 and Section 5 of the Structural Engineering Practice Act of 1989. The prime contractors that received the contracts IDOT awarded during the study period were classified into two groups, Disadvantaged Business Enterprises and Non-Disadvantaged Business Enterprises. The two groups are listed below in Table 4.01.

¹ Construction also includes construction-related professional services which includes construction design, layout, inspection, support, feasibility, location study, research, development, planning, or other investigative study undertaken by a construction agency concerning construction or potential construction.



Table 4.01 Business Groups

Group	Definition
Disadvantaged Business Enterprises	Businesses owned by Minority Males, Minority Women, Caucasian American Women, and Caucasian American Males certified as DBE ²
Non-Disadvantaged Business Enterprises	Businesses owned by Caucasian American Males and businesses that did not declare their ethnicity or could not be identified as minority or woman-owned ³

II. PRIME CONTRACT DATA SOURCES

The prime contracts analyzed were purchase orders and payments issued by IDOT during the study period. A unique list of transactions was created by grouping the purchase orders by unique number and the vendor number. The transactions are referred to as contracts in this Study.

The contract records were extracted from IDOT’s financial management system. The dataset included contracts awarded between January 1, 2006 and December 31, 2008. Mason Tillman, in collaboration with IDOT, verified and cleaned the data to remove duplicates and complete the contract records with missing and incomplete data. Contracts with non-profits, government agencies, and utilities, were marked for exclusion.

Each contract was classified into either construction and/or architecture and engineering. The industry classifications were reviewed and approved by IDOT.

The information regarding the prime contractors’ DBE status was incomplete and, therefore, some data had to be reconstructed. To address this issue, which is a common problem with government records, Mason Tillman conducted research to verify the DBE status for each contractor. Prime contractor names were cross-referenced with certification lists, and websites were reviewed for the DBE status of the owner. Prime contractors whose DBE

² Minority is defined as African American, Asian American, Hispanic American, and Native American.

³ See Section II: Prime Contract Data Sources for the methodology employed to identify the DBE status of IDOT’s utilized prime contractors.



status could not be verified through published sources were surveyed. The DBE status of the prime contractors were completed except for five, which were not verified.

Once the contract records were cleaned and the DBE status verified, the utilization analysis was performed.

III. PRIME CONTRACTOR UTILIZATION THRESHOLDS

Contracts within each of the two industries were analyzed at three dollar levels. One category included all contracts regardless of size. A second size category included all contracts under \$500,000. This was the level where there was a demonstrated capacity within the pool of willing DBEs to perform IDOT’s contracts. The third size category included informal contracts that did not require advertising. As described in Table 4.02, the informal contract threshold was \$25,000 and under for both construction and architecture and engineering.

Table 4.02 Informal Contract Thresholds for IDOT

Industry	Informal Contract Threshold
Construction	\$25,000
Architecture and Engineering	\$25,000

IV. PRIME CONTRACTOR UTILIZATION

A. All Prime Contractors

As depicted in Table 4.03, IDOT issued 4,129 prime contracts during the January 1, 2006 to December 31, 2008 study period. The 4,129 contracts included 3,688 for construction and 441 for architecture and engineering.

The payments made by IDOT during the study period for the 4,129 prime contracts totaled \$4,039,185,639. These expenditures included \$3,784,155,409 for construction and \$255,030,230 for architecture and engineering.



Table 4.03 Total Prime Contracts and Dollars Expended, All Industries, January 1, 2006 to December 31, 2008

Industry	Total Number of Contracts	Total Dollars Expended
Construction	3,688	\$3,784,155,409
Architecture and Engineering	441	\$255,030,230
Total Expenditures	4,129	\$4,039,185,639

B. Highly Used Prime Contractors

As depicted in Table 4.04 below, IDOT’s 4,129 prime contracts were awarded to 555 contractors.

Table 4.04 Total Prime Contracts, Utilized Vendors, and Dollars Expended, All Industries, January 1, 2006 to December 31, 2008

Prime Contracts/ Vendors/ Dollars	Number of Contracts/ Vendors/ Dollars
Total Contracts	4,129
Total Utilized Vendors	555
Total Expenditures	\$4,039,185,639

Of the 555 prime contractors, 22 received 21.24 percent of the 4,129 prime contracts representing \$2,034,640,665 or 50 percent of the contract dollars. Five of the 22 highly used prime contractors received 25 percent of the contract dollars. Table 4.05 below depicts the distribution of the total prime contracts by number of contractors.



Table 4.05 Distribution of All Contracts by Number of Contractors

Contractors	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
5 Vendors Received	\$984,073,428	25%	311	7.53%
22 Vendors Received	\$2,034,640,665	50%	877	21.24%
35 Vendors Received	\$2,421,017,080	60%	1,159	28.07%
520 Vendors Received	\$1,618,168,559	40%	2,970	71.93%
555 Vendors Received	\$4,039,185,639	100%	4,129	100%

Table 4.06 below presents the DBE profile of the 22 most highly used prime contractors. The individual contracts received by these 22 businesses ranged from \$26.57 to \$76,001,882.71.

The 2,970 contracts awarded to the 520 vendors totaling \$1,618,168,559 ranged in size from \$114.80 to \$16,284,425.04. There were 2,190 contracts under \$500,000 and 27.14 percent under \$100,000.

Table 4.06 Top 22 Highly Used Prime Contractors by Group

Group	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Disadvantaged Business Enterprises	\$70,703,439	3.47%	1	0.11%
Non-Disadvantaged Business Enterprise	\$1,963,937,226	96.53%	876	99.89%
Total	\$2,034,640,665	100%	877	100%



C. Prime Contractor Utilization Categories

IDOT's service areas are divided into nine districts and a Statewide Service area. The counties included in each district are depicted in Table 4.07 below.

A prime contractor utilization analysis has been prepared for each of the ten service areas. The findings from the prime utilization analysis, presented in the tables below, are organized into three groups. The first group represents the prime contracts awarded by IDOT and the Statewide Service area. The second group, labeled All Districts, is a combination of all nine districts and the Statewide Service area. The third group represents the prime contractor utilization by each of the nine districts and is labeled by district. Each of the nine districts awarded construction contracts and seven awarded architecture and engineering contracts. There were no architecture and engineering contracts awarded in Districts 2 and 7.

Table 4.07 IDOT Districts by Counties

DISTRICT	COUNTIES		
District 1	Cook	DuPage	Kane
	Lake	McHenry	Will
District 2	Boone	Carroll	Henry
	JoDaviess	Lee	Ogle
	Rock Island	Stephenson	Whiteside
	Winnegabo		
District 3	Bureau	DeKalb	Ford
	Grundy	Iroquois	Kankakee
	Kendall	LaSalle	Livingston
District 4	Fulton	Henderson	Knox
	McDonough	Marshall	Mercer
	Peoria	Putnam	Stark
	Tazewell	Warren	Woodford



DISTRICT	COUNTIES		
District 5	Champaign	DeWitt	Douglas
	Edgar	McLean	Piatt
	Vermilion		
District 6	Adams	Brown	Cass
	Christian	Hancock	Logan
	Macoupin	Mason	Menard
	Montgomery	Morgan	Pike
	Sangamon	Schuyler	Scott
District 7	Clark	Clay	Coles
	Crawford	Cumberland	Edwards
	Effingham	Fayette	Jasper
	Lawrence	Macon	Moultrie
	Richland	Shelby	Wabash
	Wayne		
District 8	Bond	Calhoun	Clinton
	Greene	Jersey	Madison
	Marion	Monroe	Randolph
	St. Clair	Washington	
District 9	Alexander	Franklin	Gallatin
	Hamilton	Hardin	Jackson
	Jefferson	Johnson	Massac
	Perry	Pope	Pulaski
	Saline	Union	White
	Williamson		



D. All Prime Contracts: By Industry, Statewide Service

This section represents IDOT’s Statewide Service prime contractor utilization by industry.

1. Construction Prime Contractor Utilization: All Contracts, Statewide Service

Table 4.08 summarizes all prime contract dollars expended by IDOT on the Statewide Service construction contracts. Disadvantaged Business Enterprises received 61.41 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 38.59 percent.

Disadvantaged Business Enterprises received 2 or 50 percent of the Statewide Service construction contracts during the study period, representing \$825,028 or 61.41 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 2 or 50 percent of the Statewide Service construction contracts during the study period, representing \$518,357 or 38.59 percent of the contract dollars.

Table 4.08 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, Statewide Service

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	2	50.00%	\$825,028	61.41%
Non Disadvantaged Business Enterprises	2	50.00%	\$518,357	38.59%
TOTAL	4	100.00%	\$1,343,385	100.00%



2. Architecture and Engineering Prime Contractor Utilization: All Contracts, Statewide Service

Table 4.09 summarizes prime contract dollars expended by IDOT on Statewide Service architecture and engineering prime contracts. Disadvantaged Business Enterprises received 21.55 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 78.45 percent.

Disadvantaged Business Enterprises received 11 or 23.4 percent of the Statewide Service architecture and engineering contracts during the study period, representing \$5,625,382 or 21.55 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 36 or 76.6 percent of the Statewide Service architecture and engineering contracts during the study period, representing \$20,472,475 or 78.45 percent of the contract dollars.

Table 4.09 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, Statewide Service

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	11	23.40%	\$5,625,382	21.55%
Non-Disadvantaged Business Enterprises	36	76.60%	\$20,472,475	78.45%
TOTAL	47	100.00%	\$26,097,858	100.00%



E. All Prime Contracts: By Industry, All Districts

This section represents IDOT's prime contractor utilization by industry for all IDOT Districts.⁴

1. Construction Prime Contractor Utilization: All Districts

Table 4.10 summarizes all prime contract dollars expended by IDOT on construction contracts for all IDOT Districts. Disadvantaged Business Enterprises received 5.69 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 94.31 percent.

Disadvantaged Business Enterprises received 280 or 7.59 percent of the construction contracts for all IDOT Districts during the study period, representing \$215,306,483 or 5.69 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 3,408 or 92.41 percent of the construction contracts for all IDOT Districts during the study period, representing \$3,568,848,926 or 94.31 percent of the contract dollars.

Table 4.10 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, All Districts

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	280	7.59%	\$215,306,483	5.69%
Non Disadvantaged Business Enterprises	3,408	92.41%	\$3,568,848,926	94.31%
TOTAL	3,688	100.00%	\$3,784,155,409	100.00%

⁴ IDOT's geographic region includes nine districts.



2. Architecture and Engineering Prime Contractor Utilization: All Districts

Table 4.11 summarizes prime contract dollars expended by IDOT on architecture and engineering prime contracts for all IDOT Districts. Disadvantaged Business Enterprises received 20.16 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 79.84 percent.

Disadvantaged Business Enterprises received 89 or 20.18 percent of the architecture and engineering contracts for all IDOT Districts during the study period, representing \$51,415,080 or 20.16 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 352 or 79.82 percent of the architecture and engineering contracts for all IDOT Districts during the study period, representing \$203,615,150 or 79.84 percent of the contract dollars.

**Table 4.11 Architecture and Engineering Prime Contractor Utilization
January 1, 2006 to December 31, 2008: All Contracts, All Districts**

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	89	20.18%	\$51,415,080	20.16%
Non Disadvantaged Business Enterprises	352	79.82%	\$203,615,150	79.84%
TOTAL	441	100.00%	\$255,030,230	100.00%



F. Construction Prime Contractor Utilization, All Contracts, By District

This section represents IDOT’s construction prime contractor utilization by District.

1. Construction Prime Contractor Utilization: All Contracts, District 1

Table 4.12 summarizes all prime contract dollars expended by IDOT on District 1 construction contracts. Disadvantaged Business Enterprises received 9.31 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 90.69 percent.

Disadvantaged Business Enterprises received 133 or 10.7 percent of the District 1 construction contracts during the study period, representing \$161,706,661 or 9.31 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 1,110 or 89.3 percent of the District 1 construction contracts during the study period, representing \$1,574,678,348 or 90.69 percent of the contract dollars.

Table 4.12 Construction Prime Contractor Utilization, January 1, 2008 to December 31, 2008: All Contracts, District 1

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	133	10.70%	\$161,706,661	9.31%
Non Disadvantaged Business Enterprises	1,110	89.30%	\$1,574,678,348	90.69%
TOTAL	1,243	100.00%	\$1,736,385,009	100.00%



2. Construction Prime Contractor Utilization: All Contracts, District 2

Table 4.13 summarizes all contract dollars expended by IDOT on District 2 construction prime contracts. Disadvantaged Business Enterprises received 5.06 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 94.94 percent.

Disadvantaged Business Enterprises received 1 or 5.88 percent of the District 2 construction contracts during the study period, representing \$968,192 or 5.06 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 16 or 94.12 percent of the District 2 construction contracts during the study period, representing \$18,175,176 or 94.94 percent of the contract dollars.

**Table 4.13 Construction Prime Contractor Utilization,
January 1, 2006 to December 31, 2008: All Contracts,
District 2**

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	1	5.88%	\$968,192	5.06%
Non Disadvantaged Business Enterprises	16	94.12%	\$18,175,176	94.94%
TOTAL	17	100.00%	\$19,143,369	100.00%



3. Construction Prime Contractor Utilization: All Contracts, District 3

Table 4.14 summarizes all contract dollars expended by IDOT on District 3 construction prime contracts. Disadvantaged Business Enterprises received 2 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 98 percent.

Disadvantaged Business Enterprises received 19 or 6.81 percent of the District 3 construction contracts during the study period, representing \$6,011,362 or 2 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 260 or 93.19 percent of the District 3 construction contracts during the study period, representing \$293,903,148 or 98 percent of the contract dollars.

Table 4.14 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 3

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	19	6.81%	\$6,011,362	2.00%
Non Disadvantaged Business Enterprises	260	93.19%	\$293,903,148	98.00%
TOTAL	279	100.00%	\$299,914,510	100.00%



4. Construction Prime Contractor Utilization: All Contracts, District 4

Table 4.15 summarizes all contract dollars expended by IDOT on District 4 construction prime contracts. Disadvantaged Business Enterprises received 1.82 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 98.18 percent.

Disadvantaged Business Enterprises received 19 or 7.22 percent of the District 4 construction contracts during the study period, representing \$4,642,565 or 1.82 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 244 or 92.78 percent of the District 4 construction contracts during the study period, representing \$250,021,965 or 98.18 percent of the contract dollars.

Table 4.15 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 4

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	19	7.22%	\$4,642,565	1.82%
Non Disadvantaged Business Enterprises	244	92.78%	\$250,021,965	98.18%
TOTAL	263	100.00%	\$254,664,530	100.00%



5. Construction Prime Contractor Utilization: All Contracts, District 5

Table 4.16 summarizes prime contract dollars expended by IDOT on District 5 construction contracts. Disadvantaged Business Enterprises received 0.47 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 99.53 percent.

Disadvantaged Business Enterprises received 5 or 2.59 percent of the District 5 construction contracts during the study period, representing \$775,781 or 0.47 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 188 or 97.41 percent of the District 5 construction contracts during the study period, representing \$164,109,165 or 99.53 percent of the contract dollars.

Table 4.16 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 5

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	5	2.59%	\$775,781	0.47%
Non Disadvantaged Business Enterprises	188	97.41%	\$164,109,165	99.53%
TOTAL	193	100.00%	\$164,884,946	100.00%



6. Construction Prime Contractor Utilization: All Contracts, District 6

Table 4.17 summarizes prime contract dollars expended by IDOT on District 6 construction contracts. Disadvantaged Business Enterprises received 3.48 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 96.52 percent.

Disadvantaged Business Enterprises received 33 or 9.54 percent of the District 6 construction contracts during the study period, representing \$10,076,091 or 3.48 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 313 or 90.46 percent of the District 6 construction contracts during the study period, representing \$279,545,690 or 96.52 percent of the contract dollars.

Table 4.17 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2009: All Contracts, District 6

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	33	9.54%	\$10,076,091	3.48%
Non Disadvantaged Business Enterprises	313	90.46%	\$279,545,690	96.52%
TOTAL	346	100.00%	\$289,621,781	100.00%



7. Construction Prime Contractor Utilization: All Contracts, District 7

Table 4.18 summarizes prime contract dollars expended by IDOT on District 7 construction contracts. Disadvantaged Business Enterprises received 1.46 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 98.54 percent.

Disadvantaged Business Enterprises received 14 or 4.75 percent of the District 7 construction contracts during the study period, representing \$2,511,921 or 1.46 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 281 or 95.25 percent of the District 7 construction contracts during the study period, representing \$169,734,012 or 98.54 percent of the contract dollars.

**Table 4.18 Construction Prime Contractor Utilization,
January 1, 2006 to December 31, 2008: All Contracts,
District 7**

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	14	4.75%	\$2,511,921	1.46%
Non Disadvantaged Business Enterprises	281	95.25%	\$169,734,012	98.54%
TOTAL	295	100.00%	\$172,245,933	100.00%



8. Construction Prime Contractor Utilization: All Contracts, District 8

Table 4.19 summarizes prime contract dollars expended by IDOT on District 8 construction prime contracts. Disadvantaged Business Enterprises received 3.22 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 96.78 percent.

Disadvantaged Business Enterprises received 24 or 6.33 percent of the District 8 construction contracts during the study period, representing \$9,931,491 or 3.22 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 355 or 93.67 percent of the District 8 construction contracts during the study period, representing \$298,122,610 or 96.78 percent of the contract dollars.

Table 4.19 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 8

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	24	6.33%	\$9,931,491	3.22%
Non Disadvantaged Business Enterprises	355	93.67%	\$298,122,610	96.78%
TOTAL	379	100.00%	\$308,054,100	100.00%



9. Construction Prime Contractor Utilization: All Contracts, District 9

Table 4.20 summarizes prime contract dollars expended by IDOT on District 9 construction prime contracts. Disadvantaged Business Enterprises received 1.56 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 98.44 percent.

Disadvantaged Business Enterprises received 13 or 5.08 percent of the District 9 construction contracts during the study period, representing \$2,978,445 or 1.56 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 243 or 94.92 percent of the District 9 construction contracts during the study period, representing \$188,168,661 or 98.44 percent of the contract dollars.

Table 4.20 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 9

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	13	5.08%	\$2,978,445	1.56%
Non Disadvantaged Business Enterprises	243	94.92%	\$188,168,661	98.44%
TOTAL	256	100.00%	\$191,147,107	100.00%



G. Architecture and Engineering Prime Contractor Utilization: All Contracts, By District

This section represents IDOT’s architecture and engineering prime contractor utilization by District.

1. Architecture and Engineering Prime Contractor Utilization: District 1

Table 4.21 summarizes prime contracts expended by IDOT on District 1 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 27.02 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 72.98 percent.

Disadvantaged Business Enterprises received 29 or 23.39 percent of the District 1 architecture and engineering contracts during the study period, representing \$33,664,900 or 27.02 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 95 or 76.61 percent of the District 1 architecture and engineering contracts during the study period, representing \$90,936,581 or 72.98 percent of the contract dollars.

Table 4.21 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 1

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	29	23.39%	\$33,664,900	27.02%
Non Disadvantaged Business Enterprises	95	76.61%	\$90,936,581	72.98%
TOTAL	124	100.00%	\$124,601,480	100.00%



2. Architecture and Engineering Prime Contractor Utilization: All Contracts, District 3⁵

Table 4.22 summarizes prime contract dollars expended by IDOT on District 3 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 7.38 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 92.62 percent.

Disadvantaged Business Enterprises received 6 or 13.95 percent of the District 3 architecture and engineering contracts during the study period, representing \$1,029,112 or 7.38 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 37 or 86.05 percent of the District 3 architecture and engineering contracts during the study period, representing \$12,911,793 or 92.62 percent of the contract dollars.

Table 4.22 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 3

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	6	13.95%	\$1,029,112	7.38%
Non Disadvantaged Business Enterprises	37	86.05%	\$12,911,793	92.62%
TOTAL	43	100.00%	\$13,940,905	100.00%

⁵ There were no District 2 architecture and engineering contracts awarded during the study period.



3. Architecture and Engineering Prime Contractor Utilization: All Contracts, District 4

Table 4.23 summarizes prime contract dollars expended by IDOT on District 4 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 17.86 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 82.14 percent.

Disadvantaged Business Enterprises received 11 or 27.5 percent of the District 4 architecture and engineering contracts during the study period, representing \$1,994,710 or 17.86 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 29 or 72.5 percent of the District 4 architecture and engineering contracts during the study period, representing \$9,175,521 or 82.14 percent of the contract dollars.

Table 4.23 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 4

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	11	27.50%	\$1,994,710	17.86%
Non Disadvantaged Business Enterprises	29	72.50%	\$9,175,521	82.14%
TOTAL	40	100.00%	\$11,170,231	100.00%



4. Architecture and Engineering Prime Contractor Utilization: All Contracts, District 5

Table 4.24 summarizes prime contracts dollars expended by IDOT on District 5 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 39.04 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 60.96 percent.

Disadvantaged Business Enterprises received 1 or 25 percent of the District 5 architecture and engineering contracts during the study period, representing \$479,668 or 39.04 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 3 or 75 percent of the District 5 architecture and engineering contracts during the study period, representing \$748,980 or 60.96 percent of the contract dollars.

Table 4.24 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 5

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	1	25.00%	\$479,668	39.04%
Non Disadvantaged Business Enterprises	3	75.00%	\$748,980	60.96%
TOTAL	4	100.00%	\$1,228,648	100.00%



5. Architecture and Engineering Prime Contractor Utilization: All Contracts, District 6

Table 4.25 summarizes prime contracts dollars expended by IDOT on District 6 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 3.08 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 96.92 percent.

Disadvantaged Business Enterprises received 4 or 12.12 percent of the District 6 architecture and engineering contracts during the study period, representing \$303,610 or 3.08 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 29 or 87.88 percent of the District 6 architecture and engineering contracts during the study period, representing \$9,544,831 or 96.92 percent of the contract dollars.

Table 4.25 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 6

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	4	12.12%	\$303,610	3.08%
Non Disadvantaged Business Enterprises	29	87.88%	\$9,544,831	96.92%
TOTAL	33	100.00%	\$9,848,442	100.00%



6. Architecture and Engineering Prime Contractor Utilization: All Contracts, District 8⁶

Table 4.26 summarizes prime contract expended by IDOT on District 8 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 4.62 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 95.38 percent.

Disadvantaged Business Enterprises received 8 or 16.33 percent of the District 8 architecture and engineering contracts during the study period, representing \$1,306,008 or 4.62 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 41 or 83.67 percent of the District 8 architecture and engineering contracts during the study period, representing \$26,975,470 or 95.38 percent of the contract dollars.

Table 4.26 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 8

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	8	16.33%	\$1,306,008	4.62%
Non Disadvantaged Business Enterprises	41	83.67%	\$26,975,470	95.38%
TOTAL	49	100.00%	\$28,281,478	100.00%

⁶ There were no District 7 architecture and engineering contracts awarded during the study period.



7. Architecture and Engineering Prime Contractor Utilization: All Contracts, District 9

Table 4.27 summarizes prime contract dollars expended by IDOT on District 9 architecture and engineering prime contracts. Disadvantaged Business Enterprises received 38.11 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 61.89 percent.

Disadvantaged Business Enterprises received 7 or 28 percent of the District 9 architecture and engineering contracts during the study period, representing \$3,245,620 or 38.11 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 18 or 72 percent of the District 9 architecture and engineering contracts during the study period, representing \$5,271,869 or 61.89 percent of the contract dollars.

Table 4.27 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: All Contracts, District 9

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	7	28.00%	\$3,245,620	38.11%
Non Disadvantaged Business Enterprises	18	72.00%	\$5,271,869	61.89%
TOTAL	25	100.00%	\$8,517,489	100.00%



H. Prime Contracts under \$500,000: All Districts, by Industry

This section represents IDOT's prime contracts under \$500,000 for all Districts.

1. Construction Prime Contractor Utilization: under \$500,000, All Districts

Table 4.28 summarizes prime contracts dollars expended by IDOT on construction prime contracts for all IDOT Districts. Disadvantaged Business Enterprises received 8.25 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 91.75 percent.

Disadvantaged Business Enterprises received 210 or 9.13 percent of the construction contracts for all IDOT Districts during the study period, representing \$35,920,738 or 8.25 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 2,091 or 90.87 percent of the construction contracts for all IDOT Districts during the study period, representing \$399,307,546 or 91.75 percent of the contract dollars.

Table 4.28 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: Contracts under \$500,000, All Districts

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	210	9.13%	\$35,920,738	8.25%
Non Disadvantaged Business Enterprises	2,091	90.87%	\$399,307,546	91.75%
TOTAL	2,301	100.00%	\$435,228,284	100.00%



2. Architecture and Engineering Prime Contractor Utilization: under \$500,000, All Districts

Table 4.29 summarizes prime contracts dollars expended by IDOT on architecture and engineering prime contracts under \$500,000 for all IDOT Districts. Disadvantaged Business Enterprises received 20.95 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 79.05 percent.

Disadvantaged Business Enterprises received 73 or 22.74 percent of the architecture and engineering contracts for all IDOT Districts during the study period, representing \$14,982,003 or 20.95 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 248 or 77.26 percent of the architecture and engineering contracts for all IDOT Districts during the study period, representing \$56,532,194 or 79.05 percent of the contract dollars.

Table 4.29 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: Contracts under \$500,000, All Districts

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	73	22.74%	\$14,982,003	20.95%
Non Disadvantaged Business Enterprises	248	77.26%	\$56,532,194	79.05%
TOTAL	321	100.00%	\$71,514,197	100.00%



I. Prime Contractor Utilization: Contracts \$25,000 or Less: By Industry, All Districts

This section represents IDOT’s prime contracts \$25,000 or less by District.

1. Construction Prime Contractor Utilization: Contracts at \$25,000 or Less, All Districts

Table 4.30 summarizes prime contract dollars expended by IDOT on construction prime contracts valued at \$25,000 or less for all IDOT Districts. Disadvantaged Business Enterprises received 10.38 percent of the construction prime contract dollars and Non-Disadvantaged Business Enterprises received 89.62 percent.

Disadvantaged Business Enterprises received 19 or 8.96 percent of the construction contracts for all IDOT Districts during the study period, representing \$267,970 or 10.38 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 193 or 91.04 percent of the construction contracts for all IDOT Districts during the study period, representing \$2,313,005 or 89.62 percent of the contract dollars.

Table 4.30 Construction Prime Contractor Utilization, January 1, 2006 to December 31, 2008: Contracts \$25,000 or Less, All Districts

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	19	8.96%	\$267,970	10.38%
Non Disadvantaged Business Enterprises	193	91.04%	\$2,313,005	89.62%
TOTAL	212	100.00%	\$2,580,975	100.00%



2. Architecture and Engineering Prime Contractor Utilization: Contracts \$25,000 or Less, All Districts

Table 4.31 summarizes prime contracts dollars expended by IDOT on architecture and engineering prime contracts valued at \$25,000 or less for all IDOT Districts. Disadvantaged Business Enterprises received 33.08 percent of the architecture and engineering prime contract dollars and Non-Disadvantaged Business Enterprises received 66.92 percent.

Disadvantaged Business Enterprises received 5 or 26.32 percent of the architecture and engineering contracts for all IDOT Districts during the study period, representing \$63,147 or 33.08 percent of the contract dollars.

Non-Disadvantaged Business Enterprises received 14 or 73.68 percent of the architecture and engineering contracts for all IDOT Districts during the study period, representing \$127,728 or 66.92 percent of the contract dollars.

Table 4.31 Architecture and Engineering Prime Contractor Utilization, January 1, 2006 to December 31, 2008: Contracts \$25,000 or Less, All Districts

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	5	26.32%	\$63,147	33.08%
Non Disadvantaged Business Enterprises	14	73.68%	\$127,728	66.92%
TOTAL	19	100.00%	\$190,875	100.00%



V. SUMMARY

IDOT's prime contractor utilization analysis examined \$4,039,185,639 expended on prime contracts awarded between January 1, 2006 to December 31, 2008. The \$4,039,185,639 expended included \$3,784,155,409 for construction and \$255,030,230 for architecture and engineering contracts. A total of 4,129 contracts were analyzed, which included 3,688 for construction and 441 for architecture and engineering contracts.

The utilization analysis was performed separately for informal and formal prime contracts. The informal levels included contracts \$25,000 and under for construction and architecture and engineering contracts. The analysis of formal contracts was limited to contracts under \$500,000 for both industries. *Chapter 8: Prime Contractor Disparity Analysis* presents the statistical analysis of disparity in each of the two industries.



5

SUBCONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As discussed in the prime contractor utilization analysis presented in Chapter 4, a disparity study as required under *Crososn* documents Disadvantaged Business Enterprise (DBE) contracting history in the market. A finding of subcontractor disparity is required to implement DBE subcontracting program.

In order to identify the underutilization of DBE subcontractors in the Illinois Department of Transportation's (IDOT's) award of construction and architecture and engineering contracts, it is imperative to determine the level of DBE and non-DBE subcontractor utilization on IDOT's contracts. In this Study, the subcontracts awarded by IDOT prime contractors during the January 1, 2006 to December 31, 2008 study period are analyzed.

II. SUBCONTRACT DATA SOURCES

Extensive research was undertaken to compile the subcontracts awarded by IDOT's prime contractors during the study period. Mason Tillman worked closely with IDOT's staff to reconstruct the subcontractor data for construction and architecture and engineering prime contracts.

Two sources were used to reconstruct the subcontractor data. First, IDOT provided Mason Tillman with subcontractor records extracted from its subcontractor tracking database. Mason Tillman compiled IDOT's data into a relational database.



The second source was the prime and subcontractor expenditure surveys. IDOT's prime contractors that received one or more contracts were contacted by mail to request their subcontractors. For each of their relevant contracts, the prime contractors were asked to provide the subcontractor name, award, and total payment amount. After mailing the prime contractors their list of prime contracts, Mason Tillman conducted reminder telephone calls to encourage prime contractors to respond. IDOT's project managers and engineers assisted with the prime survey in an effort to maximize the expenditure survey response by contacting the non-responsive prime contractors to request their subcontract data.

All subcontractors identified from either IDOT's records or the prime contractor survey were contacted to verify their participation and payment on each prime contract.

The extraordinary effort of our project manager and other staff at IDOT made it possible to successfully reconstruct the subcontracts for most prime contracts. For some prime contracts, the subcontract records reconstructed were only DBE subcontractors. The disparity analysis requires the compilation of DBE and non-DBE subcontracts. There were, however, sufficient subcontract records compiled through this research to perform the subcontractor analysis for the period of January 1, 2006 to December 31, 2008.

III. SUBCONTRACTOR UTILIZATION

A. All Subcontractors

As depicted in Table 5.01 below, Mason Tillman analyzed 5,683 construction subcontracts and 68 architecture and engineering subcontracts for the January 1, 2006 to December 31, 2008 study period.

Of the subcontracts analyzed, \$1,887,635,993 total dollars were expended during the study period for construction subcontracts and \$18,128,221 total dollars were expended during the study period for architecture and engineering.

Table 5.01 Total Number of Subcontract Awards and Dollars, Construction and Architecture and Engineering January 1, 2006 to December 31, 2008

Industry	Total Number of Subcontracts	Total Amount Expended
Construction	5,683	\$1,887,635,993
Architecture and Engineering	68	\$18,128,221



B. All Subcontracts: By Industry

1. Subcontractor Utilization: Construction

Table 5.02 depicts IDOT's construction subcontracts utilized by prime contractors on IDOT's construction contracts. Disadvantaged Business Enterprises received 10.65 percent of the construction subcontract dollars and Non-Disadvantaged Business Enterprises received 89.35 percent.

Disadvantaged Business Enterprises received 2,536 or 44.62 percent of IDOT's construction subcontracts during the study period, representing \$200,952,585 or 10.65 percent of the subcontract dollars.

Non-Disadvantaged Business Enterprises received 3,147 or 55.38 percent of IDOT's construction contracts during the study period, representing \$1,686,683,408 or 89.35 percent of the subcontract dollars.

**Table 5.02 Construction Subcontractor Utilization
January 1, 2006 to December 31, 2008**

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	2,536	44.62%	\$200,952,585	10.65%
Non Disadvantaged Business Enterprises	3,147	55.38%	\$1,686,683,408	89.35%
TOTAL	5,683	100.00%	\$1,887,635,993	100.00%



2. Subcontractor Utilization: Architecture and Engineering

Table 5.03 depicts IDOT's architecture and engineering subcontracts utilized by IDOT's prime contractors. Disadvantaged Business Enterprises received 14.97 percent and Non-Disadvantaged Business Enterprises received 85.03 percent.

Disadvantaged Business Enterprises received 20 or 29.41 percent of IDOT's architecture and engineering subcontracts during the study period, representing \$2,713,818 or 14.97 percent of the subcontract dollars.

Non-Disadvantaged Business Enterprises received 48 or 70.59 percent of IDOT's architecture and engineering subcontracts during the study period, representing \$15,414,403 or 85.03 percent of the subcontract dollars.

**Table 5.03 Architecture and Engineering Subcontractor Utilization
January 1, 2006 to December 31, 2008**

Group	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Disadvantaged Business Enterprises	20	29.41%	\$2,713,818	14.97%
Non Disadvantaged Business Enterprises	48	70.59%	\$15,414,403	85.03%
TOTAL	68	100.00%	\$18,128,221	100.00%



6

MARKET AREA ANALYSIS

I. INTRODUCTION

A. Legal Criteria for Geographic Market Area

The Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*¹ held that programs established by local governments to set goals for the participation of minority- and woman-owned firms must be supported by evidence of past discrimination in the awarding of their contracts.

Prior to the *Croson* decision, many agencies and jurisdictions implementing race-conscious programs did so without developing a detailed public record to document discrimination in their awarding of contracts. Instead, they relied upon common knowledge and what was viewed as widely-recognized patterns of discrimination, both local and national.²

Croson established that a local government could not rely on society-wide discrimination as the basis for a race-based program, but instead was required to identify discrimination within its own jurisdiction.³ In *Croson*, the Court found the City of Richmond's Minority Business Enterprise (MBE) construction program to be unconstitutional because there was insufficient evidence of discrimination in the *local construction market*.

Croson was explicit in saying that the *local construction market* was the appropriate geographical framework within which to perform statistical comparisons of business

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

² *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

³ *Croson*, 488 U.S. at 497 (1989).



availability and business utilization. Therefore, the identification of the local market area is particularly important, because that factor establishes the parameters within which to conduct a disparity study.

B. Application of the Croson Standard

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters.⁴ However, it is informative to review the Court's definition of the City of Richmond's market area. In discussing the scope of the constitutional violation that must be investigated, the Court interchangeably used the terms "relevant market,"⁵ "Richmond construction industry,"⁶ and "city's construction industry"⁷ to define the proper scope of the examination of the existence of discrimination within the City of Richmond. This interchangeable use of terms lends support to a definition of market area that coincides with the boundaries of a jurisdiction.

In analyzing the cases following *Croson*, a pattern emerges that provides additional guidance. The body of cases examining market areas support a definition of market area that is reasonable.⁸ In *Cone Corporation v. Hillsborough County*,⁹ the Eleventh Circuit Court of Appeals considered a study in support of Florida's Hillsborough County's MBE program, which used minority contractors located in the County as the measure of available firms. The program was found to be constitutional under the compelling governmental interest element of the strict scrutiny standard.

Hillsborough County's program was based on statistics indicating that specific discrimination existed in the construction contracts awarded by the County, not in the construction industry in general. Hillsborough County had extracted data from within its own jurisdictional boundaries and assessed the percentage of minority businesses available in Hillsborough County. The Court stated that the study was properly conducted within the "local construction industry."¹⁰

⁴ *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995) which extended *Croson's* strict scrutiny standard to federal programs, did not change *Croson's* approach to market area where federal funds are involved.

⁵ *Croson*, 488 U.S. at 471 (1989).

⁶ *Id.* at 500.

⁷ *Id.* at 470.

⁸ See e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994).

⁹ *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

¹⁰ *Id.* at 915.



Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,¹¹ the Ninth Circuit Court of Appeals found the City and County of San Francisco’s MBE program to have the factual predicate necessary to survive strict scrutiny. The San Francisco MBE program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco. The Court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.¹²

In *Coral Construction v. King County*, the Ninth Circuit Court of Appeals held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”¹³ In support of its MBE program, the State of Washington’s King County offered studies compiled by other jurisdictions, including entities completely within the County or coterminous with the boundaries of the County, as well as a separate jurisdiction completely outside of the County. The plaintiffs contended that *Croson* required King County to compile its own data and cited *Croson* as prohibiting data sharing.

The Court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program and that innocent third parties could be unnecessarily burdened if an MBE program were based on outside data. However, the Court also found that the data from entities within the County and from coterminous jurisdictions was relevant to discrimination in the County. It also found that the data posed no risk of unfairly burdening innocent third parties.

Concerning data gathered by a neighboring county, the Court concluded that this data could not be used to support King County’s MBE program. The Court noted, “It is vital that a race-conscious program align itself as closely to the scope of the problem legitimately sought to be rectified by the governmental entity. To prevent an over-reach, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries.”¹⁴ However, the Court did note that the “world of contracting does not conform itself neatly to jurisdictional boundaries.”¹⁵

¹¹ *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991). (“AGCCII”)

¹² *Id.* at 1415.

¹³ *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875 (1992).

¹⁴ *Id.* at 917.

¹⁵ *Id.*



There are other situations where courts have approved a definition of market area that extends beyond a jurisdiction's geographic boundaries. In *Concrete Works v. City and County of Denver*,¹⁶ the Tenth Circuit Court of Appeals directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine "local market area" for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Court of Appeals disagreed.

Critical to the Court's acceptance of the Denver MSA as the relevant local market was the finding that more than 80 percent of construction and design contracts awarded by Denver were awarded to contractors within the MSA. Another consideration was that Denver's analysis was based on U.S. Census data, which was available for the Denver MSA but not for the city itself. There was no undue burden placed on innocent parties, as Denver had conducted a majority of its construction contracts within the area defined as the local market. Citing *AGCCII*,¹⁷ the Court noted, "that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the city has taken in the past have visited racial discrimination on such individuals."¹⁸

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses which received more than 90 percent of the dollar value of all contracts awarded by the agency.¹⁹

State and local governments must pay special attention to the geographical scope of their disparity studies. *Croson* determined that the statistical analysis should focus on the number of qualified minority individuals or qualified minority business owners in the government's marketplace.²⁰ The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area, and other courts have agreed with this finding. In addition, other cases have approved the use of a percentage of the dollars spent by an agency on contracting as the appropriate measure for determining the market area.

¹⁶ *Concrete Works*, 36 F.3d 1513, 1528 (10th Cir. 1994).

¹⁷ *AGCCII*, 950 F.2d 1401 (9th Cir. 1991).

¹⁸ *Concrete Works*, 36 F.3d at 1528 (10th Cir. 1994).

¹⁹ *Opportunity Denied! New York State's Study*, 26 *Urban Lawyer* No. 3, Summer 1994.

²⁰ *Croson*, 488 U.S. at 501 (1989).



It follows then that an entity may limit consideration of evidence of discrimination to discrimination occurring within its own jurisdiction. Under certain circumstances, extra-jurisdictional evidence can be used if the percentage of governmental dollars supports such boundaries. Taken collectively, the cases support a definition of market area that is reasonable rather than dictating a specific or unreasonably rigid formula. In other words, since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based and case-specific.

II. MARKET AREA ANALYSIS

Although *Croson* and its progeny do not provide a bright line rule for the delineation of the local market area, taken collectively the case law supports a definition of market area as the area within the jurisdiction's own boundaries. It is within the market area where an entity may limit consideration of evidence of discrimination.

Considering the relevant case law, the Illinois Department of Transportation's (IDOT's) local market area would not necessarily be the same as the political jurisdiction in which it is geographically located. Instead, an appropriate market area is the jurisdiction where the substantial majority of the contractors and subcontractors with which IDOT does business is located and the area in which the agency spends the substantial majority of its contracting dollars. This method is recommended by the United States Department of Transportation's Office of Small and Disadvantaged Business Utilization in its *Tips for Goal Setting in the DBE Program*.

A review of the contracts awarded by IDOT shows that most of its 4,131 contract awards and the majority of the contract dollars were awarded to businesses within the State of Illinois. A review of the contracts and dollars awarded by State is depicted below:



1. All Contracts

a. Distribution by State

The distribution of the contracts and dollars awarded by State is depicted in Table 6.01 below. IDOT awarded 3,888 contracts valued at \$3,906,387,777 to businesses within the state of Illinois during the January 1, 2006 to December 31, 2008 study period.

Of the 4,129 total contracts, 241 contracts or 5.84 percent of all contracts were awarded to businesses domiciled outside of Illinois.

**Table 6.01 Distribution of All Contracts Awarded by State
January 1, 2006 to December 31, 2008**

State	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
IL	\$3,906,387,777	96.71%	3888	94.16%
WI	\$39,894,646	0.99%	24	0.58%
MO	\$30,064,690	0.74%	46	1.11%
IA	\$21,500,550	0.53%	35	0.85%
Unknown	\$19,298,331	0.48%	79	1.91%
IN	\$9,376,208	0.23%	36	0.87%
MI	\$8,450,104	0.21%	9	0.22%
PA	\$1,411,674	0.03%	4	0.10%
CO	\$1,387,360	0.03%	1	0.02%
OH	\$825,028	0.02%	2	0.05%
NC	\$413,842	0.01%	3	0.07%
MD	\$129,186	0.00%	1	0.02%
VA	\$46,244	0.00%	1	0.02%
Total	\$4,039,185,639	100.00%	4129	100.00%



2. Construction Contracts

a. Distribution by State

The distribution of the construction contracts and dollars awarded by State is depicted in Table 6.02 below. IDOT awarded 3,486 construction contracts valued at \$3,662,779,650 to businesses within the State of Illinois during the January 1, 2006 to December 31, 2008 study period.

Of the 3,688 construction contracts, 202 contracts or 5.48 percent of construction contracts were awarded to businesses domiciled outside of Illinois.

Table 6.02 Distribution of Construction Contracts Awarded by State, January 1, 2006 to December 31, 2008

State	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
IL	\$3,662,779,650	96.79%	3486	94.52%
WI	\$39,202,235	1.04%	22	0.60%
MO	\$28,491,015	0.75%	39	1.06%
IA	\$21,104,810	0.56%	33	0.89%
Unknown	\$11,371,935	0.30%	56	1.52%
IN	\$9,376,208	0.25%	36	0.98%
MI	\$8,259,199	0.22%	8	0.22%
CO	\$1,387,360	0.04%	1	0.03%
PA	\$944,127	0.02%	2	0.05%
OH	\$825,028	0.02%	2	0.05%
NC	\$413,842	0.01%	3	0.08%
Total	\$3,784,155,409	100.00%	3688	100.00%



3. Architecture and Engineering Contracts

a. Distribution by State

The distribution of the architecture and engineering contracts and dollars awarded by State is depicted in Table 6.03 below. IDOT awarded 402 architecture and engineering contracts valued at \$243,608,127 to businesses within the State of Illinois during the January 1, 2006 to December 31, 2008 study period.

Of the 441 architecture and engineering contracts, 39 contracts or 5.48 percent of architecture and engineering contracts were awarded to businesses domiciled outside of Illinois.

Table 6.03 Distribution of Architecture and Engineering Contracts Awarded by State, January 1, 2006 to December 31, 2008

State	Total Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
IL	\$243,608,127	95.52%	402	91.16%
Unknown	\$7,926,396	3.11%	23	5.22%
MO	\$1,573,674	0.62%	7	1.59%
WI	\$692,411	0.27%	2	0.45%
PA	\$467,547	0.18%	2	0.45%
IA	\$395,740	0.16%	2	0.45%
MI	\$190,905	0.07%	1	0.23%
MD	\$129,186	0.05%	1	0.23%
VA	\$46,244	0.02%	1	0.23%
Total	\$255,030,230	100.00%	441	100.00%

III. IDOT'S MARKET AREA

IDOT awarded 4,129 construction and architecture and engineering contracts valued at \$4,039,185,639 during the study period. IDOT awarded 94.16 percent of these contracts and 96.71 percent of dollars to businesses located in the State of Illinois. Given the distribution of the contracts awarded by IDOT and the requirements set forth in the applicable case law, the Study's market area is determined to be the state of Illinois. The analysis of discrimination has been limited to that which occurred within this market area.

Table 6.04 below depicts the overall number of construction and architecture and engineering contracts and the dollar value of those contracts awarded by IDOT between



January 1, 2006 and December 31, 2008. Of the 4,129 contracts awarded by IDOT during the study period, 3,888 or 94.16 percent were awarded to market area businesses, which represents \$3,906,387,777 or 96.71 percent of all contract dollars awarded.

The breakdown of contracts awarded to market area businesses is as follows:

Architecture and Engineering Contracts: 402 or 91.16 percent of these contracts were awarded to market area businesses. The dollar value of those contracts was \$243,608,127 or 95.52 percent of the total architecture and engineering dollars.

Construction Contracts: 3,486 or 94.52 percent of these contracts were awarded to market area businesses. The dollar value of those contracts was \$3,662,779,650 or 96.79 percent of the total construction dollars.

**Table 6.04 IDOT'S Market Area, Contract Distribution - All Industries:
January 1, 2006 to December 31, 2008**

Market Area	Amount of Dollars	Percent of Dollars	Number of Contracts	Percent of Contracts
Combined Types of Work				
Market Area	\$3,906,387,777	96.71%	3,888	94.16%
Outside Market Area	\$132,797,862	3.29%	241	5.84%
Total	\$4,039,185,639	100.00%	4,129	100.00%
Architecture and Engineering				
Market Area	\$243,608,127	95.52%	402	91.16%
Outside Market Area	\$11,422,103	4.48%	39	8.84%
Total	\$255,030,230	100.00%	441	100.00%
Construction				
Market Area	\$3,662,779,650	96.79%	3,486	94.52%
Outside Market Area	\$121,375,758	3.21%	202	5.48%
Total	\$3,784,155,409	100.00%	3,688	100.00%



7

PRIME AND SUBCONTRACTOR AVAILABILITY ANALYSIS

I. INTRODUCTION

Availability is defined, according to *Croson*, as the number of qualified businesses in the jurisdiction's market area that are willing and able to provide goods or services.¹ To determine availability, qualified Disadvantaged Business Enterprises (DBEs) and qualified non-DBEs within the jurisdiction's market area that are willing and able to provide the goods or services need to be enumerated. The analysis presented in *Chapter 6: Market Area Analysis* defined the State of Illinois as the market area for this Study. This determination was made because most of the businesses utilized by the Illinois Department of Transportation (IDOT) are domiciled within the State of Illinois.

When considering sources for determining the number of willing and able DBEs and non-DBEs, the selection must be based on whether two significant aspects about the population in question can be gauged from the sources. A business' interest in contracting with a government agency, as implied by the term "willing" and its ability or capacity to provide goods or services, as implied by the term "able," must be discerned.

The compiled list of available businesses includes construction and architecture and engineering DBEs and non-DBEs. Government records, certification lists, business association membership listings, and an outreach campaign were the sources used to compile the list of available market area businesses.

A business was classified as willing if it had either bid on an Illinois Tollway or IDOT contract, obtained pre-qualification with the State of Illinois, certified with a government

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).



agency, or responded to the outreach campaign conducted in conjunction with this Study. Businesses identified through trade association or chamber of commerce membership lists were classified as willing only after affirming their interest in contracting with IDOT through a survey. A detailed discussion of the definition of “willingness” is contained in *Chapter 2: Legal Analysis*.

II. PRIME CONTRACTOR AVAILABILITY DATA SOURCES

A. Identification of Willing Businesses within the Market Area

Seven types of sources were used to identify businesses in the State of Illinois market area that provided construction and architecture and engineering services that IDOT procures. Sources included government listings, certification lists, trade association and chamber of commerce membership lists, unsuccessful bidders, Illinois pre-qualified businesses, other agency vendor lists, and business community meetings. Through an extensive effort, 3347 unique market area businesses were identified. The Illinois Tollway and IDOT’s utilized prime contractors, which were secured from the two agencies’ records, formed the base upon which the availability list was compiled.

The Illinois Tollway and IDOT’s unsuccessful bidders, Illinois pre-qualified businesses, and other agencies’ vendor lists were also collected. Additionally, certified lists were collected from federal, state, and local agencies that certify businesses as disadvantaged. The unique businesses from these sources were appended to the availability list.

Outreach was also conducted in the State of Illinois to identify additional businesses willing to contract with IDOT. In addition, trade organizations and chambers of commerce were contacted to identify and collect membership lists. Unique businesses identified through trade association and chamber of commerce sources had not demonstrated their willingness to perform IDOT contracts. To assess the willingness of the unique businesses on these lists, a business survey was conducted, and businesses that affirmed their willingness to work on IDOT contracts were appended to the availability list after the capacity of the willing market area firms to do business with IDOT was assessed using the four approaches described in *Section III: Capacity*.



B. Prime Contractor Sources

Table 7.01 lists the government and business association sources from which the willing businesses were compiled.

Table 7.01 Prime Contractor Availability Data Sources

Source
Sources of Government Listings
Arlington Heights Vendor List
City of Bloomington Contractor List
City of Des Plains Contractor List
Illinois Department of Central Management Services Vendor List
Illinois Department of Transportation and Illinois State Toll Highway Authority Business Survey
Illinois Contractor Pre-qualification List
Illinois Department of Transportation Bidders List
Illinois Department of Transportation Utilized Prime Contractors
Illinois Engineer Consultant Pre-qualification List
Illinois State Toll Highway Authority Bidders List
Illinois State Toll Highway Authority Utilized Prime Contractors
Lake County Bidders List
McLean County Highway Department Contractor List
Missouri Department of Transportation Bidders List
Missouri Department of Transportation Utilized Prime Contractors
Sources of Certification Lists
City of Chicago Procurement Directory of Disadvantaged Minority and Woman-owned Business Enterprises
Cook County Office of Contract Compliance Certified Minority and Woman-owned Business Enterprise List
Illinois Business Enterprise Program



Source
Illinois Small Business Set-Aside Program
Illinois Unified Certification Program
Indiana Department of Transportation Certification List
Lambert Airport Certification List
Metro Certification List
Missouri Department of Transportation Disadvantaged Business Enterprise Certification List
Missouri Department of Transportation Minority and Woman-owned Business Enterprise Certification List
Missouri Regional Certification Committee
Small Business Administration: Illinois and Missouri Procurement Marketing and Access Network
Sources of Trade Association and Chamber of Commerce Membership Lists
American Council of Engineering Companies of Illinois
American Institute of Architects, Illinois
Associated General Contractors of Illinois
Associated General Contractors of Missouri
Bloomington Normal Home Builders Association
Canton Area Chamber of Commerce
Chillicothe Chamber of Commerce Member Directory
Chinatown Chamber of Commerce
Consulting Engineer Council
East Peoria Chamber of Commerce
Fairbury Chamber of Commerce
Federation of Women Contractors
Fox Valley Associated General Contractors
Gibson Area Chamber of Commerce, Member Directory
Greater Springfield Chamber of Commerce
Havana Chamber of Commerce - Business Directory



Source
Home Builders Association of Greater Chicago
Home Builders Association of Greater Peoria
Home Builders Association of Illinois
Home Builders Association of Rockford
Illinois Valley Chamber of Commerce
Independent Electrical Contractors of Greater St. Louis
Jacksonville Area Chamber of Commerce
Kankakee Regional Chamber of Commerce
Lincoln-Logan County Chamber of Commerce
Mendota Area Chamber of Commerce
Metro East Black Contractors Organization
Monmouth Area Chamber of Commerce
National Association of Women Business Owners St. Louis
Northern Illinois Building Contractors Association
Pekin Chamber of Commerce
Peoria County Purchasing Division Contractor List
Phillipine American Chamber of Commerce of Greater Chicago
Pontiac Chamber of Commerce
Puerto Rican Chamber of Commerce of Illinois
Rantoul Area Chamber of Commerce
Southern Illinois Builder's Association
Streater Chamber of Commerce
Union Contractors for Eastern Missouri Laborers Union 2009



An account of the willing businesses derived by source is listed below.

1. Utilized Prime Contractors

All businesses identified through the Illinois Tollway and IDOT's utilized prime contractors lists were determined to be willing. There were 679 utilized construction and architecture and engineering prime contractors. Of the 679 prime contractors, 541 unique businesses were located within the market area and included in the availability list.

2. Bidders Lists

All businesses identified through the Illinois Tollway and IDOT's unsuccessful bidders lists were determined to be willing. There were 652 construction and architecture and engineering bidders. Of the 652 unsuccessful bidders, 127 unique businesses were located within the market area and added to the availability list.

3. Pre-Qualified Business Lists

All businesses identified through the Illinois Contractor Pre-qualification List and the Illinois Engineer Consultant Pre-qualification List were determined to be willing. There were 1,306 pre-qualified businesses. Of the 1,306 pre-qualified construction and architecture and engineering businesses, 441 unique businesses were located within the market area and added to the availability list.

4. Vendor Lists

All businesses identified through other agencies' vendor lists were determined to be willing. There were 1,374 vendors. Of the 1,374 construction and architecture and engineering vendors, 332 unique businesses were located within the market area and added to the availability list.

5. Certification Lists

All certified DBEs identified through federal, state, or local agencies were determined to be willing. There were 2,796 certified construction and architecture and engineering businesses. Of the 2,796 certified businesses, 1,069 unique businesses were located within the market area and added to the availability list.



6. Trade Associations and Chambers of Commerce

There were 190 trade associations and chambers of commerce identified in the State of Illinois. Membership lists were obtained from 40 entities. From the 40 business association membership lists, 13,623 businesses were identified. Of the 13,623 businesses, there were 2,635 unique construction and architecture and engineering businesses. The businesses on the unique list were queried, and those without a telephone number were excluded. There were 2,091 businesses with telephone numbers that were located within the market area; all were surveyed to determine their willingness to contract with IDOT. A total of 132 unique businesses willing to contract with IDOT were located in the market area and added to the availability list.

7. Outreach

Three business community meetings were an additional method to identify businesses that were willing to contract with IDOT. A total of 6,740 businesses were invited to attend the community meetings, which were widely advertised in print and electronic media. No unique businesses were identified through this outreach effort.

C. Distribution of Available Prime Contractors by Source, Ethnicity, and Gender

Some businesses were listed multiple times on the various sources used to compile the list of available businesses. A business was *counted only once*, even when listed on multiple sources. For example, a utilized prime contractor that was certified or pre-qualified was not counted a second time when it appeared in the other sources. Tables 7.02 and 7.03 present the distribution of willing prime contractors according to the type of source.

A distribution of available businesses by source was also calculated for each industry. As noted in Table 7.02 below, 97.75 percent of the construction businesses on the unique list of available prime contractors was obtained from the Illinois Tollway and IDOT's records of utilized prime contractors and unsuccessful bidders, Illinois pre-qualified business lists, government certification lists, and other agencies' vendor lists. Unique construction companies identified from trade associations and chambers of commerce membership lists represent 2.25 percent of the available businesses.



**Table 7.02 Distribution of Prime Contractor Availability Data Sources,
Construction**

Sources	Percent of DBE	Percent of Non-DBEs	Percent of Total
Prime Contractor Utilization	7.82%	18.85%	14.77%
Bidders Lists	2.55%	5.93%	4.68%
Pre-Qualified Businesses	4.36%	17.08%	12.38%
Certification Lists	58.45%	19.54%	33.94%
SBA Pro-Net	14.45%	20.93%	18.53%
Vendor Lists	11.36%	14.68%	13.45%
Subtotal	99.00%	97.01%	97.75%
Trade Associations and Chambers of Commerce Lists	1.00%	2.99%	2.25%
Subtotal	1.00%	2.99%	2.25%
Grand Total*	100.00%	100.00%	100.00%

* The percentages may not total 100 percent due to rounding.

As noted in Table 7.03 below, 95.76 percent of the architecture and engineering businesses on the unique list of available prime contractors was obtained from the Illinois Tollway and IDOT's records of utilized prime contractors and unsuccessful bidders, Illinois pre-qualified business lists, government certification lists, and other agencies' vendor lists. Unique architecture and engineering companies identified through trade association and chambers of commerce membership lists represent 4.24 percent of the available businesses.



**Table 7.03 Distribution of Prime Contractor Availability Data Sources,
Architecture and Engineering**

Sources	Percent of DBEs	Percent of Non-DBEs	Percent of Total
Prime Contractor Utilization	12.10%	20.48%	17.15%
Bidders Lists	2.23%	1.05%	1.52%
Pre-Qualified Businesses	9.39%	10.61%	10.13%
Certification Lists	52.23%	14.92%	29.75%
SBA Pro-Net	17.83%	40.86%	31.71%
Vendor Lists	5.89%	5.25%	5.51%
Subtotal	99.68%	93.17%	95.76%
Trade Associations and Chambers of Commerce Lists	0.32%	6.83%	4.24%
Subtotal	0.32%	6.83%	4.24%
Grand Total*	100.00%	100.00%	100.00%

* The percentages may not total 100 percent due to rounding.

III. CAPACITY

The second component of the availability requirement set forth in *Croson* is a business' capacity or ability to work on the contracts awarded by the jurisdiction.² However, capacity requirements are not delineated in *Croson*. In fact, a standard for capacity has only been addressed in a few subsequent cases. Each case where capacity has been considered has involved large, competitively bid construction prime contracts.

But there are still unanswered questions on how capacity should be defined, i.e. revenues, employment size, bonding limits. There is very little guidance on how to determine "qualified" or "able" and no clear methods on how to obtain such information. Revenues

² *Croson*, 488 U.S. 469.



can only measure the value of contracts that a firm received. A firm's revenues, business size, and bonding limits are factors that can be used to determine its capacity. And if there is marketplace discrimination, the revenues of DBEs could be smaller as a result.

Relative capacity, the ability of a firm to handle more than one contract simultaneously, is another consideration for measuring availability as mentioned in *Rothe*.³ The *Rothe* court opined that a regression analysis could be used to control for relative capacity. A regression analysis has been conducted for this Study and will be included in the final report.

Nevertheless, the capacity of willing market area businesses to do business with IDOT was assessed using the following four approaches:

- The size of all prime contracts awarded by IDOT was analyzed to determine the capacity needed to perform the average awarded contract.
- The largest contracts awarded to DBEs by the Illinois Tollway and IDOT were identified to determine demonstrated ability to win large, competitively bid contracts.
- IDOT's certification process was assessed to determine if it meets the standard set in *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia (Philadelphia)*,⁴ which found the U.S. Department of Transportation (USDOT) certification to measure capacity.
- The disparity analysis was restricted to an examination of the prime contracts valued under \$500,000, thus limiting the capacity required to perform the contracts subjected to the statistical analysis.

A. Size of Contracts Analyzed

In *Associated General Contractors of America v. City of Columbus* and *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade City*, the courts were concerned with the capacity of available businesses to bid on large, competitively bid contracts. It should be noted that the focus in both cases was on the bidding company's size and ability

³ *Rothe Dev. Corp., Inc. v. United States Dep't. of Def.*, 324 F.Supp.2d. 840 (Fed. Cir., 2005).

⁴ *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Penn. 1995), affd, 91 F.3d 586 (3d Cir. 1996).



to perform on large, competitively bid construction contracts.⁵

IDOT's construction and architecture and engineering contracts were analyzed to determine the size of awarded contracts. The size distribution illustrates the fact that the majority of IDOT's construction and architecture and engineering prime contracts were less than \$500,000.

For this contract size analysis, IDOT's contracts were grouped into eight dollar ranges.⁶ Each award was analyzed to determine the number and percentage of contracts that fell within each of the eight size categories. The size distribution of contracts awarded to non-DBEs was compared to the size distribution of contracts awarded to DBEs.

1. Construction Contracts by Size

Table 7.04 depicts IDOT's construction prime contracts awarded within the eight dollar ranges. Contracts valued at less than \$25,000 were 5.75 percent of all construction prime contracts awarded; those valued less than \$100,000 were 21.42 percent of all construction prime contracts awarded; those less than \$500,000 were 62.39 percent; and those less than \$1,000,000 were 80.26 percent. Construction prime contracts valued at \$3,000,000 or more were 5.99 percent.

2. Architecture and Engineering Contracts by Size

Table 7.05 depicts IDOT's architecture and engineering prime contracts awarded within the eight dollar ranges. Contracts valued at less than \$25,000 were 4.31 percent of all architecture and engineering prime contracts awarded; those less than \$100,000 were 15.65 percent; those less than \$500,000 were 72.79 percent; and those less than \$1,000,000 were 88.66 percent. Architecture and engineering prime contracts valued at \$3,000,000 or more were 2.72 percent.

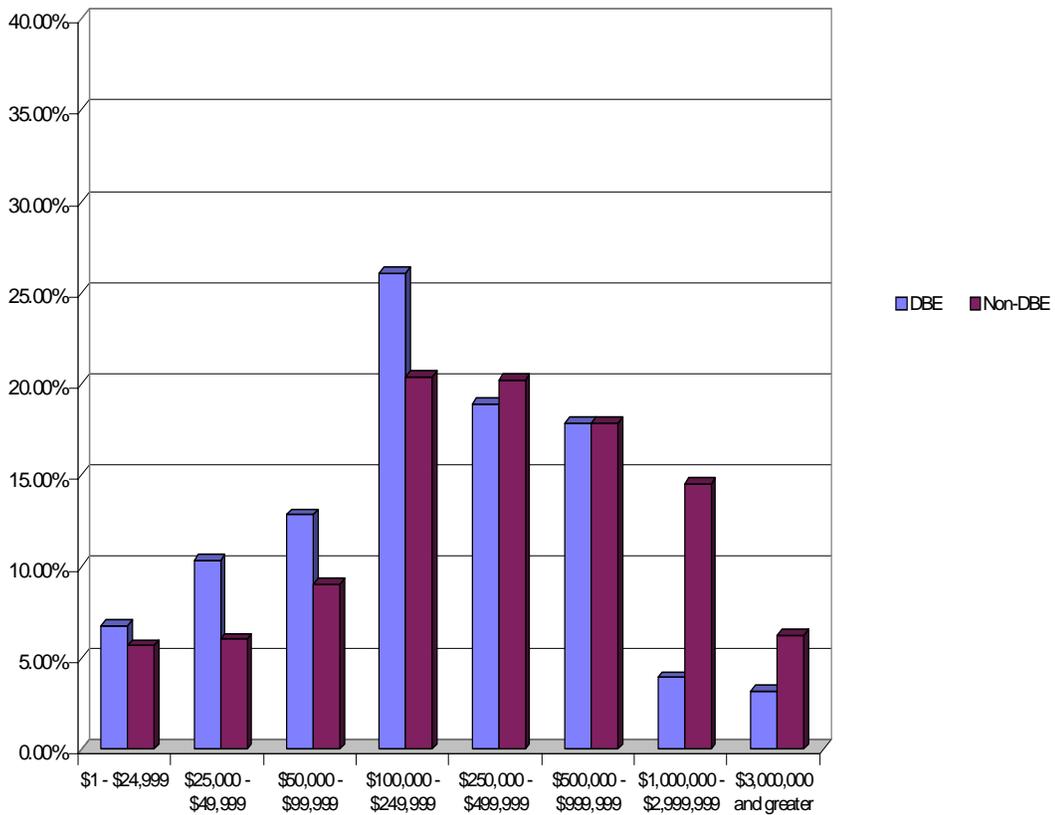
⁵ *Associated General Contractors of America v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio Eastern Division, decided August 26, 1996), and *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade City*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd 122 F.3d 895 (11th Cir. 1997). Writ of certiorari denied *Metropolitan Dade County v. Engineering Contrs. Ass'n*, 523 U.S. 1004, 140 L. Ed. 2d 317, 118 S. Ct. 1186, (1998); Related proceeding at *Hershell Gill Consulting Eng'Rs, Inc. v. Miami-Dade County*, 2004 U.S. Dist. LEXIS 17197 (S.D. Fla., Aug. 24, 2004). Decision was vacated by the 6th Circuit Court of Appeals.

⁶ The eight dollar ranges are \$1 to \$24,999, \$25,000 to \$49,999, \$50,000 to \$99,999, \$100,000 to \$249,999, \$250,000 to \$499,999, \$500,000 to \$999,999, \$1,000,000 to \$2,999,999, and \$3,000,000 and greater.



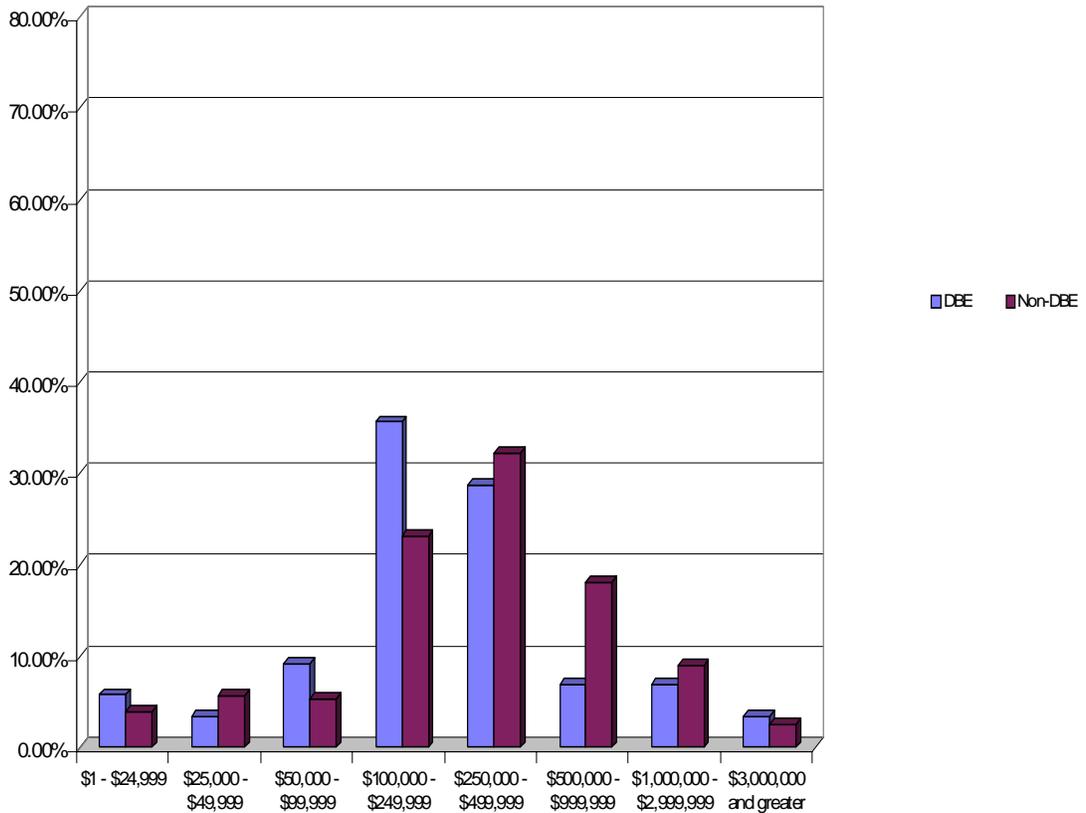
Table 7.04 Construction Contracts by Size: January 1, 2006 to December 31, 2008

Size	Group				Total	
	DBE		Non-DBE		Freq	Percent
	Freq	Percent	Freq	Percent		
\$1 - \$24,999	19	6.79%	193	5.66%	212	5.75%
\$25,000 - \$49,999	29	10.36%	205	6.02%	234	6.34%
\$50,000 - \$99,999	36	12.86%	308	9.04%	344	9.33%
\$100,000 - \$249,999	73	26.07%	695	20.39%	768	20.82%
\$250,000 - \$499,999	53	18.93%	690	20.25%	743	20.15%
\$500,000 - \$999,999	50	17.86%	609	17.87%	659	17.87%
\$1,000,000 - \$2,999,999	11	3.93%	496	14.55%	507	13.75%
\$3,000,000 and greater	9	3.21%	212	6.22%	221	5.99%
Total	280	100.00%	3408	100.00%	3688	100.00%



**Table 7.05 Architecture and Engineering Contracts by Size:
January 1, 2006 to December 31, 2008**

Size	Group				Total	
	DBE		Non-DBE		Total	
	Freq	Percent	Freq	Percent	Freq	Percent
\$1 - \$24,999	5	5.75%	14	3.95%	19	4.31%
\$25,000 - \$49,999	3	3.45%	20	5.65%	23	5.22%
\$50,000 - \$99,999	8	9.20%	19	5.37%	27	6.12%
\$100,000 - \$249,999	31	35.63%	82	23.16%	113	25.62%
\$250,000 - \$499,999	25	28.74%	114	32.20%	139	31.52%
\$500,000 - \$999,999	6	6.90%	64	18.08%	70	15.87%
\$1,000,000 - \$2,999,999	6	6.90%	32	9.04%	38	8.62%
\$3,000,000 and greater	3	3.45%	9	2.54%	12	2.72%
Total	87	100.00%	354	100.00%	441	100.00%



B. Largest DBE Contract Awards

The largest contracts IDOT awarded to DBEs for construction and architecture and engineering are depicted below in Table 7.06. In both industries, DBEs were awarded very large, competitively bid contracts. The utilization analysis shows that DBEs demonstrated the capacity to successfully compete for IDOT contracts as large as \$10.6 million in construction and \$3 million in architecture and engineering.

Table 7.06 Largest DBE Contract Awards by IDOT

Largest Contract Value		
Ethnic/Gender Group	Construction	Architecture and Engineering
Disadvantaged Business Enterprises	\$10,639,010	\$3,016,882
Non-Disadvantaged Business Enterprises	\$70,703,439	\$9,090,722



IV. WEIGHTED AVAILABILITY

The availability of the willing market area construction businesses were weighted by NAICS code that reflects IDOT's contracting pattern. The availability of willing market area architecture and engineering businesses were not weighted because there is only one NAICS code for that industry.

- Calculation of Weighted Construction Availability

The list of willing and able businesses compiled for construction industry was weighted. The weights were used to calculate the availability depicted in the tables below. To determine the weights, all federally funded and non-federally funded contracts awarded during the study period were assigned a NAICS code based on the description of the contract. A total of eight NAICS codes were assigned to the awarded contracts. Weights were assigned based on the percentage of the total award amount in each NAICS code. Therefore the NAICS code with the highest associated dollars was assigned the highest weight. The weights were reflected as the percentage of the total dollars awarded.

The businesses in the availability database were classified by NAICS code. The utilized firms in the availability lists were assigned the NAICS code as discussed above. The balance of the coding was derived from certification lists, the Dun and Bradstreet Selectory database, and Internet research.

The weights for each NAICS code were used as multipliers. The number of available businesses in each NAICS code was multiplied by the assigned weight. The product represented the number of available firms in each NAICS code. The product for each NAICS code was added together to calculate the overall weighted availability. The ethnicity and gender distribution percentages were then calculated based on the overall weighted availability.



Table 7.07 IDOT Construction Prime Contractors - Percent of Available Firms by Weight and NAICS Codes

NAICS Code	NAICS Code Description	Awarded Dollars	Industry Weight	Cumulative Weight	Percent of Available Firms
2362	Nonresidential Building Construction	\$130,726,627.83	3.74%	3.74%	13.91%
2373	Highway, Street, and Bridge Construction	\$2,589,711,123.79	74.04%	77.78%	12.11%
2379	Other Heavy and Civil Engineering Construction	\$157,412,886.75	4.50%	82.28%	7.87%
2381	Foundation, Structure, and Building Exterior Contractors	\$25,882,740.11	0.74%	83.02%	15.61%
2382	Building Equipment Contractors	\$82,233,899.23	2.35%	85.37%	12.70%
2383	Building Finishing Contractors	\$33,939,487.44	0.97%	86.34%	12.03%
2389	Other Specialty Trade Contractors	\$477,461,961.30	13.65%	99.99%	19.40%
4842	Specialized Freight Trucking	\$376,374.30	0.01%	100.00%	6.37%
TOTAL			100.00%		100.00%



Table 7.08 IDOT Construction Subcontractors - Percent of Available Firms by Weight and NAICS Code

NAICS Code	NAICS CODE Description	Awarded Dollars	Industry Weight	Cumulative Weight	Percent of Available Firms
2362	Nonresidential Building Construction	\$49,304,831.17	2.66%	2.66%	13.30%
2373	Highway, Street, and Bridge Construction	\$428,689,328.48	23.16%	25.82%	11.77%
2379	Other Heavy and Civil Engineering Construction	\$28,880,453.54	1.56%	27.38%	7.71%
2381	Foundation, Structure, and Building Exterior Contractors	\$4,305,102.29	0.23%	27.62%	16.33%
2382	Building Equipment Contractors	\$2,026,374.70	0.11%	27.73%	12.91%
2383	Building Finishing Contractors	\$1,638,344.12	0.09%	27.81%	11.73%
2389	Other Specialty Trade Contractors	\$1,325,410,191.07	71.60%	99.42%	20.19%
4842	Specialized Freight Trucking	\$10,766,289.07	0.58%	100.00%	6.06%
TOTAL			100.00%		100.00%



V. PRIME CONTRACTOR AVAILABILITY ANALYSIS

The prime contractor availability findings for the State of Illinois market area are summarized below.

A. Construction Prime Contractor Weighted Availability

The distribution of weighted available construction prime contractors is summarized in Table 7.09 below. These two groups, Disadvantaged Business Enterprises and Non-Disadvantaged Business Enterprises, are defined in Table 4.01 of *Chapter 4: Prime Contractor Utilization Analysis*.

Disadvantaged Business Enterprises account for 25.55 percent of the construction prime contractors in IDOT's market area.

Non-Disadvantaged Business Enterprises account for 74.45 percent of the construction prime contractors in IDOT's market area.

Table 7.09 Weighted Available Construction Prime Contractors

Group	Percent of Businesses
Disadvantaged Business Enterprises	25.55%
Non Disadvantaged Business Enterprises	74.45%
TOTAL	100.00%



B. Architecture and Engineering Prime Contractor Availability

Since there is only one NAICS code associated with architecture and engineering, the weighted availability calculation was not applied to architecture and engineering availability. The distribution of available architecture and engineering prime contractors is summarized in Table 7.10 below.

Disadvantaged Business Enterprises account for 29.7 percent of the architecture and engineering prime contractors in IDOT’s market area.

Non-Disadvantaged Business Enterprises account for 70.3 percent of the architecture and engineering prime contractors in IDOT’s market area.

Table 7.10 Available Architecture and Engineering Prime Contractors

Group	Percent of Businesses
Disadvantaged Business Enterprises	29.70%
Non Disadvantaged Business Enterprises	70.30%
TOTAL	100.00%



VI. SUBCONTRACTOR AVAILABILITY ANALYSIS

A. Sources of Potentially Willing and Able Subcontractors and Availability

All available prime contractors were included in the calculation of the subcontractor availability. Additional subcontractors in IDOT's market area were identified using the sources in Table 7.09.

Table 7.11 Unique Subcontractor Availability Data Sources

Type of Record	Type of Information
Subcontracting records provided by IDOT	DBEs and non-DBEs
Prime contractor survey which identified subcontractors utilized by IDOT	DBEs and non-DBEs

B. Determination of Willingness and Capacity

Subcontractor availability was limited to businesses determined to be willing and able to perform as prime contractors and businesses utilized as subcontractors; therefore, the determination of willingness was achieved. *Croson* does not require a measure of subcontractor capacity; therefore, it is not necessary to address capacity issues in the context of subcontractors.



C. Construction Subcontractor Weighted Availability

Construction subcontractor weighted availability was calculated using the same method as applied to the construction prime availability. The distribution of weighted available construction subcontractors is summarized in Table 7.10.

Disadvantaged Business Enterprises account for 29.24 percent of the construction subcontractors in IDOT's market area.

Non-Disadvantaged Business Enterprises account for 70.76 percent of the construction subcontractors in IDOT's market area.

Table 7.12 Weighted Available Construction Subcontractors

Group	Percent of Businesses
Disadvantaged Business Enterprises	29.24%
Non Disadvantaged Business Enterprises	70.76%
TOTAL	100.00%



D. Architecture and Engineering Subcontractor Availability

Since there is only one NAICS code associated with architecture and engineering, the weighted subcontractor availability calculation was not applied. The distribution of available architecture and engineering subcontractors is summarized in Table 7.11.

Disadvantaged Business Enterprises account for 32.06 percent of the architecture and engineering subcontractors in IDOT’s market area.

Non-Disadvantaged Business Enterprises account for 67.94 percent of the architecture and engineering subcontractors in IDOT’s market area.

Table 7.13 Available Architecture and Engineering Subcontractors

Group	Percent of Businesses
Disadvantaged Business Enterprises	32.06%
Non Disadvantaged Business Enterprises	67.94%
TOTAL	100.00%





8

PRIME CONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of the disparity analysis is to determine the level that Disadvantaged Business Enterprises (DBEs) are utilized on the State of Illinois Department of Transportation's (IDOT's) contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to DBEs would be approximate to the proportion of available DBEs¹ in the relevant market area. If the available DBEs are underutilized, a statistical test can determine the probability that the disparity is due to chance. If there is a low probability that the disparity is due to chance,² *Croson* states that an inference of discrimination can be made.

The first step in conducting the statistical test is to calculate the contract value that each group (DBEs and non-DBEs) is expected to receive, based on each group's availability in the market area. This value shall be referred to as the **expected contract amount**. The next step is to compute the difference between each group's expected contract amount and the **actual contract amount** received by each group.

¹ Availability is defined as the number of willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 7.

² When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.



A disparity ratio of less than 0.80 indicates a relevant degree of disparity. This disparity may be detected using a parametric analysis,³ where the number of contracts is sufficiently large and the variation of the contract amount is not too large. When the variation in contract dollar amounts is high, a disparity may not be detectable using a parametric analysis. Under the condition when the variation in the contract dollar amount is high, a non-parametric analysis⁴ would be employed to analyze the contracts ranked by dollar amount. Both parametric and non-parametric analyses are effective due to the central limit theorem, which is strongest when the number of prime and subcontractor contracts is large and the data is not skewed. In the event there are too few contracts or the contract dollars are skewed, a simulation analysis is employed. The simulation analysis utilizes randomization to simulate a distribution for the contracts. By conducting multiple trials in the simulation, the empirical data can be attained and used to test prime and subcontractor contracts for significance. The simulation analysis can also be conducted for the contract dollars or the contract ranking.

In order to assess whether the difference in contract values is attributable to chance, a P-value⁵ is calculated. For parametric and non-parametric analyses, the P-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a P-value equal to or less than 0.05, the difference is statistically significant.⁶ In the simulation analysis, the P-value takes into account the contract dollars or rank and the distribution formulated from the empirical data. If the actual contract dollars or actual rank falls at or below five percent of the distribution, this denotes a P-value equal to or less than 0.05 and is statistically significant.

The analysis of the amount of prime contract dollars for each group incorporates the number of prime contracts awarded and the value of the prime contract dollars received by each group. There are two critical constraints in performing statistical tests of significance. First, the size of the population affects the reliability of the results when the available prime contractors are underutilized. In other words, a relatively small population size, whether in terms of the total number of contracts or the total number of available businesses, decreases the reliability of the statistical results.

³ Parametric analysis is a statistical examination based on the actual values of the variable. In this case, the parametric analysis consists of the actual dollar values of the contracts.

⁴ Non-parametric analysis is a method to make data more suitable for statistical testing by allowing one variable to be replaced with a new variable that maintains the essential characteristics of the original one. In this case, the contracts are ranked from the smallest to the largest. The dollar value of each contract is replaced with its rank order number.

⁵ P-value is a measure of statistical significance.

⁶ The study does not test statistically the overutilization of DBEs or the underutilization of Non-DBEs.



Second, a relatively small population size, whether in terms of the total number of contracts or the total number of available businesses, decreases the reliability of the statistical results. Nevertheless, an inference of discrimination cannot be made when the available businesses are underutilized unless there is a finding of statistically significant underutilization.

In short, the results of the statistical disparity analysis are necessarily influenced by the size of the population in each industry and group. Therefore, where the results are not statistically significant, the existence of discrimination *cannot* be ruled out. Given these limitations of the statistical analysis, the anecdotal data has an especially important role in describing business practices in the market area that cannot be tested statistically. However, the anecdotal data cannot be used as a proxy for the factual predicate which is required for a DBE-specific remedy.

II. DISPARITY ANALYSIS

A prime contract disparity analysis was performed on construction and architecture and engineering contracts awarded between January 1, 2006 to December 31, 2008.

As demonstrated in *Chapter 7: Availability Analysis*, the majority of IDOT's contracts were small. Construction prime contracts valued at less than \$500,000 constituted 62.39 percent and those valued at less than \$1,000,000 constituted 80.26 percent. Architecture and engineering prime contracts valued less than \$500,000 represented 72.79 percent and those valued at less than \$1,000,000 constituted 88.66 percent.

The threshold levels for the disparity analysis were set to ensure that within the pool of willing firms there was documented capacity to perform the formal contracts analyzed. The thresholds for both construction and architecture and engineering was limited to \$500,000 at the formal contract level. The threshold applied for the informal contract analysis was the \$25,000 threshold stipulated in IDOT procurement policy.



A. Disparity Analysis: All Prime Contracts under \$500,000, by Industry

1. Construction Prime Contracts under \$500,000

The disparity analysis of all construction prime contracts under \$500,000 is described below and depicted in Table 8.01 and Chart 8.01.

Disadvantaged Business Enterprises represent 25.55 percent of available construction firms and received 8.25 percent of construction prime contracts under \$500,000. This underutilization is statistically significant.

Non-Disadvantaged Business Enterprises represent 74.45 percent of the available construction firms and received 91.75 percent of construction prime contracts under \$500,000. This overutilization is statistically significant.



Table 8.01 Disparity Analysis: Construction Prime Contracts under \$500,000, January 1, 2006 to December 31, 2008

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Disadvantaged Business Enterprises	\$35,920,738	8.25%	25.55%	\$111,204,894	-\$75,284,156	0.32	< .05 *
Non Disadvantaged Business Enterprises	\$399,307,546	91.75%	74.45%	\$324,023,390	\$75,284,156	1.23	< .05 †

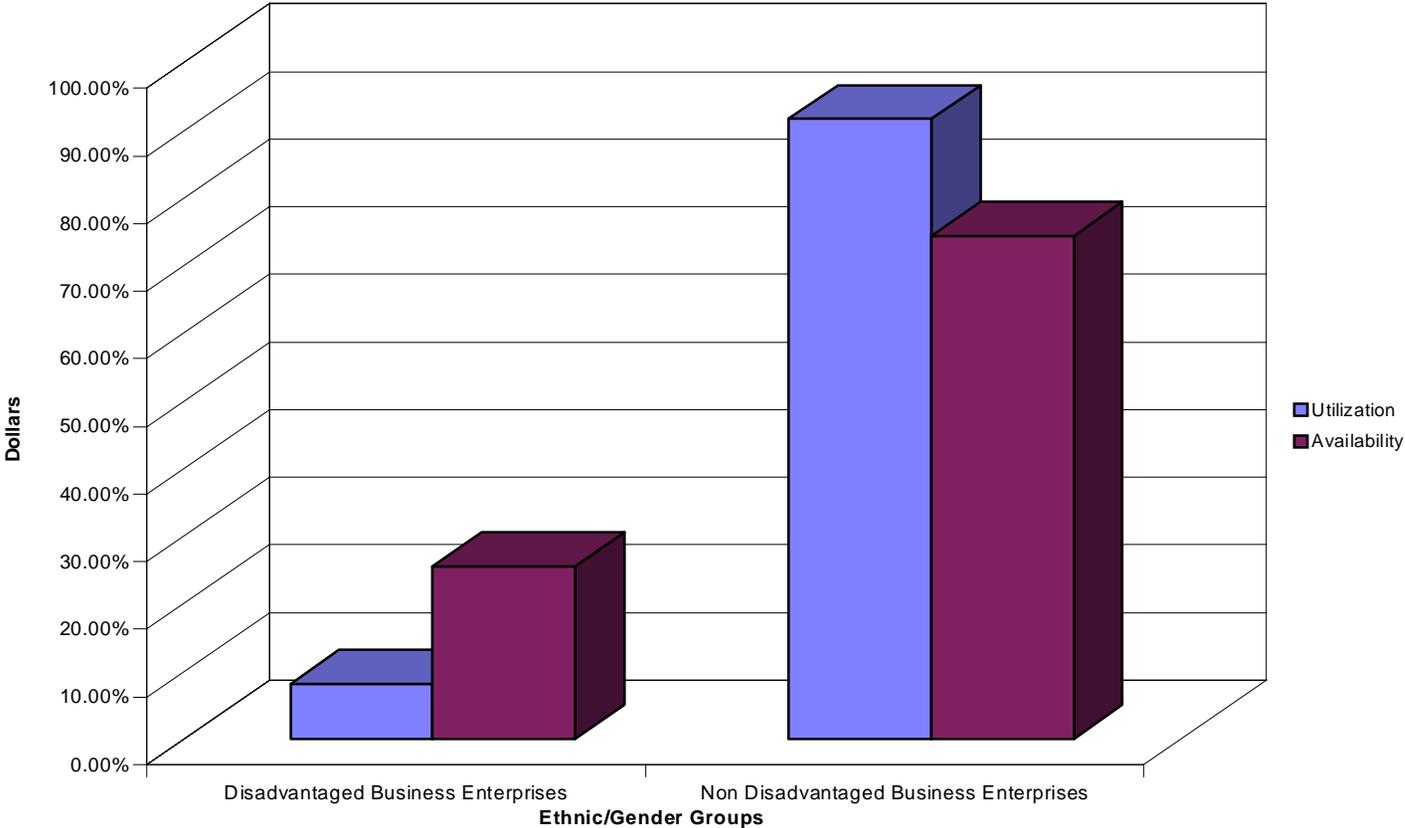
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of DBEs or the underutilization of Non-DBEs.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.01 Disparity Analysis: Construction Prime Contracts under \$500,000, January 1, 2006 to December 31, 2008



*Mason Tilman Associates, Ltd.
Illinois Department of Transportation DBE Disparity Study*

2. **Architecture and Engineering Prime Contracts under \$500,000**

The disparity analysis of architecture and engineering prime contracts under \$500,000 is described below and depicted in Table 8.02 and Chart 8.02.

Disadvantaged Business Enterprises represent 29.7 percent of the available architecture and engineering firms and received 20.95 percent of prime contracts under \$500,000. This underutilization is statistically significant.

Non-Disadvantaged Business Enterprises represent 70.3 percent of the available architecture and engineering firms and received 79.05 percent of prime contracts under \$500,000. This overutilization is statistically significant.



Table 8.02 Disparity Analysis: Architecture and Engineering Prime Contracts under \$500,000 January 1, 2006 to December 31, 2008

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Disadvantaged Business Enterprises	\$14,982,003	20.95%	29.70%	\$21,243,281	-\$6,261,278	0.71	< .05 *
Non Disadvantaged Business Enterprises	\$56,532,194	79.05%	70.30%	\$50,270,916	\$6,261,278	1.12	< .05 †

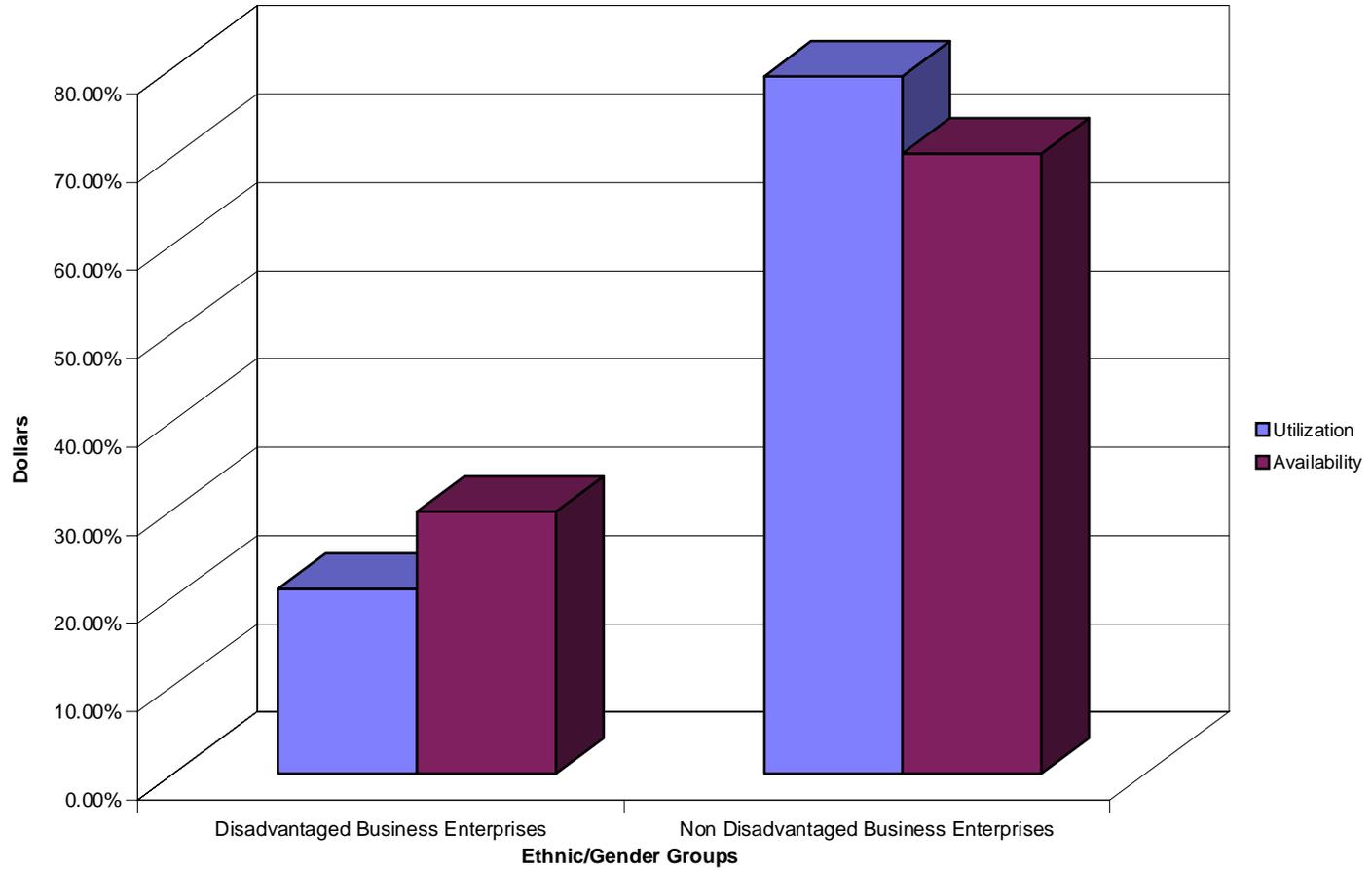
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of DBEs or the underutilization of Non-DBEs.

(----) denotes an underutilized group with too few available firms to test statistical significance.

**Chart 8.02 Disparity Analysis: Architecture and Engineering Prime Contracts under \$500,000
January 1, 2006 to December 31, 2008**



B. Disparity Analysis: All Prime Contracts \$25,000 and under, by Industry

1. Construction Prime Contracts \$25,000 and under

The disparity analysis of all construction prime contracts \$25,000 and under is described below and depicted in Table 8.03 and Chart 8.03.

Disadvantaged Business Enterprises represent 25.55 percent of available construction firms and received 10.38 percent of construction prime contracts \$25,000 and under. This underutilization is statistically significant.

Non-Disadvantaged Business Enterprises represent 74.45 percent of the available construction firms and received 89.62 percent of construction prime contracts \$25,000 and under. This overutilization is statistically significant.



Table 8.03 Disparity Analysis: Construction Prime Contracts \$25,000 and under, January 1, 2006 to December 31, 2008

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Disadvantaged Business Enterprises	\$267,970	10.38%	25.55%	\$659,463	-\$391,493	0.41	< .05 *
Non Disadvantaged Business Enterprises	\$2,313,005	89.62%	74.45%	\$1,921,512	\$391,493	1.20	< .05 †

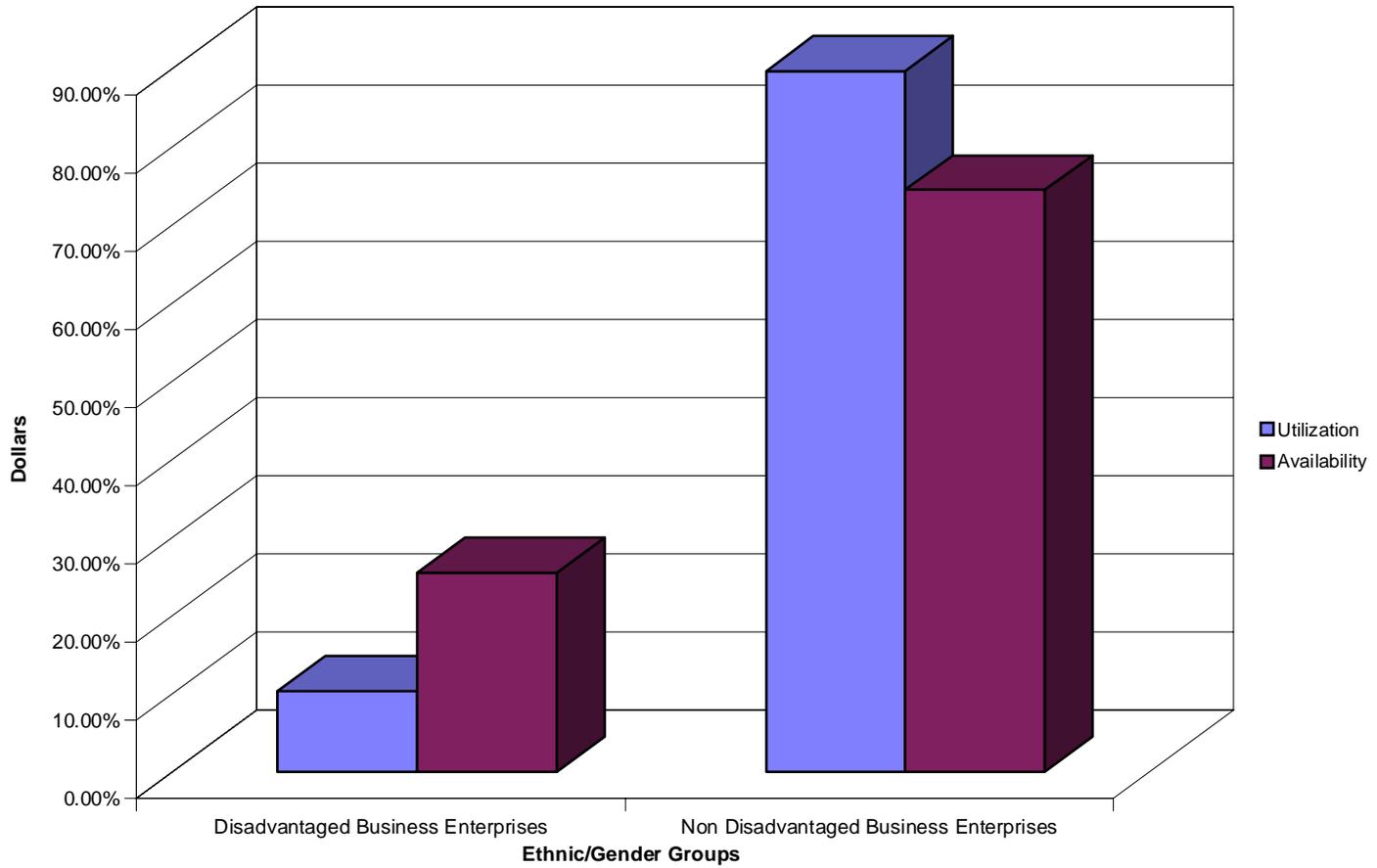
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of DBEs or the underutilization of Non-DBEs.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.03 Disparity Analysis: Construction Prime Contracts \$25,000 and under, January 1, 2006 to December 31, 2008



2. Architecture and Engineering Prime Contracts \$25,000 and under

The disparity analysis of architecture and engineering prime contracts \$25,000 and under is described below and depicted in Table 8.04 and Chart 8.04.

Disadvantaged Business Enterprises represent 29.7 percent of the available architecture and engineering firms and received 33.08 percent of prime contracts \$25,000 and under. This study does not test statistically the overutilization of DBEs or the underutilization of non-DBEs males.

Non-Disadvantaged Business Enterprises represent 70.3 percent of the available architecture and engineering firms and received 66.92 percent of prime contracts \$25,000 and under. This study does not test statistically the overutilization of DBEs or the underutilization of non-DBEs males.



**Table 8.04 Disparity Analysis: Architecture and Engineering Prime Contracts \$25,000 and under,
January 1, 2006 to December 31, 2008**

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Disadvantaged Business Enterprises	\$63,147	33.08%	29.70%	\$56,699	\$6,447	1.11	**
Non Disadvantaged Business Enterprises	\$127,728	66.92%	70.30%	\$134,175	-\$6,447	0.95	**

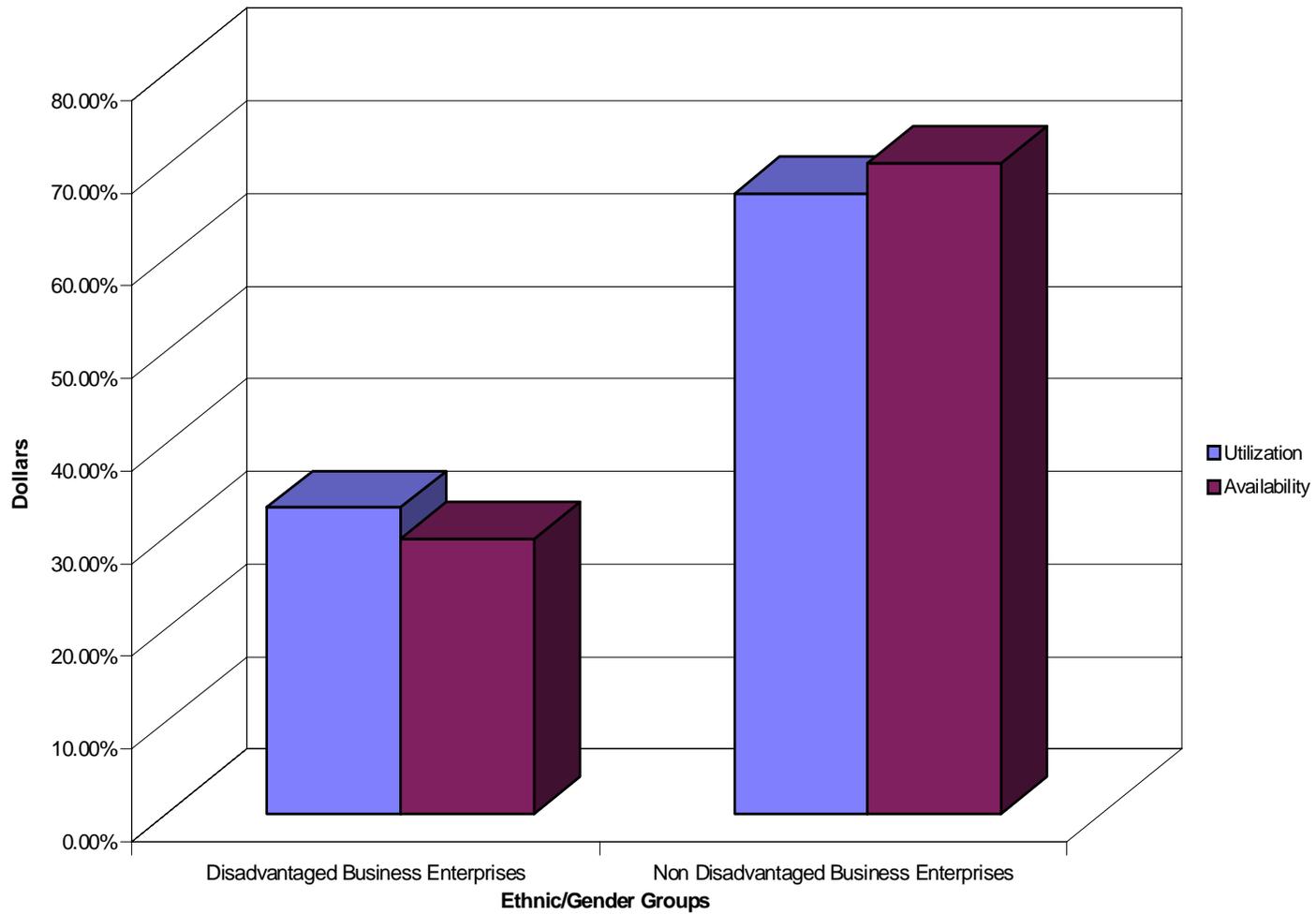
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) this study does not test statistically the overutilization of DBEs or the underutilization of Non-DBEs.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 8.04 Disparity Analysis: Architecture and Engineering Prime Contracts \$25,000 and under, January 1, 2006 to December 31, 2008



III. DISPARITY ANALYSIS SUMMARY

A. Construction Prime Contracts

As indicated in Table 8.05 below, Disadvantaged Business Enterprises were significantly underutilized at both the formal and informal contract levels.

Table 8.05 Disparity Summary: Construction Prime Contract Dollars, January 1, 2006 to December 31, 2008

Group	Construction	
	Contracts under \$500,000	Contracts \$25,000 and under
Disadvantaged Business Enterprises	Yes	Yes

B. Architecture and Engineering Prime Contracts

As indicated in Table 8.06 below, Disadvantaged Business Enterprises were significantly underutilized at the formal contract level.

Table 8.06 Disparity Summary: Architecture and Engineering Prime Contract Dollars, January 1, 2006 to December 31, 2008

Group	Architecture and Engineering	
	Contracts under \$500,000	Contracts \$25,000 and under
Disadvantaged Business Enterprises	Yes	No



9

SUBCONTRACTOR DISPARITY ANALYSIS

I. INTRODUCTION

The objective of this analysis is to determine if Disadvantaged Business Enterprise (DBE) subcontractors were underutilized at a statistically significant level on the State of Illinois Department of Transportation's (IDOT's) contracts. A detailed discussion of the statistical procedures for conducting a disparity analysis is set forth in *Chapter 8: Prime Contractor Disparity Analysis*. The same analytical procedures were used to perform the subcontractor disparity analysis. Under a fair and equitable system of awarding subcontracts, the proportion of subcontracts and subcontract dollars awarded to DBEs would be approximate to the proportion of available DBEs¹ in the relevant market area. If the available DBEs are underutilized, a statistical test can determine the probability that the disparity is due to chance. If there is a low probability that the disparity is due to chance,² *Croson* states that an inference of discrimination can be made.

¹ Availability is defined as the number of willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 7.

² When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.



II. DISPARITY ANALYSIS

A subcontractor disparity analysis was performed on construction and architecture and engineering contracts awarded between January 1, 2006 and December 31, 2008.

As detailed in *Chapter 5: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontractor records for IDOT's construction and architecture and engineering contracts. IDOT provided information on subcontracts for both industries.

The subcontract disparity findings in the two industries under consideration are summarized below.



III. DISPARITY ANALYSIS: ALL SUBCONTRACTS, BY INDUSTRY

A. Construction Subcontracts

The disparity analysis of all construction subcontracts is described below and depicted in Table 9.01 and Chart 9.01.

Disadvantaged Business Enterprises represent 29.24 percent of the available construction firms and received 10.65 percent of construction subcontracts. This underutilization is statistically significant.

Non-Disadvantaged Business Enterprises represent 70.76 percent of the available construction firms and received 89.35 percent of construction subcontracts. This overutilization is statistically significant.



Table 9.01 Disparity Analysis: Construction Subcontracts, January 1, 2006 to December 31, 2008

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Disadvantaged Business Enterprises	\$200,952,585	10.65%	29.24%	\$551,893,487	-\$350,940,902	0.36	< .05 *
Non Disadvantaged Business Enterprises	\$1,686,683,408	89.35%	70.76%	\$1,335,742,506	\$350,940,902	1.26	< .05 †

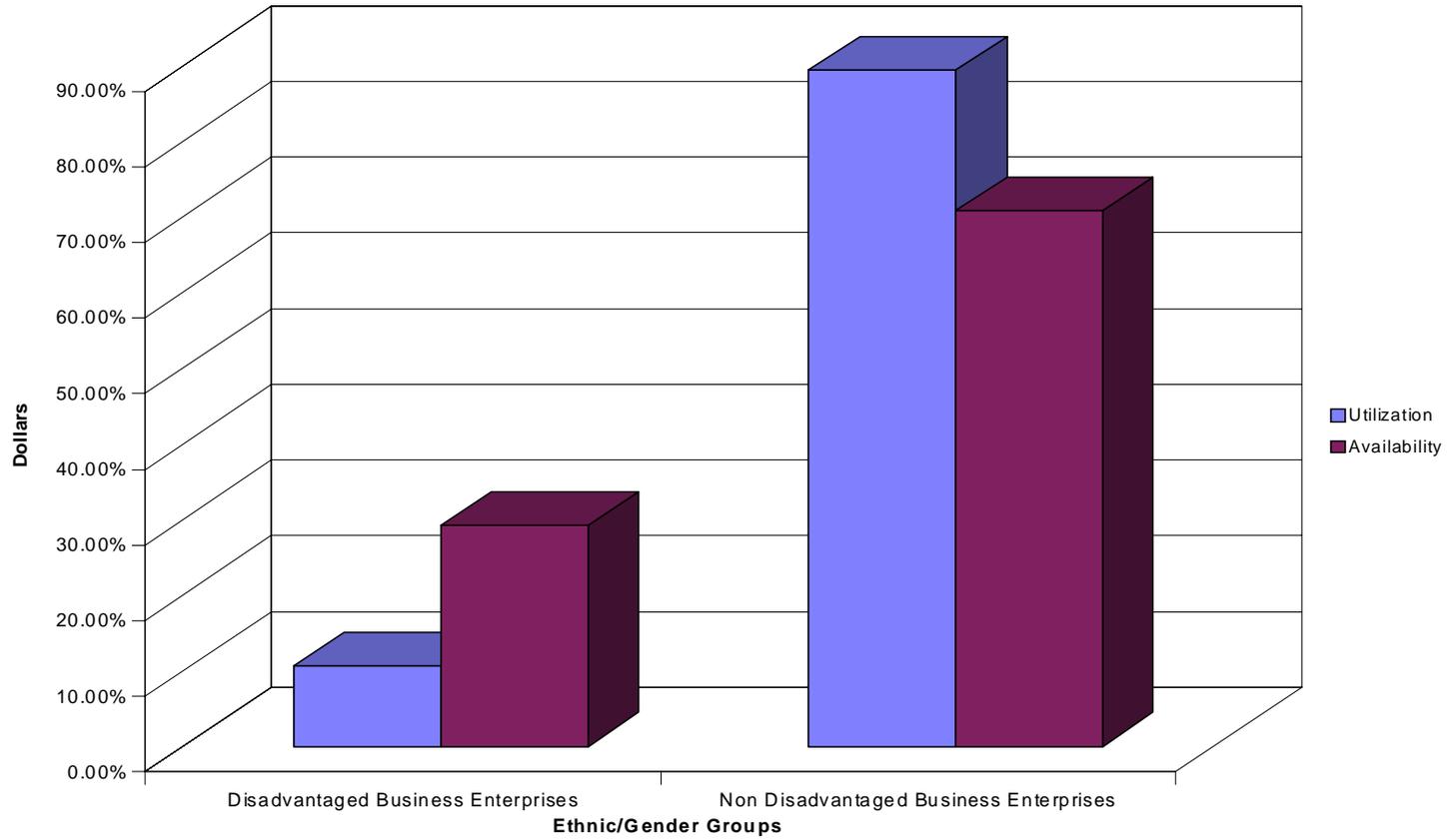
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of DBEs or the underutilization of Non-DBEs.

(---) denotes an underutilized group with too few available firms to test statistical significance.

Chart 9.01 Disparity Analysis: Construction Subcontracts, January 1, 2006 to December 31, 2008



B. Architecture and Engineering Subcontracts

The disparity analysis of architecture and engineering subcontracts is described below and depicted in Table 9.02 and Chart 9.02.

Disadvantaged Business Enterprises represent 32.06 percent of the available architecture and engineering firms and received 14.97 percent of subcontracts. This underutilization is statistically significant.

Non-Disadvantaged Business Enterprises represent 67.94 percent of the available architecture and engineering firms and received 85.03 percent of subcontracts. This overutilization is statistically significant.



Table 9.02 Disparity Analysis: Architecture and Engineering Subcontracts, January 1, 2006 to December 31, 2008

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Disadvantaged Business Enterprises	\$2,713,818	14.97%	32.06%	\$5,812,656	-\$3,098,838	0.47	< .05 *
Non Disadvantaged Business Enterprises	\$15,414,403	85.03%	67.94%	\$12,315,565	\$3,098,838	1.25	< .05 †

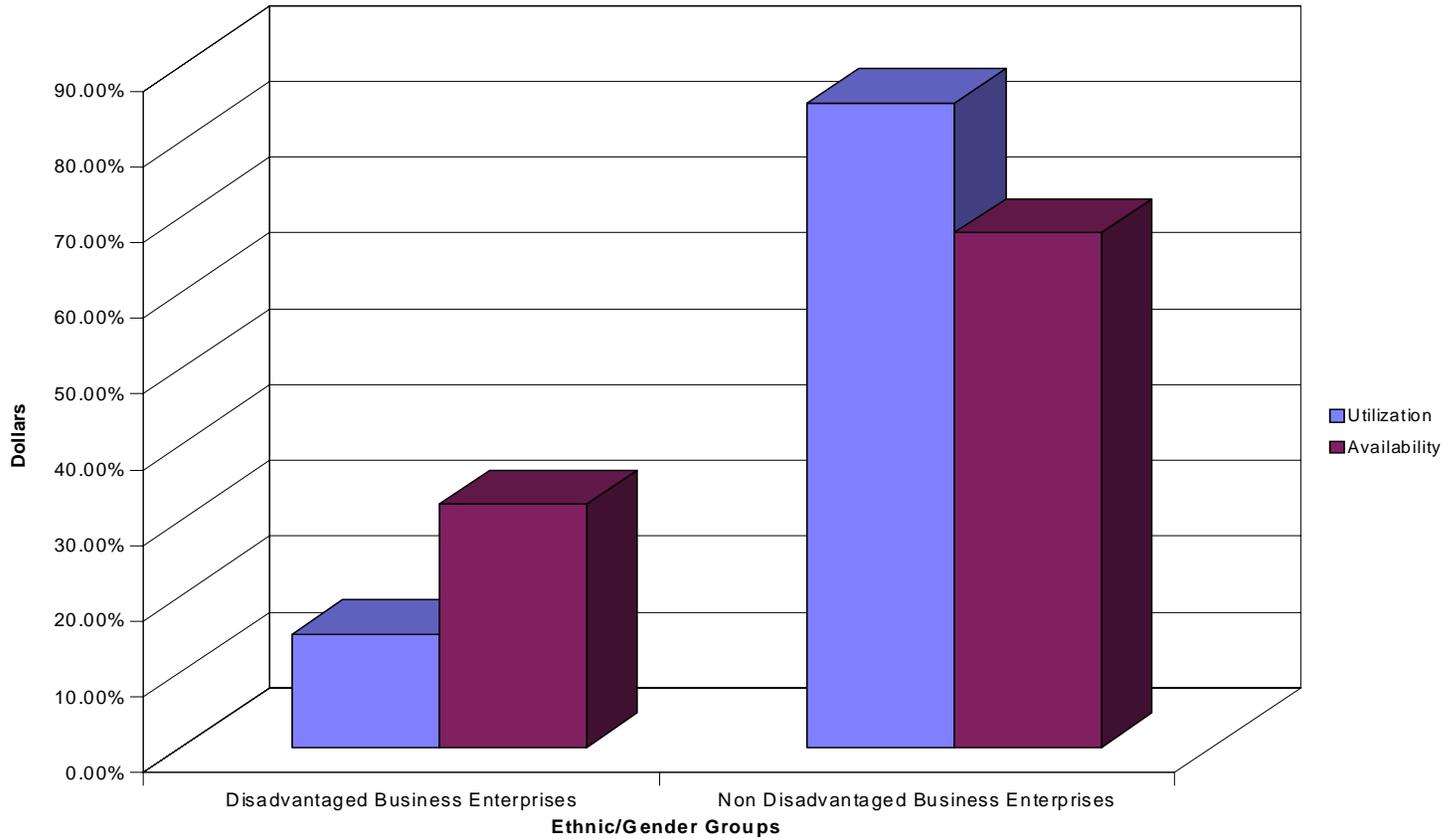
(*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(**) denotes that this study does not test statistically the overutilization of DBEs or the underutilization of Non DBEs.

(----) denotes an underutilized group with too few available firms to test statistical significance.

Chart 9.02 Disparity Analysis: Architecture and Engineering Subcontracts, January 1, 2006 to December 31, 2008



IV. SUBCONTRACTOR DISPARITY SUMMARY

As indicated in Table 9.03 below, Disadvantaged Business Enterprises were underutilized on construction and architecture and engineering subcontracts at a statistically significant level.

**Table 9.03 Subcontractor Disparity Summary, January 1, 2006
to December 31, 2008**

Group	Construction	Architecture and Engineering
Disadvantaged Business Enterprises	Yes	Yes



10

ANECDOTAL ANALYSIS

I. INTRODUCTION

The United States Supreme Court in its 1989 decision, *City of Richmond v. J.A. Croson Co.*,¹ specified the use of anecdotal testimony as a means to determine whether remedial race-conscious relief may be justified in a particular market area. In its *Croson* decision, the Court stated that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proofs, lend support to a [local entity’s] determination that broader remedial relief [be] justified.”²

Anecdotal testimony of individual discriminatory acts can, when paired with statistical data, document the routine practices by which minority- and woman-owned business enterprises (M/WBEs) are excluded from business opportunities within a given market area. The statistical data can quantify the results of discriminatory practices, while anecdotal testimony provides the human context through which the numbers can be understood. Anecdotal testimony from business owners provides information on the kinds of barriers that they believe exist within the market area, including who perpetrates them and their effect on the development of M/WBEs.

A. Anecdotal Evidence of Active or Passive Participation

Croson authorizes anecdotal inquiries along two lines. The first approach investigates active government discrimination or formal acts of exclusion that are undertaken by representatives of the governmental entity. The purpose of this examination is to determine

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 509 (1989).

² *Id.*



whether the government has committed acts that bar minority and women business owners from contracting opportunities.

The second line of inquiry examines the government’s “passive” support of exclusionary practices that occur in the market area into which its funds are infused. “Passive” exclusion results from government officials knowingly using public monies to contract with companies that discriminate against M/WBEs, or fail to take positive steps to prevent discrimination by contractors who receive public funds.³

Anecdotal accounts of passive discrimination mainly delve into the activities of private sector entities. The Tenth Circuit Court of Appeals has cautioned that anecdotal accounts of discrimination are entitled to less evidentiary weight to the extent that the accounts concern more private than government-sponsored activities.⁴ Nonetheless, when paired with appropriate statistical data, anecdotal evidence of either active or passive forms of discrimination can support the imposition of a race or gender-conscious remedial program. Anecdotal evidence that is not sufficiently compelling, in combination with statistical data, to support a race or gender-conscious program is not without utility in the *Croson* framework. As *Croson* points out, jurisdictions 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.”⁵ Anecdotal accounts can paint a finely detailed portrait of the practices and procedures that generally govern the award of public contracts in the relevant market area. These narratives can identify specific generic practices that can be implemented, improved, or eliminated in order to increase contracting opportunities for businesses owned by all citizens.

This chapter presents anecdotal accounts from interviews with businesses domiciled in the state of Illinois. There are anecdotal accounts of barriers encountered directly with the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority (Illinois Tollway).

³ *Croson*, 488 U.S. at 491-93, 509.

⁴ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d at 1530 (10th Cir. 1994): “while a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality’s institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions.”

⁵ *Croson*, 488 U.S. at 509.



B. Anecdotal Methodology

The method used in gathering anecdotal testimony was oral history interviews and an anecdotal survey that was e-mailed via an E-Survey. The distribution list for the E-Survey was drawn from a database that was produced in the performance of the DBE Disparity Study. The list comprised of 5,258 minority and non-minority construction and construction-related firms that were willing to perform IDOT and the Illinois Tollway's prime contracts and subcontracts. The surveyed firms included both DBE and non-DBE firms.

The E-Survey was designed to elicit from the respondents: (1) general background information; (2) experience submitting bid/proposals; (3) experience working with IDOT and the Illinois Tollway; (4) utilization of supportive services; (5) recommendation to help businesses obtain work from IDOT and the Illinois Tollway; (6) interest in additional supportive services; (7) recommendations for IDOT and the Illinois Tollway's DBE Programs; and (8) experiences with discrimination on IDOT or the Illinois Tollway projects. An analysis of the anecdotal survey will be reported in a separate report.

The in-depth interview method affords the researcher a greater opportunity to garner in-depth eyewitness accounts to assess the effects of exclusionary practices against disadvantaged business enterprises (DBEs) and the means by which these practices occur. Oral history is defined by the *American Heritage Dictionary* as "historical information obtained in tape-recorded interviews with individuals having firsthand knowledge." The in-depth interviews also afford the interviewees a process in which their anonymity can be preserved. Allowing interviewees to describe the barriers they have experienced in conducting business provides an understanding of how barriers occur, who creates them, and their effect on business development. Thus, the information obtained can offer IDOT and the Illinois Tollway vital insights on future program needs and changes.

The business owners for the one-on-one interviews were identified from contract and certification records, community meetings, and outreach. Potential interviewees were pre-screened to determine if they operated within the market area and were willing to commit to the interview process.

A set of probes was used to capture information regarding each interviewee's experience with discrimination, and it was designed to screen for all aspects of business development from start-up to growth issues and both public and private sector experiences. Completed interviews were transcribed and analyzed for barriers the interviewees encountered. From the analysis, the anecdotal report was prepared, which describes general market conditions, prime contractor barriers, and the range of experiences encountered by interviewees attempting to do business with IDOT and the Illinois Tollway.



C. Anecdotal Interviewee Profile

Table 10.01 presents a profile of the business owners interviewed for this Study.

Table 10.01 Anecdotal Interviewee Profile

Ethnicity	Number
African American	9
Hispanic American	9
Asian American	3
Native American	1
Caucasian	18
Total	40
Gender	Number
Male	24
Female	16
Total	40
Industry	Number
Construction Services	25
Construction-Related Professional Services	5
Architecture and Engineering Services	10
Total	40
DBE Status	Number
DBE	27
Non DBE	13
Total	40



II. BUSINESS COMMUNITY BARRIERS

A. Racial Barriers and Harassment

The interviewees reported the following anecdotes concerning racial barriers:

A minority male owner of a construction company reported that some minorities are told the only reason they are on the job site is to meet a quota:

A minority male owner of a construction company reported that some minorities are told the only reason they are on the job site is to meet a quota:

I definitely feel like [minorities] face discrimination because . . . when we are on a job site with other subcontractors . . . some general contractors say will, “Oh, you’re only out here because they needed a minority,” and they don’t think that we can do the job. It’s more like just a general harassment . . . They think that [we’re] only there as a placeholder, a face. [We] are only there because they need a quota. . . Sometimes some of these guys think that we are taking work away from some of their Caucasian male friends. Because of the high unemployment rate, this is what was said to us on a project site earlier this year. One guy was pretty vulgar saying that we were out there because we were minorities and his friends were sitting at home, other Caucasian males. We [complained] to the general contractor. If they don’t do anything about it then we would complain to IDOT.

A minority male representative of a construction trade organization believes that some prime contractors prevent minority and women contractors access to construction subcontracts due to discrimination:

The Dan Ryan project was really highway robbery where [company name withheld] was allowed to come in and discriminate against African American men, women, and White women. They made sure that no one really benefitted. Right now [company name withheld] is practicing the same bogus policies. These projects can be unbundled. It doesn't have to be a billion-dollar contract where only [company name withheld] or [company name withheld] can come in and bid on it. This process [where] only super companies can come in is discriminatory and elitist at best. Now, with the I-290 [project] you already have [trade organization name withheld] lined up. You also have the same unions who historically discriminated against African American men, women, and White women.



This Caucasian male owner of a construction company reported that his Caucasian employees have been harassed by minority community leaders:

In the south suburbs of Chicago . . . we have had pastors who say, “I want my people working.” That is their quote not mine. [They] have stopped the jobs and demanded that we hire [minorities]. We had crews where everybody was a minority on the crew except for the foreman, and the foreman was kicked and spit on and demeaned by these outside groups who are demanding employment. I can tell you that . . . happens to [Caucasian] people who have been harassed racially.

A Caucasian male owner of a construction company reported that he believes DBEs are held to a much lower performance standard than other business owners:

The DBE firms . . . are given every benefit of the doubt to survive and perform. IDOT wants to do everything they can to help these guys and so do I because I need those guys. If he’s gone tomorrow, I’ve got one less DBE sub[contractor] I can use. So . . . it gets very frustrating and not just for me, but it gets frustrating for the resident engineers in the field and [IDOT employee name withheld] because we are doing everything we can possibly do to help these guys survive. They are held to a much lower standard, if anything.

A minority male owner of an engineering company reported that minority-owned firms are held to a higher standard of review than their Caucasian counterparts:

This racial stuff is insidious, but the detection of it and the identification of it can be difficult at times. Black and [minority woman] firms are held to a higher standard than their White counterparts. I keep on telling my minority brothers and sisters that we have to strive for excellence. The competition is stiff and you wouldn’t want to have somebody design a bridge that is not capable of designing a bridge. So, we want to hold the minority and women firms not to a higher standard, but to the same standard. When I talked to my guys that are dealing with these companies, no one is walking around calling people n***ers. But [prime contractors] are choosing White woman firms over Black firms. Or they will choose an Asian or Hispanic firm over a Black firm, which happens a lot too. I think that agencies should take into account the social, political, and economic impact of past policies and the impact of current practices on minority and woman businesses, particularly African American businesses.



A minority male owner of a construction company reported that he believes there is disparity for minority business owners in the construction industry:

In this industry there is a clear disparity for minorities, particularly African American. [This is an] industry that doesn't speak on behalf of African Americans. There have been several times I have walked in to bid a job. Before I can open my mouth [I am told], "We already have MBE participation." I said, "Well, does that mean [I cannot] quote you on this job?"

A Caucasian female owner of a construction company reported that certain prime contractors refused to work with women business owners:

I had men come up to me and say, "Look, I haven't worked with a woman as long as I've been in this business, I'm not starting now." That was a superintendent for a large contractor. Obviously though, when they're required, I would definitely get the feeling that a lot of these prime [contractors] would love for this program to go away. They do not want to share. These companies have been around for a long time. They are White male-owned businesses and they want to hang onto what they have and they don't really want to share it.

The interviewees reported the following anecdotes concerning harassment:

A Caucasian female owner of a construction company reported that her company is treated differently when loading her trucks at the quarry:

When our trucks go to the quarry to get loaded, there is another White male company, [company name withheld]. They are a huge White male-owned company and they always get preferential treatment at the quarry over us. Their trucks will get loaded faster than our trucks. We will have to wait and [while] we [are] waiting, we lose revenue. We [have complained] but the people that are in control of the quarry don't really care. Maybe IDOT would say something and step in on our behalf.

A Caucasian female owner of a construction company reported that she has experienced harassment because of her gender:

Anytime a woman walks on the job, there is going to be whistles, being called "honey," and [some]times they ask, "Don't you need your beauty sleep?" I have had some contractors not want to talk to me on the job site.



They think that they have to talk to a man to get something done. Even though we got the job, I've had contractors [and] superintendents not want to deal with me, and ultimately I had to send a male out to the job to get things going. It has improved because I have been in business so long, and now word of mouth says who I am and who my company is . . . but it's still out there. There is still a need for the DBE program and for the women in the DBE program, especially in the bridge and the heavy highway industry.

A Caucasian female owner of a construction company reported that being accused of operating a “front” by minority subcontractors, in her opinion, is a form of harassment:

When the study started for the Mississippi River Bridge Project, which I know is not the same as what we're doing right now, but the same people [are] involved, and there were a lot of accusations made toward women contractors that we are all front companies. It's like we're not capable of running our own company because we are women. Whereas, I think, I'm doing pretty well. But [this is] said at every meeting that we go to, and the funny thing is it comes from other DBEs who are not White women. It's directed at all of us, and I think that's a huge form of harassment. Every single meeting someone stands up and makes a comment directed at all of us. It's definitely coming from other subcontractors, not from [prime] contractors or from IDOT.

B. Difficulty Breaking into the Contracting Community

*The interviewees reported the following anecdotes concerning DBEs breaking into the contracting community:*⁶

A minority male owner of an engineering company reported on IDOT utilizing the same prime contractors:

Some [prime contractors] have their friends and family already on their team, and it does not matter if IDOT is monitoring the goal or not. Because they keep 20 to 25 percent for their friends. And this is a problem for newcomers who [can't] get involved in the process. Because they keep using the same people over and over. It's still going on.

⁶ Behaviors by established large contractors that prevent new and/or small contractors from successfully obtaining work as prime contractors on public contracts.



A minority male owner of an engineering company reported that IDOT utilizes the same prime contractors on their engineering and construction projects:

We look at who gets awarded contracts and a lot of times you see [some prime contractors] doing very well. They get repeat [work]. I understand that IDOT is being sued. A suit has been filed by the Illinois Black Chamber of Commerce [because] the Latino and African American community is not happy with the amount of money that is awarded to minority contractors and professional service firms. For example, here in the State of Illinois, African Americans are 40 percent of the City of Chicago [and roughly] 13 percent of the State of Illinois. And [African American] professional service and construction [contractors receive] one percent or less. Latinos [receive] about 1.3 to 1.4 percent. That's horrendous. I think there should be a public outcry about that.

A minority male owner of a construction company also reported that a few prime contractors are receiving the majority of the highway projects:

I see the same companies win the same jobs on the highway projects.

And, this minority owner of a construction company reported that the same contractors are receiving the work on IDOT's projects:

There are a lot of contractors that only use the same two or three contractors. They will say we don't think you are big enough for it, or IDOT will have us go through the qualification process and will say the same thing, you are just not big enough.

A female minority owner of a construction-related company reported that she has experienced difficulties obtaining work as a supplier for the Illinois Tollway:

I think that as much rebar and material that is involved with tollways, it is totally impossible for me to believe that I could not or other people like me could not bid as a supplier. And I want to know what is going to be different this time with primes or the Tollway. I understand there is no brokering, but what is going to be different with this letting than what has been done? I cannot believe that with all of the materials that's involved with putting together all the tollways and expressways that there would not be an opportunity for DBE suppliers.



A Caucasian male representative of a construction trade organization reported that he believes there are barriers for DBEs to obtain contracts from IDOT and the Illinois Tollway:

I believe there are a lot of barriers to smaller companies and DBEs getting involved in agency projects whether it's Tollway or IDOT. We certainly do want to partner with the agencies and with the various groups to get that pipeline open and create a communication and networking structure so that we can expand the DBE opportunities with IDOT and the Tollway.

A Caucasian male owner of an engineering company explained why he believes that a more diverse group of consultants is utilized in his industry as compared to construction services:

In Springfield it seems like that there is only a handful of contractors that get most of the projects, but as far as consultants like us, it seems like there are a very wide variety of consultants. So [it] seems [that] much more [consultants are used] than contractors because I don't think there are as many contractors available to bid.

A Caucasian male owner of a construction company reported that he believes limited opportunity's make it difficult for minority-and woman-owned businesses to obtain work:

In my opinion when it comes to minority or woman-owned businesses, I feel like that there are some opportunities on projects that they are probably overlooked. I say that from being down here in Southern Illinois. I don't think that there are as many bids to choose from; and therefore, whenever they have to meet a requirement on these jobs, it's really tough for those guys.

A Caucasian female owner of a construction company reported that there are far fewer networking opportunities for women business owners than minorities:

I think networking is tough anyway but especially being a woman in a male-dominated industry, whether it is White or Black males. It's hard for women to be accepted and fit in a networking group. They have a lot of [networking events] for minorities, but they never have [any]thing for women. There are a lot of events, associations, and support groups for minorities, but the women don't have anything like that. There's no advocates, associations, or support groups. We are just kind of left out there in left field.



This same business owner reported that she has complained about the situation, but networking opportunities for women are still an issue:

I have complained to [name withheld] and she has been wonderful and offered her support . . . but she has a full-time job [and] she can't just be concerned about the issues of the White women in District Eight. Now that I think about it, when going to these disparity [study] meetings and all these round tables, there is definitely a lack of support for women. I don't know why they keep shunning the women.

A Caucasian female owner of an engineering company reported that breaking into the contracting networks is harder for women:

Unfortunately, I feel like I really have to play golf. What I find is that women do business differently than men. In other words, in this male-oriented business you have to do business the way men do it.

A minority male owner of a construction company reported that there are only a few contractors that are able to bid on IDOT's projects due to size:

There is only a small group here that is capable of handling the larger jobs, like building bridges and . . . major road construction. We had a pretty good meeting with IDOT in District Nine, and . . . they [shared the same] concern but I have not seen anything come out of it.

A minority male owner of a construction company also reported that small companies are denied access to work because of the size of the projects:

The jobs are very large, and small firms are denied participation because of the size of the [project].

A minority male owner of an engineering company reported that minorities oftentimes work on small projects which do not enable them to build capacity for larger complex projects:

All the minority firms who came after me that didn't have the opportunities I had, [are] having a lot of difficulty getting through the door. When you are a DBE firm, people expect you to be in the subcontracting field, and all they want to do is give you a bone. If you go after a job, it's a one or two person job [valued] at two to three hundred thousand dollars. [But they] don't have the challenges of a complex project, so therefore they cannot go and offer



good talents to work with them because they prefer to [work] for larger firms where there are good complex projects.

This same business owner reported that oftentimes he is not able to get on teams because of political connections and due to the size of his business:

Usually primes select subs based on the political district [where] I work, and they go with their political connection or go with their favorite DBEs. When IDOT advertises those projects, we will call the primes and tell them we [are] interested in being on their team. We are told, “I have my mind made up already.” Meaning that has [there is] [an]other DBE. There may be a way to [complain], but I never have . . . because if you go and express your opinion on that issue, you may be black[listed]. [We] try to get on the teams, [but] the projects are sized very large and they will not look at a small firm like mine because [they believe we] would not have the capacity to do the job. [They should] review the size of the projects . . . and make them more competitive so more local firms can participate.

A minority male owner of a construction company believes that the lack of long standing established relationships with prime contractors is a barrier to small business owners:

I think that there are economic factors that play into our firm being treated differently than someone else. We haven’t been around as long as some of the other companies we consider competitors. So in terms of the bidding, our quote might not be taken as seriously if our number is a little bit higher or the perception of our ability to be able to perform. So in that regard, it goes back to relationships and not having had the history with some of these large prime contractors. It’s not [because of] race or gender. I don’t like the term “good ol’ boys,” but I mean it’s basically based on longer term relationships. Generally speaking, it’s [due] to the [lack of] buying power to be competitive with other firms that have longer relationships with the vendors. Due to our size, we don’t have the buying power that somebody else might have that would solicit a lower quote. It has really been difficult to match some of the numbers from non-DBE ready mix suppliers.

A Caucasian female owner of a construction-related professional services company reported on her experience trying to get work as a prime contractor:

When a firm is growing, it’s hard to be a sub and [get] to be a prime. That is where the good old boys network [makes it] harder for a DBE firm. Not in the beginning years but now you want to [work] as a prime, but how do



you gain the knowledge of knowing which projects are coming up and who's doing what? [This is where these] networks that exist where we are not part of [are influential]. You either [need] a marketing person who can do [outreach] or you need to be more aggressive in meetings with IDOT or the Tollway and find out what's going on.

And a Caucasian female owner of an engineering company explained why she believes that some business owners in her industry do not support the idea of working with DBEs:

I think that the prime engineering consultants resent the [DBE] Program or resent the requirement that they [have to] give away a certain amount of their work to DBEs. As a consequence, they are not real welcoming of DBE owners or representatives because they see this as folks that are basically taking a piece of the pie that they would otherwise have. There are a lot of people in the engineering community that would really like to see the Program go away. And some of them will come right out and say it. Some of them it's in their demeanor and in their way of acting. And they know it's important to IDOT and the Tollway [to meet] their commitment. As a consequence, the engineering firms are required to meet the requirements, but they're not happy about it.

III. DIFFICULTIES IN THE CONTRACTING PROCESS

A. Navigating Through the Bid Process

The interviewees reported the following anecdotes concerning the bidding process:

A minority male owner of a construction company believes that IDOT's bidding requirements can be intimidating for start-ups:

IDOT has so many requirements that it's hard for you to bid on a project. As a minority contractor, if you're just starting, it can feel like you don't have the experience because so much [could be] wrong.

A minority male owner of a construction company reported that the Illinois Tollway's union affiliation requirements for certain trades can be a barrier for minority business owners:

The Tollway do[es] not [allow] you [to] bid on a project if you don't [belong to] a union. It doesn't matter if you are paying prevailing wage if you don't



have an [union] association. There are a lot of minorities out there that don't [belong to] unions. This union thing is not good . . . [it] deprives us from bidding because the contractors won't even look at our numbers. [It cuts out] a big chunk of business.

A Caucasian male owner of a construction company reported that IDOT's proposed revisions to its bidding requirements will cause additional paperwork that can be burdensome to bidders:

IDOT has a new special provision that is coming out for the January 15th letting. The new special provision requires us to submit our DBE utilization plan as well as the individual sheets from the subcontractors with the bid. If we don't meet the goal we are required to submit a good faith effort along with whatever participation, and we have to do that on every job that we bid, not just the jobs that we are the low bidder. Right now our batting average is about one in 15 to one in 20 jobs, so every job [with] DBE utilization I have to go through the work and the expense on every single job, when in all likelihood I will only get one out of the 20.

A Caucasian female owner of a construction company reported that IDOT's revised job description list is time consuming for DBEs who are trying to locate job descriptions with DBE participation:

IDOT has changed their bidding method in Springfield. They said they were going to change it back but they have [not]. [Before], they would tell you all the jobs and descriptions of every job that was coming up on the list. It had the DBE requirements right there so I could go down through the jobs we were interested in [that] had DBE requirements. It was a very simple procedure. They have since taken the DBE requirements off of the item list. Now you have to go to each of the plans on each individual job to the special provisions and scroll down until you find the DBE requirements. What used to take less than a second, now took three minutes. I realize three minutes isn't a lot of time, but it does get old when you're looking at two hundred jobs. They said at the meeting that there had been many complaints and they were going to change it back. But that's been how many months and they haven't changed it back.



A Caucasian male owner of a construction company reported that IDOT's specifications could be structured more clearly:

I think that the [specifications] are not clear English and [contain] a lot of ambiguity. Not necessarily too rigid but one specification will say this and another specification will say [something else].

And a Caucasian male owner of an engineering company reported that he did not encounter any difficulties with IDOT's pre-qualification process:

[It] was very positive for us. I was pleased with the pre-qualification we received from IDOT, and we were able to maintain it. It was a positive experience getting the approval and getting our pre-qualification and capacity level and that sort of thing approved through the department. They have always done a good job advertising [bids]. We always receive an e-mail within the first hour of business between 8:00 and 9:00 in the morning when it is posted to the website. And you can download it.

B. Bid Shopping

The interviewees reported the following anecdotes concerning bid shopping:⁷

A minority male owner of a construction company reported that he experienced bid shopping, and he also explained why he has not made a formal complaint:

We call [bid shopping] "back dooring" and it happens. When we had the low number and all of a sudden that same number goes out to another contractor and [we] do not get [any]thing from the [prime contractor] and...you know that it was shopped. [We do not complain] because it's kind of the norm..."How do you prove it?"

A Caucasian male owner of a construction company reported that he is aware of bid shopping but not between DBE and non-DBE bidders:

Most of the time general contractors are trying to get DBEs to be low. If you have a low DBE, you don't shop him out with a non-DBE, You never do that. DBEs get the consideration because, as a general contractor, we are trying to meet those goals. The last thing you want to do is go into a job

⁷ The practice of divulging a subcontractor's bid to a competitor or other prospective subcontractor before the award of a contract in order to secure a lower bid.



where you are the low bidder and you have not met the goal. So, why would you take a low DBE and shop him out to a non-DBE? The way it happens is the other way around.

A minority male owner of a construction-related professional services company believes his bid was shopped by a prime contractor which resulted in loss of work:

There was one specific incident when I submitted a bid, and I never heard back from anyone. I didn't get the project and later on I checked the IDOT website, and . . . the pay items that I [had] bid on went for the exact amount that I bid. There [are] many different factors that go into a bid, and there is no way that the numbers just happened to match every number that I [submitted] to that contractor. I think that my price was definitely used. But I was not used for the work, someone else was.

This Caucasian female owner of a construction company offered similar sentiments:

I will give a contractor a low bid, and that contractor will call their preferred vendor and say, "Match this price and I'll give you the job." All of a sudden we see the numbers from the contractor that is ultimately published, and it's exactly the same as what [we] provided.

A Caucasian female owner of a construction company reported that prime contractors have contacted her shopping for a bid:

I have had contractors call me and say, "Hey, so and so got this, what can you do?"

A minority male owner of a construction company reported that he does not submit bids to certain prime contractors who he believes are not earnest in their solicitation:

A lot of times [there are general contractors] that [I know] will never really do business with us. They are just doing some bid shopping. That is really what I think they are doing, bid shopping.

A minority male owner of a construction company reported that prime contractors have solicited bids from his company without an honest intent of utilizing his services:

Sometimes if the [prime contractor] is not required to use us, they will [use] our price and call the other contractor that they are doing business with and say, "Look, I've got these guys at this price. Can you come in at that price



or lower and it's yours? You come down and meet this price or I [will] end up giving it to this guy." And sometimes they don't give it to us anyway. They'll just use it to bring the other guy even lower and then just give it to the other guy. I [have had this experience] with general contractors working with both agencies.

A Caucasian male owner of a construction company reported that some DBEs do not know how to correctly complete a bid quote which can cause problems for the prime contractor:

You talk about bid shopping. When they send the prices into us, a lot of the DBEs will just fill out a form and just send in the units. They won't tell you what they exclude or what they include, and they wait until the last minute before they send it in and now the bids are due at 10:00 o'clock and you've got all these DBEs looking. You're trying to compare their prices. You're trying to get a hold of them on the phone. They're not available. It's rough. They're out working the job, and you can't get them, and now you've got to make a decision on whom you're going to use.

C. Inadequate Lead Time

*The interviewees reported the following anecdotes concerning inadequate lead time:*⁸

A minority male owner of a construction company reported that a small percentage of the bid solicitations received from prime contractors have inadequate lead time:

If there is not enough time, you can't bid. There are jobs . . . [where a prime contractor] will put a notice out and . . . it [will be] due tomorrow. You can't get the plans and traffic control numbers and pay item numbers overnight. It's a small percentage, maybe five percent.

A minority male owner of a construction company reported that he too has been given a few days to prepare a bid for certain prime contractors:

Sometimes a general contractor [will] call us at the last minute, like two or three days or the morning before [they] expect us to [submit a] price. Probably 30 percent of them have inadequate lead time. I [need] about a week and a half because [I] like to visit the sites to . . . see the conditions.

⁸ An insufficient amount of time between the solicitation of a bid from a contractor and the time required for the contractor to respond.



A Caucasian male owner of a construction company reported that he has experienced inadequate lead time from both IDOT and the Illinois Tollway:

IDOT and the Tollway will list a job that is out for bid but the drawings [will] not [be available]. Both agencies are that way. We need a month and we don't get it. They have a year and a half to work up the drawings and then there are mistakes on the drawings. Then there is time we have to [spend] going through [the plans] and then get questions to them, [and] they won't answer questions a couple of weeks ahead of the letting.

Sometimes we have go[ne] to the Tollway's chief engineer and he [may] postpone the job, then sometimes he is under the gun and can't do it. But I think the Tollway tries to do that but you've got to talk to the top guy over there because he understands it all.

A minority male owner of a construction company also reported receiving untimely bid notices from prime contractors:

The [agencies] give advance notice but . . . the [prime] contractors do not like to until a day or two before the [due] date, and it makes things very difficult for a smaller company like ours to be able to respond. The other thing is that IDOT, not so much the Tollway, has more than 200 items on a letting, and they might have several projects that we're looking at bidding on the same day. We would be in a much better position if they were to have more bid lettings in a year's time.

D. Difficulty with Suppliers

The interviewees reported the following anecdotes concerning difficulties with suppliers:

A Caucasian female owner of a construction company reported that suppliers offer different rates based on the volume of supplies being purchased:

I buy a lot of aggregate [supplies] from [company name withheld]. Do they give me a discount because I'm buying millions of tons? Sure they do. I'm sure it's the same thing with the concrete guys. I'm sure if a guy is buying 100,000 cubic yards and another guy is buying 500, I would think for sure he's getting some type of volume discount. The same thing if we're both buying 100,000 cubic yards of concrete and I'm paying in 30 days and the other guy pays in 120. I think they [would] give me a discount, but as far



as just strictly pulling into the gate and you're White and you're Black, no way. It's based on how you pay and how much you buy.

A minority male owner of a construction company also reported that suppliers offer different prices based on the volume of supplies being purchased:

Sometimes [vendors] give better rates . . . depending on the relationship. If you are buying \$100,000 worth of stuff consistently from them, they are willing to cut their profits a little bit to keep doing business with you as opposed to someone who is just going to call them once.

This Caucasian male owner of a construction company reported that preferred vendor rates are sometimes based on payment options:

They might give a better price because the contractor pays them on time instead of delaying them. Some contractors will try to [delay payment] on the job because IDOT's very slow.

A minority male owner of a construction company reported that a business owner's buying power and business relationship can affect pricing for supplies:

[Suppliers] may have a standard pricing model at the outset, but they [also have] discounts after the fact but prior to bid date. In our environment, suppliers tend to deal with lower margins, higher volume. There is different pricing due to us not having either the buying power or the relationships that would affect a different decision by the [supplier].

A Caucasian female owner of a construction company reported that her supplier requires a joint check before she can purchase her supplies:

A lot of supplier agreements require a joint check. And they . . . want that check overnighted to them. A joint check is [required because] they [do] not trust me as a disadvantaged business owner to get paid and then pay them. But if it's a joint check, I can't put that check in my bank for a week because the joint check is written to my company and the supplier. So the suppliers know the checks will get to them much faster because they know that I will not be using any of that money for any length of time.



E. Difficulty Meeting Pre-Qualification Requirements

The interviewees reported the following anecdotes concerning pre-qualifications:

A Caucasian female owner of a construction-related professional services company reported that she was denied pre-qualification from IDOT because of the size of her company:

We had [difficulty with pre-qualifications] because we were too small. The way IDOT has it set up, you need many different people [with] many different levels of experience. So [we needed] about eleven people in our firm and even at thirty we still didn't have the right eleven people to get the hazardous waste pre-qualification. It doesn't mean we don't have the experience to do the work, but it's just the number of people IDOT wanted to see, precluded us from getting [the pre-qualification].

A minority male owner of an engineering company reported that he had to restructure his company in order to be pre-qualified for IDOT:

During 2006 or maybe even a little prior to that, IDOT changed their pre-qualifications to where you had to actually be a professional design or professional engineering corporation, what they call a PC. I am a licensed architect, my partner is an engineer, but he's not licensed, so the majority of [my] board of directors [had] to be a professional corporation. So we had to create another corporation that's wholly owned in order to get pre-qualified.

A minority male owner of an engineering company believes that IDOT's pre-qualifications are too lax:

I would like for them to put some limitations on [their pre-qualification requirements]. It is too wide-open. You submit an application and they give it to you. . . and [you have] a lot of DBEs out there that have no qualification but they have the pre-qualifications to do work. Because they put resources they don't have on paper, and IDOT did not check them.



F. IDOT and the Illinois Tollway Inspectors Creating Barriers

The interviewees reported the following anecdotes concerning barriers created by IDOT and the Illinois Tollway's inspectors:

A minority male owner of a construction company reported that he was unfairly monitored by an IDOT inspector:

There was a shop inspector that gave me a lot of trouble but that was years ago. He was ridiculous and Springfield knew it, but they couldn't do anything about it because he was doing his job and that's all they wanted. One time we got a load of paint on a Friday night and we moved it away, [from] the furnace in the building. And he came out at five o'clock in the morning and put a thermometer under a 20 foot door and he said it was twelve degrees. He said, "The paint is too cold and you cannot use it. You have to buy new paint." It was \$8,000 worth of paint. So, I had to buy all new paint.

I called Springfield about it and they said, "So he won't let you use frozen paint?" I said, "You know it didn't freeze because there is a water fountain right there and [it] didn't freeze." [Later] he called back and said, "When are you going to work for us again?" And I said, "When I see you in the obituary."

A Caucasian male owner of a construction company reported that oftentimes inspectors are excessively critical of competent contractors:

I think the [inspectors] hold us [company name withheld] and some other contractors to a higher standard. I mean myself and other general contractors have said that the more competent you are, the more they demand out of you. And the more incompetent you are, the less they demand from you. If a fellow walks onto the job and he doesn't know which way to start setting up a traffic control taper, they seem to take him by the hand and lead him through it. But if you know what you're doing, many times [they will] tell you no, you're out of bounds and you can't do it this way when the [contractor] on the job right next door [is allowed to] do the same thing.



A Caucasian male owner of a construction company reported that he has experienced inconsistent monitoring standards from IDOT inspectors depending on the inspector in charge:

The [inspectors] in the field tend to be inconsistent. An [inspector] that has only been out their a couple of years is certainly different then a guy that has been in the field for 25 years. That is just how it works. So, there are some inconsistencies depending on who is running the job, but that's true in the private sector too.

A minority male owner of a construction company reported that oftentimes his bid is reduced after contract award:

With IDOT, the resident engineer always has the last word on a project. We [saw] the contractor ask for all the items for us. . . and all of a sudden the contract comes back with a few items less than what we [bid] for and we try as a DBE to call and say, wait a minute you reduced the amount of the bid that we gave you and you need to change the submission papers on the DBE accordingly. This happens all the time and that's why I end up in court.

G. Excessive Monitoring

The interviewees reported the following anecdotes concerning excessive monitoring:

A minority male owner of a construction company reported that he experienced excessive monitoring on an IDOT job site:

I looked at our activity worksheet and I was [thinking] “geez Louise,” how many times are we going to get called to this one job [site]?” And we got fined the exact amount of our profit control item. In other words, we ended up doing the work for nothing. And [on] that particular job [there] was excessive [monitoring]. I don't know if it was just us [but] we were getting calls almost every day and we responded, [yet IDOT] fined us.

A minority male owner of a construction company reported on excessive monitoring by prime contractors:

[Prime] contractors. . . [will] watch every dime that goes to us or [say] “Oh, you are only doing this much work. You need to be doing this.” [It] feels like there is more supervision on us. They will scrutinize how many hours



we are putting in, or if we are actually performing the work and if they are going to have to redo it or not later.

However, a Caucasian male owner of a construction company reported that he has to deal with substandard work from minority subcontractors:

I think the standard is higher for Caucasian contractors. I shouldn't say higher in the sense of discrimination, but if the specifications or the demands of getting the work done are at a par level, that's what you expect people to hit and very many times we will put up with sub-standard performance by minority contractors. We actually try to work with the contractors and, whether they are minority or Caucasian, we try to make sure that our subcontractors make money because we want them to make money. We want them to survive and go onto the next job. So we will work with DBEs to talk to them about scheduling, [informing] them when we will need [them], so [they] can get ready. And [we tell] them everything that they need to do the work and if . . . they are not ready, we [tell] them here is why you should have done this and eventually we will talk to them about penalties for the job that they are going to incur. Because if we as a general are penalized for the job not being complete due to a delay [by a] subcontractor, whichever race they may be or gender, we pass those penalties onto them.

H. Prime Contractors Avoiding DBE Program Requirements

*The interviewees reported the following anecdotes concerning prime contractors avoiding DBE Program requirements:*⁹

A Caucasian female owner of a construction company reported that prime contractors oftentimes list her company as a subcontractor on their bid submittals without her authorization:

Prime contractors list us without authorization and the only reason we know is because IDOT notifies [us] that [we were] listed on the project.

⁹

Prime contractors engaging in activity that circumvents DBE participation requirements.



A Caucasian female owner of a construction company reported that oftentimes she does not receive a response from prime contractors regarding her bid submittal:

There [are] many times where I submitted a bid and the [prime contractor] does not call back. [I] call to follow-up a week or whatever later and they don't even return [my] phone call. . . I think that it's pervasive throughout this industry.

A minority male owner of a construction-related professional services company reported that he believes his prime contractor unfairly rescinded his contract:

The [prime] contractor wined and dined us, so to speak, to get us to become part of their teams, so they could present a quality team to IDOT and be awarded a five-year contract with two two-year extensions for a total of nine years. And in doing so, enticed me to become part of their team by signing a contract that would allocate a considerable amount of work that would allow our business to continue to grow. Now I am in the midst of a legal battle because they are breaking that contract with me, and I have been disappointed that IDOT's staff over at District 1 has been non-responsive in trying to mediate the concerns that are going on there. They are staying out of it. They think it's a contractual issue between the prime and us. I believe the prime was deceitful in bringing us in and now they are trying to terminate the agreement [even though] they added us to their DBE requirement.

A Caucasian male owner of a construction company reported that as a prime contractor he believes that DBEs should do more outreach to prime contractors to obtain work. He also reported that he is open to working with DBEs that personally come to his office seeking work:

IDOT has this mentality, and the Tollway, [where] they put the DBEs on display and we as the generals need to come and find them, which is backwards in the free market. If we're the generals and have the need for the work or we have the opportunity for the work, it's up to the subcontractor to come to us. I don't think that IDOT or the Tollway does a very good job at all of explaining that to the DBEs, which they need to come out and meet the general contractors, not the other way around. Calling on us at our office is the best approach in my mind. We, as a company, are very open to that. The DBE community seems to think that there is some castle that we live in [and] that they can't come to see us. All they need to do is walk in the front door.



A Caucasian female owner of a construction company reported that oftentimes some prime contractors could do more to earnestly seek work from DBEs:

[Prime] contractors should probably make a little bit more effort to get to know some of the DBEs and give them a chance. Put them on a smaller job if you're not comfortable with their capabilities and try them because you know that the opportunity is there. But they get used to their buddies that they work with all the time. Or they really don't want to give up any part of their contract, I've seen that too sometimes. They just want to do as much of it as they can themselves. If they didn't have to give anything to a subcontractor or a DBE, they wouldn't. Unless, of course, a DBE comes in with a price lower than their own for self-performing, then they're more than happy to give it to you and let you fall on your face.

I. Difficulty with Unions

The interviewees reported the following anecdotes concerning difficulties with unions:

A minority male owner of a construction company believes that unions are not earnest in their attempt to work with minorities:

I think the unions are open to minorities, not because they are conscious of discrimination, but they look at [minorities] as dollars. Because the reality is that I have heard union officials refer to minorities in a different way. If you look at the membership of the unions, it would be very interesting to see what percentage [are] minorities. I think [they] are used as apprentices.

A minority male owner of a construction company reported that he believes some unions only use minority apprentices when goals are required:

I think sometimes [unions] just meet the goal that they have to [for] what these general contractors need. If it's a requirement that you have a certain number of women on the project, I think they only [stick] to that number. Sometimes these unions say they have requirements where they are basically telling you that they want White people to come and be an apprentice. They say if you don't speak English, if you don't have a high school education, you're not allowed to sign up.



A Caucasian female owner of a construction company reported that she has been denied work from some prime contractors because she is not a union shop:

Basically, these contractors have flat out told me they will not use me because I'm an open-shop. Even though it says they can't discriminate based on union affiliation, they have guaranteed me they will not [use my services]. Their union contract says they cannot use me, which I don't understand how you can sign one contract that says you won't discriminate based on union affiliation, which is what they sign with IDOT. I have had them tell me flat-out there's no way they'd ever use me so often, I don't send bids to certain companies because it's a waste of my effort and office time. It's a lot of work for me to call around and get numbers and put [a bid] together and do the figuring, only to have them not use me. They don't discriminate based on my work ability. They discriminate based on something that has nothing to do with my quality of work.

IV. FINANCIAL BARRIERS

A. Difficulty Obtaining Bonding

The interviewees reported the following anecdotes concerning difficulties obtaining bonding:

A Caucasian male owner of a construction company reported that, due to the current economy, he requires bonds from his subcontractors:

We have required bonds of subcontractors and are looking at doing it more in these tough times. Historically, we have not required bonds and so it's more the exception when we do require a bond from a subcontractor.

A Caucasian male owner of a construction company reported that he typically does not require bonds from his subcontractors:

We have to really ask for [a bond from] everybody, [otherwise] it's really not fair. But if we have somebody that has never worked for us and he doesn't have a good reputation, we might have to ask him for [a bond] because we are unsure that he is going to finish the work, but we would not do it unless we had cause. So, it's a form of backup for us. Most of the minorities can't get a bond. Then we would just tend to forg[ive] it.



A minority male owner of a construction company reported that he was denied bonding due to the size of his company:

In 2008, there were a couple of five million dollar projects, and at that time our bonding capability was only two million. We tried to explain to the bonding company that more than 75 percent was going to be subcontracted out. . . and they still wouldn't. Because we are a small company, the largest we have done is probably almost two million for a single project.

A Caucasian female owner of a construction company provided several reasons why she has been unable to obtain bonding for her company:

We cannot get bonded. I have been working diligently toward getting bonded and I have literally met a block wall. They say that it's because I don't borrow money. I do borrow large sums of money but I borrow it from my local bank. I borrow it for six months at a time and I go in and I pay it off and that doesn't get reported to credit bureaus. I also feel that because some of the bonding companies ask whether I'm union affiliated or not, could be a factor. I don't know why they ask, but they do.

A Caucasian female owner of a construction company believes that the inability of small businesses to obtain bonding is a long-standing issue:

The bond market is terrible. [Unless you are one of] the huge guys, it's very difficult to get bonding, and we've been talking with the State about that for a long time now.

A minority male owner of a construction company reported that he has been able to obtain bonding; however, he still has difficulty increasing the capacity of his company:

It's been a big challenge. A lot of times these bonding companies will in fact bond you, [but] there is a lot of red tape. So we may have performed our scope of work but there is still a 100 percent of our bond tied up. [Which prevents us] from any other potential work that [my] company needs for survival. Sometimes it's very difficult to get a percentage of [my] bond lifted to grow [the] bond to capacity to bid other work. They [require] your personal financials, your work-in-progress, the status of current jobs, quarterly statements, any letters of support, recommendation letters, and they send out questionnaires and interview [businesses] you have worked with.



This same business owner believes that prime contractors that are required to obtain a bid bond should not ask for additional bonding from their subcontractors:

I believe if a prime contractor has the capacity to bond a job, why make a subcontractor bond additionally? It seems like it is overkill. At the same time I believe that bonding is a huge barrier to entry for certain jobs. More minority companies would have the ability to bond certain jobs if they have the capability of performing. The prime is always doing 35 to 45 percent self-performance, but yet I have to bond a 100 percent of the job even if I can get subcontractors that were doing certain portions of that job that I wasn't self-performing. So I think it's a huge barrier for small companies, especially when the bonding companies look at your past performance, net worth, which is limited.

B. Late Payments from IDOT and/or the Illinois Tollway

The interviewees reported the following anecdotes concerning late payments by IDOT and/or the Illinois Tollway:

A minority male owner of a construction company reported that he typically receives late payments from IDOT:

As a prime contractor, [I have received late payments] from IDOT multiple times. Even during the summer alone, they shut down because they couldn't pass the [budget] and no one got paid for 60 days at a time. When they say they'll put in a payment for you, they still take 30 to 45 days just to pay. I would say probably about 80 percent of [payments are late]. The Tollway is a little bit better.

This same business owner explained the impact of receiving late payments on his small business:

[Late payments incurs] financing costs when you have to draw on your line of credit and you're paying the bank. That is extra costs you didn't account for. You face late charges from your suppliers because you haven't been paid, and because you haven't paid down, other projects suffer because you've overextended your line of credit with that supplier. They won't give you any more material, and sometimes the employees threaten to walk off jobs because they haven't been paid.



A minority male owner of a construction company reported that he has waited up to three years for payment from IDOT:

Late payments are once it's past 30 or 90 days. With IDOT it can go past two to three years. Primes have [said] it hasn't been approved or they are still working on it in Springfield. Or "I can't pay you because I have not been paid." When you talk to IDOT or you talk to the contractor, it's always one thing after another.

This same business owner reported on the impact of late payments on subcontractors:

It goes downhill when IDOT doesn't pay, and then when the general contractor gets the money, he sits on it.

A Caucasian male owner of a construction company reported that IDOT's payment timeline has gotten worse over the years:

IDOT [has been] two to three months [late]. It's becoming more these past 12 months and we have seen a sharp rise in late payment. With IDOT, this summer was very bad. They put out a lot of work and they didn't sell bonds to pay for it, and so we all had to wait until late October to get paid for work that was let in May.

A Caucasian female owner of a construction company reported on the hardships she endured because of untimely payments from IDOT:

I've never been unable to meet obligations but I have been put in very difficult positions and had to borrow money. I never should've had to borrow from my bank because of late payments from the State. And not because of late payments from the prime [contractor as well]. I never should've had to borrow and, therefore, pay interest. It ties up my credit to where I can't borrow money on other things if I need to. It causes me to increase my bids. If I'm going to bid a job around budget time, around July, I will definitely increase the dollar amount of my bid because the chance that IDOT won't be able to pay me is good. Therefore, I have to make amends to cover my interest that I could incur. It definitely raises the cost of my bid.



A Caucasian female owner of an engineering company reported that she experienced late payments from both IDOT and the Illinois Tollway:

[Late payments are] staggering problems at both agencies and then every other agency we deal with. [It creates] massive cash flow issues. We have Tollway expenditures from 2006 that still have not been paid. Now that's not completely the Tollway's fault because the prime held them up until this year. So [we have waited] four to five months for the Tollway. IDOT, I'm sure we've gone six or seven months.

A Caucasian female owner of a construction company reported that it is easier to track payments to prime contractors on IDOT projects:

Late for me would be if we did the work and it was eight weeks later, and we still haven't gotten paid anything for it. The difference between IDOT and the Tollway is, with IDOT, all I have to do is go on the website and put in the contract number and [obtain] the contract pay item and then the pay item summary. So far I haven't had to make that call to IDOT and say look, this is getting ridiculous, I need [to get] paid.

This same business owner reported that tracking down payments can be time-consuming:

It takes a lot of time and energy. I spent almost all day on Friday trying to get paid. I have to go to the website for each job I do, look up how much has been paid, see who's not paying me that's supposed to pay me. Yeah, it takes a lot of effort on that part.

This Caucasian male owner of a construction company reported on the domino effect from prime contractors to subcontractor when IDOT is late with their payments:

It was bad for me this year. Work that we bid in May and started in June, we didn't get any money until the end of September. It was so bad, and I blew through my entire credit line. I had to call all my major suppliers . . . with my hat in my hand and say, "Hey, you guys see what's going on?" They knew what was going on. I'm a longtime customer. I needed help. I was out of money. Now, imagine a subcontractor gets paid as I get paid. When IDOT pays me, I pay them. I don't pre-pay subcontractors. Nobody does. That's just how it works. You don't prepay subcontractors, otherwise I'd be fronting all this money. So, imagine what was happening to those guys. They are already on a shoestring. They probably have very limited lines of credit and very limited relationships with their material suppliers.



All of a sudden they're not getting paid for three, four, or five months for their work.

A minority male owner of an engineering company reported that he experiences cash flow problems because of late payments:

[Prime contractors] always say if the payment is late, that they have not received [payment] from the Tollway or IDOT. That is why they [have] not paid us. Late payments cause problems when they are two to four months late. This causes cash flow [problems] and that makes it difficult for the bank [to provide] for a line of credit.

A minority male owner of an engineering company reported that he has learned to plan ahead to prepare for receiving late payments:

I have been in the system long enough to know how the system works. So maybe that makes it a little easier for me. I know IDOT is not going to pay in 60 days; it's going to be 90 days.

A Caucasian female owner of an engineering company reported that there are no procedures for subcontractors to complain about late payments from prime contractors:

As a sub we are buried, so we don't have the channel to talk to IDOT about what we have to go through. We [have to go through] our primes, so that makes it a little harder.

C. Late Payments by Prime Contractors

The interviewees reported the following anecdotes concerning late payments by prime contractors:

A minority male owner of a construction company reported that his prime contractor is late paying him because he is waiting on payment from IDOT:

My prime is slower than IDOT but I know that they have to collect from IDOT before they pay us.



A minority male owner of a construction company also reported that his prime contractor pays late because he is waiting on payment from IDOT or the Illinois Tollway:

The [prime contractor] can't pay because they haven't gotten paid. That's the only reason that I can see because I mean, anybody that has worked for the Tollway or IDOT knows that takes time to [receive payment].

A minority male owner of a construction company reported that he waited more than 120 days for payment from a prime contractor who had not been paid by IDOT:

They were over 120 days [late] because they didn't get their money from IDOT.

A minority male owner of an engineering company reported that he too receives late payments but oftentimes the prime contractor is waiting for payment from IDOT:

It's a two-way street. We experience late payment. [We have] to chase our money down by calling the contractor. The prime contractor will say that he hasn't been paid by IDOT. We would check on IDOT to see if that's true, and a lot of times it is true. But sometimes it's not true. So chasing down your money to get paid is a big issue.

A minority male owner of an engineering company reported that he has waited 120 days to receive payment from a prime contractor:

It's been tough. There has been a 120 plus days of outstanding receivables, and [I] had to meet payroll. This is one of the things that really hurts minority contractors because sometimes [we] can't wait 120 days for payment.

A Caucasian male owner of a construction company reported that he has waited up to three months to receive payment from a prime contractor:

I [have waited] two or three months for payment from a [prime contractor].

A minority male owner of a construction company reported that sometimes prime contractors refuse to pay for services previously rendered:

We have contractors that do not pay [for] services that they've requested. I'm doing some collections now and I'm calling companies up, and all of a sudden they have this mental lapse or this senior moment where, "Oh I don't



remember that.” We have got supporting documents and in some cases we end up in litigation.

A minority male owner of a construction company reported that trying to get paid can turn into a cycle of confusion:

The prime [contractor] will say IDOT hasn't paid and then you go to IDOT and [look on] the Internet and try to find if they have been paid. It's a vicious circle all the time.

A minority male owner of a construction company explained when he considers his payment to be late:

A late payment is once the [prime] have gotten their payment and it still takes them 30 days to send the check out to us.

A Caucasian female owner of a construction company explained how receiving late payments affects her business:

[Late payments] affects cash flow but it affects how I pay my vendors. I'm on a cash basis as I know a lot of people are in my business. So when that fuel truck pulls in, I have to give the money, and if I don't have the money, I don't get fuel. It's a domino effect because if I don't have fuel, then the trucks don't run.

A Caucasian female owner of a construction company also reported on the effects of late payments on her business:

There are times when I had to borrow money to meet payroll because of late payments.

A Caucasian female owner of a construction company reported on the problems she encounters because of late payments from prime contractors:

[Late payments] has caused a lot of problems. By the time I finish a job, pay all of my employees, pay all of their union benefits, and pay for all of my materials, there's a lot of money that's been put out. In some cases, there are projects right now that I have worked on where payout has not gone in, since September. So on a project like that, I'll already have my payments in for roughly 30 days, and I still have not been paid for the work. And the prime contractor still has not been paid for the work. It's very



difficult once you get into the busy season where you running like crazy doing all the jobs, and you're not getting paid for anything.

This Caucasian female owner of an engineering company reported on her experience dealing with late payments:

As a subcontractor, we have to jump through a lot more hoops and ride the wings of our prime contractors.

V. BURDENSOME DBE CERTIFICATION REQUIREMENTS

The interviewees reported the following anecdotes concerning burdensome DBE certification requirements:

A minority male owner of a construction-related professional services company reported on his experience with the DBE certification process:

I think it's a little bit onerous. Every year I'm asked to re-certify and in the re-certification process I'm asked for the last three years of tax returns. [Which] means every year I'm submitting two tax returns that are already on file because I'm going back every three years. Obviously, there is certain tax [data] that we've already submitted. When you're a small business like us, any additional paperwork is problematic. We are also a BEP through CMS, we are a DBE through IDOT, and we are an MBE through Cook County and the City of Chicago. There was something nice about the uniform process that seemed to bring some of it together but it seems like it has failed to capture it all one application.

A minority male owner of a construction company expressed his frustration in seeking his DBE re-certification:

They have a guy by the name of [name withheld] in charge in Springfield. And you can fax him all your stuff or send it by certified mail and . . . he will claim he never [received] it. And months go by and [I] will call up and say, "You know I'm going to expire?" He is probably the poorest guy I ever saw in State work.



A Caucasian male owner of a construction company reported that he believes his company was unfairly denied DBE certification:

[IDOT] was not convinced that my mom had what they claimed as control [of the business]. [There] was a couple of issues with [her] not [being] the president of the company. I was the president so that stuff in my opinion is minor . . . She does own the majority of the stock of the company and she knows what is going on every day. She [works] in the office. Is she out here on a piece of machinery running it herself? No. That's my job, that is why she hired me. They were not convinced that [she had control of the business]. The denial letter was kind of humorous [because] the person that is running and managing the company and making the business decisions does not necessarily have to know the operation . . . We met all the WBE goals and we were denied because, to be quite frank, of being Caucasian female.

A Caucasian female owner of a construction company reported that initially it was difficult for her to obtain her DBE certification:

It was very difficult to get through [the certification process]. I am a White woman married to a White man with construction experience. And that [worked] against me because they felt that I was running the company through my husband and [using] my name. Even though I had 20 years [of] experience, 15 at the time in road construction. They sent a woman out that had no concept of construction. Maybe on paper she was okay, but she didn't know [about] construction equipment and she denied me. But I later found out ways to get around it and was able to work through it.

A Caucasian female owner of a construction company believes that IDOT's strict DBE certification requirements are needed to reduce the occurrence of fronts:

I think if [the DBE certification process] was too simple and not a lot of paperwork . . . [there would be] problems with front companies. And it would be more pervasive than it is.

And this minority male owner of an engineering company reported that his experience with the certification process was long and arduous:

[The certification process] is arduously slow. I know in Illinois there have been some difficulties in the past, so maybe that is why the process is so



arduous. But it is a fairly long process and we had a site visit, a couple interviews. You have to keep pushing it. It took several months.

The interviewees reported the following anecdotes concerning businesses operating as fronts:¹⁰

A Caucasian male owner of construction company reported that he had first-hand knowledge of fronts:

I have heard of [fronts]. We had times when we have received quotes from subcontractors and have been told, well if you need it to be DBE, add ten percent to it. I would infer that is a company that is not minority-owned but is somehow going to do the work and pass it through a minority front company.

A Caucasian female owner of an engineering company reported that she has personal knowledge of fronts:

I know personally of a couple where the husband was really the power behind the throne. He used business connections to get the wife the business. I know of three instances where that was the case.

VI. COMMENTS ABOUT IDOT'S DBE PROGRAM AND THE ILLINOIS TOLLWAY'S DIVERSITY PROGRAMS

The interviewees reported the following anecdotes concerning comments about IDOT's DBE Program and the Illinois Tollway's Diversity Programs:

A minority male owner of a construction company reported that IDOT's DBE program had stricter monitoring practices in the past:

My past experience with IDOT [was] that they were very good at [monitoring their program]. [The DBE program] has affected my business in a positive way. In the past they pretty much kept contractors a little bit more on their toes [when] they needed to [meet] DBE participation. They would not award a contract if they did not meet [the DBE goals]. I don't think they're doing it very well now. I had one particular job where I was

¹⁰ A business fraudulently operating as a MBE or WBE.



penalized almost the whole amount of my [budget], and I put calls into the DBE department and [no one] ever got back [to me]. There is an engineer that insisted that we failed to respond and even with solid evidence that I . . . responded to [his] call, which [required] an immense amount of time [to] respond. I just dropped the issue because I was pretty much fed up. I'm very grateful for the [DBE] program because it has given me opportunities. We have been successful and in our own way. I have put three kids through school and I'm very grateful that The Program has worked. It's not flawless but it has worked.

This same business owner reported that he is not familiar with the Illinois Tollway's diversity programs because he is not a part of the unions:

I have not had experience working with the [Tollway]. The Tollway is an organization that for many years did not have an MBE or a DBE Program. I know they have one now, which is nice. Unfortunately, we are not permitted to step into their projects because we don't have a union.

A Caucasian female owner of a construction company reported that IDOT has the rules in place to monitor their DBE program, but the rules are not enforced:

Although they have an effective monitoring [system] in place, they do not follow the rules. In other words, yes, the engineer knows that the work is there and they are there to [ensure] that a DBE does it, but when the prime does it instead, the engineers are told to just go ahead and mark it as the DBE.

A Caucasian female owner of a construction company reported on what she believes is the lack of due diligence on the part of IDOT to monitor its DBE program:

Well, by not doing due diligence in monitoring the DBEs, other truckers are [incorrectly] counted as DBEs in my area, causing me to lose work. There are also several companies in our area that are known fronts. They are White males and they take business away from my company. I think they're helpful in shifting [complaints] and passing them along to somebody. I don't think anyone wants to take a stand. They don't want to jeopardize their position or job.



A minority male owner of a construction company believes that IDOT adequately monitors its DBE program:

I think that [IDOT does] a good job [monitoring their] Program. A percentage of certain projects [go to DBEs] and then they follow up. My business relies on it considerably. IDOT's DBE officers are helpful if there is a problem [but they] are seldom on job sites.

However, this same business owner does not believe the resident engineers track DBE utilization on the job sites:

I do not think the resident engineer does much with minority contractors because he runs his own project. I have never had a resident engineer say anything about minority contractors. I'm just a subcontractor to the prime and, as a subcontractor, I work for the prime, not for him.

A Caucasian male owner of a construction company reported on why he believes IDOT's DBE program can be unfair to prime contractors:

I would say [IDOT's DBE Program] has mostly been negative under the two Democratic governors when the [DBE] waiver process has become much more stringent, and in my mind, unfair. I think it puts the non-minority specialty contractor at a huge disadvantage. We are forced to give work to DBEs when there's competitive contractors that we know can do the work. But we are forced to meet the goals where many times we have to give up our own work and give it to a minority or take a non-minority's price and show it to a minority after the bid. We didn't receive any quotes before the letting and solicitation . . . and this particular case was a joint venture project. One of the joint venture partners was going to self-perform the sewer work. Instead, we were forced to give up that work to a DBE who severely delayed the job.

A minority male owner of a construction company reported that IDOT's good faith effort requirements are enforced to ensure that prime contractors meet the DBE goals:

[IDOT's monitoring system would be effective] if they would enforce them. They require the forms be turned in within a certain number of days for a bid package, and if it's not included or turned in during that time period, the bid is thrown out. I know IDOT lists their DBEs on their website with contact information.



They have diversity seminars to meet prime contractors and workshops on how to fill out the proper forms. I think IDOT is trying. [The DBE Program] gives us [access] to some of the contracts. [DBE participation] is required. We were given an opportunity that we wouldn't be given normally if we weren't a DBE or on that list. It allowed us to be able to have a successful company and continue. If they didn't have these DBE goals, they wouldn't even call us. They wouldn't even take us seriously.

A Caucasian male owner of a construction company believes that IDOT should consider the availability of DBEs in a particular field to make sure there are enough DBEs in each of the trades:

IDOT should address the issues of the availability of the DBE status of minority contractors or disadvantaged contractors. I don't feel that they [are represented] in our particular area in Southern Illinois. I guess what I'm wanting to say in a nutshell, is they need to . . . look at getting more DBE contractors in those areas.

This same business owner also believes that the decision makers should be made up of diverse IDOT representatives:

As far as being able to meet all of their goals that they are requiring, in my opinion, is not the problem. I think the problem lies with the individuals who are making the decision who gets to be a minority-or a woman-owned business. I don't know if there are one, two, or ten people making the decision. I'm not sure but I think it needs to be a more diverse group of people rather than maybe just a handful or one making the decisions.

A Caucasian male owner of a construction company reported that IDOT is aggressive in its approach in ensuring prime contractors meet the DBE goals:

[IDOT] has been really good because they make a big effort to push these DBE subs to perform both on the job and with their paperwork, which is two separate things. Sometimes you get a guy that performs the work but he's terrible on the paperwork, or he just can't do the work and he's over his head. What happens a lot of times when you get a decent DBE sub, everybody wants to use him because he's good. And what happens is he gets over his head.



This same business owner also explained how the DBE requirements can unfairly punish non- DBE subcontractors:

Now, he gets behind and he's not performing and that's been a problem. There's been two separate problems that IDOT has definitely intervened. Specifically, [name withheld] at IDOT has been great. She says, "Hey, if you've got a guy who is not performing, you send him your letters and you send me a letter and we'll get on top of him. If he's not turning in his paperwork..." So yes, they've been very good on helping with that. There are not a lot of DBE paving contractors. There's a couple but not a lot, and none of them own an asphalt plant.

But what happens on the flip-side is this January letting all the DBE guys get full. Well, the non-DBE guys [will get] a last look. Do you know what I mean by a last look to meet a price? Let's say I've got a non-DBE sub that's low but I need a higher percentage of DBE work. I'll tell you flat out. I call the DBE back and tell them look, if you meet this price and here is this non-DBE guy's exact price, if you meet it you can have the job and they do. So, guess who got really screwed in that deal? The non-DBE guy. The non-DBE sub who had the low price going in because I gave the last look to a DBE guy, and that happens all the time.

This same business owner further elaborated:

I've said all along it's a great opportunity for some of these DBEs, yet the guys that are good, you can take this program away tomorrow and they'd be just as good as they are now. They would get just as much work. They would perform just as well. They would make as much money. All it does is add more to them because everybody wants to use them. The smart guys don't let themselves get lulled into taking on too much work. They're smart businessmen to start with. This program is great. They love it but you can take it away tomorrow and they'd be just as successful.

A Caucasian male owner of a construction company reported that it can be difficult to keep DBEs interested in continuing to bid with his firm:

We have to use a certain percentage of the subcontractors that are DBEs, so we have to go after those people. So there is a shortage, and we keep track of them and call them up and try to find new ones. We go to meetings that IDOT has put together with DBEs and the Tollway. If he doesn't meet the goals, he has to submit his due diligence of trying to get the DBEs. So, he



has to submit all his paperwork and if we don't meet it, then they could give you a waiver. It's not an easy process to go through because you have to prove to them that you did your due diligence. They have a tendency to bid the same percentages on every job. So, there might be a job where you can turn around and get 20 percent. There might be a job where you can get only five percent. There's no DBEs out there that do the difference in percentages. They are not there. We can tell when we're going to have a problem because that's our livelihood. We have to bid this work and that's the only way we will stay in business. So, we know that when we're going to be up against it, that there's not enough DBEs out there on a particular job and we're going to have trouble.

[IDOT DBE officers perform] a workforce analysis. They want to be sure that we have minorities working for us and when we register them, they look to see that they really are minorities. They look at the DBEs, if they are out there working.

A minority male owner of a construction-related professional services company believes that DBE programs are instrumental in balancing the playing field for all contractors:

I think...the DBE program has somewhat balanced the playing field. But we get more [services] from IDOT than the Tollway. [We get] regular invitations to participate in seminars or trade shows for DBEs and to learn about the process.

A minority male owner of a construction company believes that IDOT's DBE Program is valuable because it provides DBEs an opportunity to present themselves to prime contractors:

I think [IDOT's DBE Program] is a valuable program because it helps me [present] my company in a more professional [manner] to other compan[ies].

A minority male owner of a construction company believes that the DBE program helps DBEs obtain work from prime contractors:

I think the DBE Program helps businesses because [prime contractors] know that these programs [are in place] and try to do everything legal. They are penalized if they don't meet the goals.



A minority male owner of a construction company reported that he is given access to IDOT and the Illinois Tollway's contracts through their diversity programs:

I am able to bid on jobs that I would never be able to because of the small financing I have. The only way I have been able to work with IDOT or the Tollway is as a subcontractor. As far as I know, they really push [prime contractors] to [meet] the goal. If not, they will reduce or take the contract away from them. Usually someone who is considered a DBE manager or officer will come out to either the IDOT or the Tollway site to make sure that the identified MBE or WBE business is actually working there.

A Caucasian male owner of an engineering company explained why he believes IDOT's DBE Program is effective:

From our perspective, I think [IDOT's DBE Program] is effective. When we negotiate our fee, we show the goal [which is] consistent with what is advertised, and when we close out our affidavit of completion, we show what fees have been paid to the DBE as part of the project. So from what I've seen, it appears that they do.

A minority male owner of a construction company reported why he believes IDOT's DBE Program is valuable:

I would say [IDOT's DBE Program] is a positive because they track their numbers as it relates to what their goals should be or what they feel was committed at award time. That helps us because if there's some difference, they know where the problems are to follow-up. My understanding is that there is a fine or penalty called liquidated damages that are to be enforced for not meeting those goals. However, I must say that we have never been a part of a situation at IDOT where that's happened.

This same business owner further elaborated:

My experience with the Tollway is that they are responsive to issues that come up or at least they have been. The person whom I dealt with or whom I have more experience with is no longer with the Tollway, but her name was [name withheld]. I think she was very proactive in addressing issues. My experience with both IDOT and the Tollway might differ from other firms, but in my experience the IDOT DBE officer was more apt to go in the field and check job sites and things like that. For whatever reason I'm more



aware of those because I've had conversations with them when they were out checking.

A minority male owner of a construction company explained why he believes IDOT's DBE program is needed:

IDOT's DBE program gives the little guy an opportunity. There are people that are just getting started. And the big guys are not doing all work all the time.

A minority male owner of a construction company believes that minorities would be excluded from IDOT contracts if the DBE program was not in place:

I think that [without the DBE program] a lot of minorities wouldn't be working on State jobs. They would be excluded. With a percentage of work, well you know you would get a chance to get that work.

A Caucasian female owner of an engineering company believes that DBE programs are needed for minority and women business owners to secure public contracting work:

I think that minority and women-owned firms would really have extreme difficulty breaking into the industry if not for these programs. And the programs enable [DBEs to grow]. Our goal is to graduate and to compete on a level playing field with the big boys. But we could never get there without these programs.

A Caucasian female owner of a construction company reported that IDOT's DBE Program levels the playing field for minority DBEs:

I think [the Programs] are essential for a level playing field for us to even get a shot.

A Caucasian female owner of a construction-related professional services company explained why DBE Programs are vital to the survival of DBE firms:

It gets you in the door. It gives you an opportunity to prove who you are and what your firm can do. And we wouldn't have that opportunity without that program. We have to make it on our own merits. Which is what any business wants to be able to do. You don't want it to be a crutch for your whole life of your firm but you want to give you that opportunity to develop



your skills and understand how the system works. Without the DBE Program, it just would never happen.

A Caucasian female owner of a construction company described the success she has achieved since being certified as a DBE:

Before I was certified, I had sales just over half a million dollars annually. But after being certified my sales increased to approximately two million dollars annually. I had 15 to 16 clients prior to being certified. After being certified [it was] 35 and 40 clients due to IDOT work. So the DBE Program helped my company grow tremendously. Before [I] was certified, there was a lack of opportunity and very few prime contractors used me. I was limited to a small geographical radius. I probably only worked within a 40 mile radius because I couldn't get my foot in the door with [prime contractors]. Even if I sent a bid, they didn't use me because I didn't have the credibility. They didn't know who I was.

A minority male owner of an engineering company succinctly expressed his sentiment regarding IDOT's DBE Program:

If it wasn't for the [DBE Program], we wouldn't get any work.

A Caucasian female owner of a construction company credits IDOT's DBE Program for creating job opportunities for her company:

Being a DBE is the only reason that I was given a chance with prime contractors. Once I'm given that chance, I have to prove that I'm capable of performing the work that I'm bidding on.

A minority male owner of a construction company also credited IDOT with growing his small firm:

I certainly know that IDOT's monitoring system [has] been effective. We have had the opportunity to get on jobs because of the program. There is no way that we would have had an opportunity [without] the IDOT work that we've done. We have been successful in utilizing the programs to show our customers our capabilities. So, without the program I know we would not get IDOT work.



A Caucasian female owner of a construction company believes that the DBE Program forces some prime contractors to work with women and minority-owned firms:

A lot of DBEs contractors wouldn't exist over time if the Program wasn't there to assist them. I believe that a handful of really big road contractors would self-perform. They even want to give a slice away.

A minority male owner of a construction company also explained why he believes DBE programs are valuable:

It's an attempt to level the playing field, and I believe it's needed. It's not perfect. It could be better. But I also feel that there definitely has been a disadvantage and continues to be a disadvantage for minority and women-owned businesses.

VII. EXEMPLARY AGENCY BUSINESS PRACTICES

The interviewees reported the following anecdotes concerning exemplary agency business practices:

A minority male owner of a construction company reported on the helpful assistance he received from IDOT resident engineers:

Some [IDOT] resident engineers and technicians will . . . make sure that they help you with your grades and [make sure] things are going right [with] the project. [They are] willing to help you out. I think that's because I [have] known a lot of them for years. I think that IDOT has tried to put a few programs together to help women and minorities. But there is not enough [work] around this area and I [would] like to be able to bid contracts myself and not [as] a sub.

A minority male owner of construction-related professional services company reported that IDOT made a concerted effort to ensure that subcontractors were treated fairly on his project:

We were always direct [prime] contractors to IDOT. And this last contract, IDOT laid out the law for prime contractors on how they dealt with their subcontractors. They weren't to screw around with us . . . they encouraged all prime contractors to look at the pool of subcontractors because we



previously [worked] with IDOT. They were actually very respectful toward us.

A minority male owner of a construction company reported that the “meet and greet” seminars he attended were beneficial:

They have seminars and they send us invitations . . . usually this time of year. They [are] helpful because we can introduce our[selves] and give cards to the [prime contractors] and tell them what we do and then they might call you in the future. I think it’s good.

A minority male owner of a construction company reported that IDOT’s resident engineers made themselves available to answer his questions:

They were outstanding. [When I] had a question they would have an answer.

A Caucasian male owner of a construction company also reported that many inspectors were helpful in assisting him in successfully completing his project:

A few of them will say, “Don’t forget this or did you look at this? Did you think of this?” They are helpful. We work as a team. They want to get the job done. Some people have good personalities when it comes to that and some don’t. Some want to be a grouch and not help you.

A Caucasian male owner of an engineering company spoke highly of both IDOT and the Illinois Tollway:

Being a manager on IDOT and the Tollway’s highway and bridge [projects are great]. They are our biggest clients. And over the years it’s been very positive working with professionals in both of those agencies and being able to provide our professional services to each of those respective agencies. And see these projects get implemented that we designed.

A Caucasian female owner of a construction company reported that she received assistance from resident engineers that helped to make the project run smoothly:

There were IDOT resident engineers that were very helpful. Just getting things done smoothly and making the job run efficiently.



A minority male owner of an engineering company spoke highly of his experience working with the Illinois Tollway:

We worked . . . for the Tollway as a prime and as far as I'm concerned, they were excellent and very fair-minded people. [Name withheld] was our project manager and we did fourteen miles of pre-work on I-90, and I just thought he was an excellent guy.

A Caucasian female owner of an engineering company gave kudos to IDOT for unbundling large projects in order to create prime contracting opportunities for small businesses:

I'm not sure about the Tollway because we don't do as much Tollway work. But I think IDOT [is] pretty good about spreading the work out and they're really good to us. They are the only agency . . . where we have prime work. Because they have smaller contracts, they seem to not discriminate in terms of giving them out to small businesses whether women-or minority-owned. I would say IDOT has been super in general. I would give them an A in just relating to us and being helpful, especially as a prime.

A Caucasian female owner of a construction company reported that an IDOT inspector was quick to respond to a safety issue on a project on which she worked on:

One job I worked on, I called [name withheld] and said that the general contractor had yanked the traffic control and that the cars were flying by my men at fifty miles an hour. He took care of it immediately and got some traffic control. When it came to a safety issue, he was responsive.



VIII. RECOMMENDATIONS FOR IDOT'S DBE PROGRAM AND ILLINOIS TOLLWAY'S DIVERSITY PROGRAMS

The interviewees reported the following anecdotes concerning recommendations for IDOT's DBE Program and Illinois Tollway's Diversity Programs:

A Caucasian male owner of a construction company believes that IDOT and the Illinois Tollway could do more to train DBEs to work on their projects:

The contractors don't have the resources to train DBEs so they can do the bigger work. When the Tollway has an electrical contract, it's a big undertaking of equipment and manpower. They need to build these smaller guys that want to work for the Tollway but they can't because they're not qualified and they don't have the equipment. IDOT and the Tollway need training programs for these people so they can go after loans and the whole bit. We just don't have the resources to do it. It's too competitive in our business to ever have anybody do that. So the Tollway and IDOT really need to train them for . . . smaller jobs where they can do the job directly with the owner. That is really what we call set aside work. They really need to do that and then they can spend more time with them to get them to do the work or understand the work. We would rather lose some of the volume of the work to have set aside work for the DBEs. Not that we want to separate ourselves from them but we feel that they need some training. We can't give it to them. So we work with our subcontractors in the field, but we can't financially support them and help them get the work. That's what they need.

This same business owner recommends that more qualified DBEs are needed to do highway construction work:

I think they need to stress getting the minorities working and getting those [DBE] percentages increased. They really can't do that unless they have the backup behind the DBEs to make it go higher. They don't do the research [to determine if] the contractors are really qualified to do the work. One of the big things that needs to be stressed is getting DBEs that can do the work. I've been down in Springfield at meetings and gone to Black caucuses and they'll come up to you say, "How come you guys never called us?" He's got a pickup truck, his son and an extension ladder, and that's his operation. In our highway work, where is he going to fit in? The only way he can fit in is, if he can work for us, but he can't be a DBE. He's not qualified. They



complain to their elected officials that they want more DBE goals, but even if they had more DBE goals, they wouldn't get the work.

A Caucasian male owner of a construction company recommends that the DBE goals be reduced or the number of qualified DBEs in the program be increased:

The work that is being let out is not commensurate with the subs' ability to do the work. They either [need] to try and get more subs in or lower the [DBE] percentage. One of the two things has to happen. They can't keep going the way they're doing it. They're even taking the good guys and just burying them. There are guys that are pretty good DBEs, and if they would only do a million bucks worth of work, they'd be fine. Well, all of a sudden he's doing \$10 million and he can't do it. That's the biggest problem right now, and I don't know if I know the answer to this. They're doing everything they can to try and bring these guys in to start their own businesses but it's tough. Imagine a guy that you drag in kicking and screaming and you throw him into this, and now you're banking and bonding and doing the work and finances.

This same business owner also requests that IDOT and the Tollway not lower their pre-qualification requirements for asphalt paving services:

The pre-qualification process has very stringent requirements on what you need to compete at an advanced level. They have different kinds of asphalt paving pre-qualifying classifications. One of them is for jobs under 2500 tons where you [need] a lot less equipment and experience. I have no problem with that because guys can get into the business. But I have been around for 35 years and it's always been a prestigious or an honor or whatever to have that higher asphalt paving qualification because it meant something.

It meant that I have the asphalt plant, equipment, personnel, finances, and the bonding to compete at that level. Because you don't want a guy that doesn't have those things doing that kind of work. I don't care if he's a DBE or non-DBE. That's irrelevant to me, but what they are doing is slowly but surely waiving those pre-qualification requirements at that level for DBE contractors, and I think that's a terrible mistake. They're going to be doing work that they're not qualified to do and, again, there's a reason those qualifications are there. It is [so] IDOT and the Tollway [can] get the final and finished product that they want. So I think they are going down a really dangerous path with lessening the pre-qualification requirements for some



of these DBEs. I don't think that does them any service at all, and I don't think it does IDOT or the Tollway any service. Now, they may be doing it in other areas but that to me to continually lower your standards, what service does that?

A minority male owner of a construction company recommends more site visits to verify DBE utilization:

I think they need to have somebody physically come in and look at the DBE that is being utilized and review the documents that the contractor submits to them . . . to make sure that they acknowledge that we have a contract with so and so. But the communication [should] be directly with the DBE or MBE. They definitely need to regulate the programs more tightly and to follow up. Not just tongue and cheek the situation.

This minority male owner of a construction company also recommends more on-site visits:

I'm not familiar with the Tollway . . . but I think that [IDOT] probably [could do] more on site inspections from their DBE officers. [They had not done this] on my projects.

A minority male owner of a construction company suggests training be made available on IDOT's bidding procedures:

In my opinion [it would be] important to [know how] to do business with IDOT and the main [contractors] for the highways. Even if you are a small guy, [knowing] how to get the job [would be helpful].

A minority male owner of a construction company recommends more technical assistance training for DBEs:

Provide technical assistance training. Many of the contractors that I work with [need] assist[ance] with their bidding . . . to help enhance and improve their bidding on projects. I think that would be beneficial to assist many DBEs, MBEs, and WBEs.

A minority male owner of an engineering company reported more outreach to DBEs to inform them of upcoming contracting opportunities is needed:

They need to make an effort to reach out to DBEs because they are out there. It's just difficult for DBEs to get on jobs. Make an effort to reach out



to some of the minority groups like the Black engineers or some of the groups that are responsible for different minority groups that are out there.

A minority male owner of a construction company request stricter monitoring regarding DBE participation requirements:

I would recommend checking the big contractors [who] use small DBEs [to confirm] that they met the [DBE] percentage especially on the big jobs. This is the only way that we can get jobs because if it was not for the [DBE goals], [we] could not get a big job. If you're smaller, you're not going to get a big job. This is the only source where we can get jobs.

A Caucasian female owner of a construction company suggests stricter good faith effort requirements to reduce the amount of waivers:

[IDOT and the Tollway should] stop providing waivers so readily.

A minority male owner of a construction company recommends that IDOT increase its DBE goals:

I would [suggest] increasing the DBE percentages because when they only require two percent or three percent, they can meet that by buying two suppliers, or they just pick one aspect of the contract. If they raised the percentage of DBE contractors, they would have to go to more trades or find more contractors to meet that goal as opposed to just a two percent or three percent DBE goal that they have now.

A minority male owner of an engineering company suggests that IDOT unbundle more projects to create contracting opportunities for DBEs:

I know that the IDOT DBE overall goal has not been met and it's lower than what is expected. Maybe they can separate smaller projects for DBEs to solve the problem.

A minority male owner of a construction company recommends assistance with financing to get better rates from suppliers:

What would help us . . . is the ability to obtain credit from the key suppliers and vendors to allow us to be competitive to bid against other non-DBE ready mix suppliers.



And a minority male owner of an engineering company recommends raising the net worth limits for participation into the DBE Program:

The Federal guidelines for the DBE Program need to be modified to raise the limits on net worth and revenue so that many of the firms which have shown that they can do the work stay in the Program.

IX. SUMMARY

Mason Tillman completed 40 anecdotal interviews with business owners that were domiciled in IDOT's districts 1, 2, 3, 6, 8, and 9. The interviewees were identified from community meetings, media outreach, bidders, and trade and professional business organizations' membership rosters.

The results of the interviews yielded personal anecdotes from the interviewees regarding their experiences working with or seeking work from IDOT and the Illinois Tollway. Interviewees reported on their personal knowledge of barriers that can prevent contractors from successfully competing for public contracts. Exemplary practices from both IDOT and the Illinois Tollway were described. Recommendations to improve access for DBEs and other small businesses were offered as well.



11

PRIVATE SECTOR AND REGRESSION ANALYSIS

I. INTRODUCTION

A private sector analysis was conducted as a means of assessing whether there were economic indicators of discrimination in IDOT and the Illinois Tollway's market area. Private sector business practices which are not subject to government-imposed M/WBE requirements are indicators of marketplace conditions which could affect the formation and growth of minority- and woman-owned business enterprises.

Four analytical models were used to assess the relevant economic factors. Three were regression models: the Likelihood of Business Ownership Model, the Earnings Disparity Model, and the Likelihood of Business Loan Denial Model. The fourth analytical model analyzed growth indicators for minority businesses.

Case law regarding the use of private sector findings of discrimination as a predicate for a government-sponsored race-based program is discussed in detail. The application of the private sector findings is dictated by case law and is the subject of this chapter.

II. LEGAL ANALYSIS

The issue of discriminatory barriers to the formation and development of M/WBEs as a result of private sector discriminatory barriers to fair competition between Caucasian-owned business enterprises and existing MBEs, was analyzed in *Concrete Works III*¹ and *Adarand*

¹ *Concrete Works of Colo., Inc. v. City of Denver*, 86 F. Supp. 2d 1042, 1073 (D. Colo. 2000), rev'd on other grounds, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027 (2003).



*VII² and City of Chicago.*³ *Concrete Works* set forth the framework for the passive participant model for states and localities, *Adarand* addressed the standards for Department Of Transportation (DOTs), and the *City of Chicago* addressed the obligation of the government to show a nexus between the government remedy and the private sector discrimination. *Concrete Works* set forth the frame work for the passive participant model for states and localities and *Adarand* addressed the standards for DOT funded projects.

A. Passive Discrimination

The *Croson* court suggested that if a city shows that it became something akin to a joint tort feisor, i.e., a "passive participant," in a "system of racial exclusion practiced by elements of the local construction industry," then the city undoubtedly could take "affirmative steps to dismantle such a system."⁴

The court acknowledged that any state or federal entity has a compelling interest to ensure that public monies are not used to facilitate discrimination against minorities in the private sector. Unfortunately, the *Croson* court's guideline for satisfying the passive participant model for state and local agencies lacked specific guidelines and standards, ruling that entities must identify the private discrimination "with some specificity" before they implement race-conscious relief. Defining *Croson's* standard for a passive participant model has resulted in legal jurisdictions differing on the exact meaning of "some specificity."

In 2003, *Builders Association of Greater Chicago v. City of Chicago*⁵ explicitly held that business activities conducted in the private sector, if within the government's marketplace, are appropriate areas to examine the issue of discrimination. The *City of Chicago* held that a finding of discrimination from a private sector analysis, to be actionable by government, must show a nexus between the government remedy and the private sector discrimination.

And in 1992, *Concrete Works of Colorado, Inc.* challenged the constitutionality of an affirmative action ordinance enacted by the City and County of Denver. The ordinance established participation goals for minorities and women on certain City construction and professional design projects. The ordinance required all contractors bidding on Denver contracts to abide with the goals and requirements stated in the ordinance. *Concrete Works* argued that it lost three contracts with Denver because it failed to comply with the participation goals or meet the good faith requirements detailed in ordinance.

² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

³ *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. III. 2003).

⁴ *City of Richmond v. J.A. Croson., Co.*, 488 U.S. 469, 492 (1989).

⁵ *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. III. 2003).



The *Concrete Works* litigation extended over eleven years. In *Concrete III*, the Tenth Circuit held that Denver demonstrated a strong basis in evidence that the Ordinances were narrowly tailored to serve the City's compelling interest in remedying racial discrimination in the Denver construction industry.⁶

The Tenth Circuit, in setting out its standard of review, noted that Denver was not required to "conclusively prov[e] the existence of past or present racial discrimination."⁷ The Tenth Circuit mentioned two possible paths that Denver could take to establish its compelling interest: (1) presenting evidence of its own direct participation in racial discrimination *or* (2) presenting evidence of its passive participation in private discrimination.⁸

B. Evidence of Passive Discrimination

Denver relied on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area rather than confining the boundary to its own jurisdictional limits. In approving this jurisdictional boundary, the court reasoned that confining the relevant data to a governmental body's strict geographical boundaries would "ignore the economic reality that contracts are often awarded to firms situated in adjacent areas."⁹

During trial, the district court criticized and discounted Denver's evidence because the evidence did not answer six questions the court had posed in its memorandum and order.¹⁰ By strictly adhering to six rigid questions, the appellate court ruled that the district court had failed to consider Denver's case properly, because Denver's case revolved mainly around the passive participant model.

⁶ *Concrete Works of Colo., Inc. v. City of Denver*, 86 F. Supp. 2d 1042, 1073 (D. Colo. 2000), rev'd on other grounds, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027 (2003).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ (1) Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA? (2) Does such discrimination equally affect all of the racial and ethnic groups designated for preference by Denver and all women? (3) Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender? (4) Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination? (5) Is the compelled use of certified MBEs and WBEs in the prescribed percentages on particular projects likely to change the discriminatory policies and programs that taint the industry? (6) Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination?



The *Concrete Works III* court found Denver's statistical and anecdotal evidence relevant because it "identifie[d] discrimination in the local construction industry, not simply discrimination in society."¹¹

Additionally, the court placed significant weight on Denver's evidence of private marketplace discrimination, which played a key role in sustaining Denver's passive participant argument. Denver linked this evidence of discrimination with its disbursement of City funds, confirming that Denver was a passive participant in the racially exclusionary practices of the Denver construction industry.

The Tenth Circuit ruled that Denver's lending discrimination and business formation studies, which included extensive anecdotal evidence, were relevant. The court ruled that the studies revealed the existence of discriminatory barriers to business formation and competition in the Denver construction industry and the studies were thus relevant to Denver's showing that it passively participated in industry discrimination.

Quoting *Bazemore* the court stated that a party's statistical evidence may prove discrimination so long as it accounts for the major measurable factors causing the racial disparity.¹² Explaining that the *Bazemore* court held that "a multiple regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions."¹³

The *Concrete Works* court also referenced *Fullilove*, where the court identified the kinds of private actions that may affect the ability of M/WBEs to compete for public contracts.¹⁴ Those actions included evidence before Congress that minority businesses had encountered difficulties in gaining "working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses."¹⁵

¹¹ *Concrete Works of Colo., Inc. v. City of Denver*, 86 F. Supp. 2d 1042, 1073 (D. Colo. 2000), rev'd on other grounds, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027 (2003).

¹² *Bazemore v. Friday*, 478 U.S. 385 (1986).

¹³ *Id.*

¹⁴ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

¹⁵ 488 U.S. at 467.



Additionally, the Tenth Circuit sought to determine whether the evidence offered by DOT supported the existence of past and present discrimination in the highway subcontracting market.

In *Adarand*,¹⁶ the DOT determined that “passive participation” is present when private discrimination creates a barrier to contracting opportunities for minorities which creates a nexus between its award of public contracts and private discrimination.¹⁷ The Circuit Court reaffirmed the long-standing rule that the “benchmark for judging the adequacy of a government’s factual predicate for affirmative action legislation [i]s whether there exists a strong basis in evidence for [the government’s] conclusion that remedial action was necessary.”¹⁸

The variables identified for such a “strict scrutiny calculus,” the Tenth Circuit noted that both statistical and anecdotal evidence are appropriate, although anecdotal evidence by itself is not. DOT’s use of direct and circumstantial evidence, evidence in the legislative history, and post-enactment evidence as other variables were approved.

The permissible scope of evidence of discrimination, that the court found relevant was not only the evidence in the specific area of government procurement contracts. Evidence of discrimination in the entire construction industry was considered.¹⁹

This flexible standard enabled the Tenth Circuit to give appropriate weight to DOT’s principal evidence, which demonstrated the existence of the two notable discriminatory barriers facing MBEs within the construction industry. They were (1) discriminatory barriers to the formation and development of MBEs as a result of private discrimination; and (2) discriminatory barriers to fair competition between Caucasian-owned businesses and existing MBEs.²⁰

It was ruled that this evidence showed “a strong link between racial disparities in DOT’s disbursements of public funds for construction contracts and the channeling of those funds

¹⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*



due to private discrimination."²¹ And it showed that DOT had participated passively in the private construction industry's discriminatory system.

DOT's "evidence of specific barriers to market entry and fair competition facing actual and potential minority participants in the market for public construction contracts" was satisfactory to confirm a nexus to private discrimination.²² As a result of DOT's proffered evidence, the court held that the DOT met its initial burden of presenting a strong basis in evidence sufficient to support its compelling interest of eradicating the effects of private discrimination.

DOT also offered congressional findings of discrimination in all aspects of the private construction industry, as well as in those industries that support the construction industry. These findings enabled DOT to overcome the court's requirement for a rigorous and strong basis in private sector evidence that previously had been nearly impossible to meet. Finally, utilizing the passive participant model, DOT was not required to present evidence of its own direct participation in discrimination.

III. REGRESSION ANALYSIS METHODOLOGY

A regression analysis is the methodology employed to ascertain whether there are private sector economic indicators of discrimination in IDOT/ Illinois Tollway's market area that could impact the formation and development of businesses by minorities and females. The regression analysis focus was on construction and architecture and engineering, the two industries studied in the 2010 IDOT/ Illinois Tollway DBE Disparity Study.

Three regression models are used for this analysis. They are the Likelihood of Business Ownership Model, the Earnings Disparity Model, and the Likelihood of Business Loan Denial Model. The analysis takes into consideration race and gender-neutral factors such as age, education, and creditworthiness in assessing whether the socio-economic factors examined in these models disproportionately affect minorities and women.

The regression analysis found that there are statistically significant disparities for some ethnic and gender groups in the likelihood of business ownership, business earnings, and likelihood to be denied a business loan. Even when controlling for race- neutral factors such as age, education, and creditworthiness, the findings still suggest that there are discriminatory factors in the private sector that adversely affect minorities and women's

²¹ *Id.*

²² *Id.*



access to the financial resources needed to grow their businesses. The details of the analysis are presented below.

IV. DATASETS ANALYZED

The three datasets used were produced by the United States Census Bureau. The 2008 One-Year Public Use Microdata Sample (PUMS) data was used to analyze, within the State of Illinois, business ownership and earning disparities in the Likelihood of Business Ownership Model and the Earnings Disparity Model. The PUMS data allowed for an analysis by an individual's race and gender. The dataset includes observations regarding personal profile, industry, work characteristics, and family structure.

The 2003 Survey of Small Business Finances (SSBF) was utilized to analyze business loan denial rates in the Likelihood of Business Loan Denial Model. This was regional data presented for the East North Central States, which include Illinois, Indiana, Michigan, Ohio, and Wisconsin. The dataset only allowed for an analysis of the two industries by race and gender within the five states region. The SSBF dataset includes observations for business and owner characteristics, the business's credit and financial status, and the lender environment and loan characteristics.

V. REGRESSION MODELS DEFINED

A. The Likelihood of Business Ownership Model

The Likelihood of Business Ownership Model examines the relationship between the likelihood of being a business owner and socio-economic variables. The dependent variable, business ownership, includes business owners of incorporated and non-incorporated firms. The business ownership variable takes only two values. A value of "1" indicates that a person is a business owner, whereas a value of "0" indicates that a person is not a business owner. When the dependent variable is defined this way it is called a binary variable.²³ In this case a Probit model is utilized to predict the likelihood of business ownership on the basis of independent socio-economic variables. Categories of independent variables analyzed include educational level, U.S. citizenship status, employment classifications, personal characteristics, profession, race/gender, and a capital indicator.

²³ In this case, the standard OLS regression model cannot be employed and a Probit model is utilized to predict the likelihood of business ownership



A disparity finding is reported when the independent variable is significant at or above the 95% level. A finding of disparity indicates that there is a non-random relationship between wages and each independent variable. Regression results tables indicate the sign of each variable's coefficient from the regression output. If the coefficient sign is positive, it means there is a positive relationship between the two variables. For example, having an advanced degree is positively related to the likelihood of being a business owner, holding all else constant. If the coefficient sign for the independent variable is negative this implies an inverse relationship between the two variables. For example, as the number of years a firm has been in operation increases, the likelihood of being denied a business loan decreases, holding all else constant.

B. The Earnings Disparity Model

The Earnings Disparity Model examines the relationship between wages and socio-economic variables. Wages are defined as the individual's total dollar income earned in the previous twelve months. Categories of independent variables analyzed include educational level, U.S. citizenship status, employment classifications, personal characteristics, profession, and race/gender.

All of the independent variables are regressed against wages in a standard Ordinary Least Squares regression model (OLS). The OLS model estimates a linear relationship between the independent variables and the dependent variable. This multivariate regression model estimates a line similar to the standard $y = mx + b$ format, but with additional independent variables. The mathematical purpose of a regression analysis is to estimate a linear line for all observations and explain if the findings are statistically significant.

A disparity finding is reported when the independent variable is significant at or above the 95% level. A finding of disparity indicates that there is a non-random relationship between wages and each independent variable. The regression results tables indicate the sign of each variable's coefficient from the regression output. If the coefficient sign is positive it means there is a positive relationship between the two variables. For example, having an advanced degree is positively related to wages. Therefore, individuals who have an advanced degree are more likely to make money, holding all else constant. If the coefficient sign for the independent variable is negative this implies an inverse relationship between the two variables. For example, as the number of years a firm has been in operation increases, the likelihood of being denied a business loan decreases, holding all else constant.



C. The Likelihood of Business Loan Denial Model

The Likelihood of Business Loan Denial Model examines the relationship between the likelihood of being denied a business loan and variables related to socio-economics and business. The dependent variable is binary and coded as 1= sometimes or always denied a loan, and 0= never denied a loan.²⁴ Independent variable categories include race/gender, business owners' credit and resources, business credit and financial health, and business/lender environment and loan characteristics.

A disparity finding is reported when the independent variable is significant at or above the 95% level. A finding of disparity indicates that there is a non-random relationship between being denied a business loan and each independent variable. The tables containing the regression results also indicate the sign of each variable's coefficient from the regression output. If the coefficient sign is positive it means there is a positive relationship between the two variables. For example, having a degree is negatively related to the likelihood of being denied a business loan, holding all else constant. If the coefficient sign for the independent variable is negative, this implies an inverse relationship between the two variables. For example, as a business owner's credit score increases, the likelihood of being denied a business loan decreases.

VI. FINDINGS

A. The Likelihood of Business Ownership

The business ownership variable is identified by the number of business owners in the two industries. The analysis considered incorporated and non-incorporated businesses. The data in this section comes from the Illinois 2008 PUMS dataset.²⁵ Previous studies have shown that many non-discriminatory factors such as education, age, and marital status are associated with self-employment. In this analysis, race- and gender- neutral factors are combined with race and gender groups in a Probit regression model to determine whether observed race or gender disparities were independent of the race- and gender-neutral factors known to be associated with self-employment.

²⁴ An ordered Probit model could also be explored for this model. This allows for three distinct answers 1= always denied a loan 2= sometimes denied a loan, and 3= never denied a loan. However, in this case all individuals who reported loan denial or sometimes loan denial were coded as 1.

²⁵ The PUMS data were collected by the U.S. Census Bureau from a five percent sample of U.S. households. The observations were weighted to preserve the representative nature of the sample in relation to the population as a whole.



The PUMS data for the State of Illinois included a total of 8,214 individuals in the construction and architecture and engineering industries. The analysis considered both incorporated and non-incorporated business sectors. Table 11.01 provides a summary of the number of individuals in both industries.

Table 11.01 Summary of Occupational Industry

Occupational Industry	Number of Individuals	African American	Hispanic American	Asian American	Females
Construction	6,189	5.56%	11.6%	1.03%	2.84%
Architecture and Engineering	2,025	5.43%	4.64%	5.93%	23.8%
Total	8,214	5.53%	9.88%	2.24%	8.01%

Table 11.02 provides a summary of minority and female business ownership rates in both industries.

Table 11.02 Minority and Female Business Ownership Rates

Occupational Industry	African American	Hispanic American	Asian American	Females
Construction	4.04%	6.2%	1.12%	2.63%
Architecture and Engineering	5.32%	4.25%	1.6%	12.77%

For each of the two industries, the Probit regression is used to identify the probability that an individual owns a business given his or her background, including ethnicity, gender, and race- and gender-neutral factors. The dependent variables in all regressions are binary variables coded as "1" for individuals who are self-employed and "0" for individuals who are not self-employed. The independent variables used are as follows:

- Personal characteristics related to the business ownership-- age, marital status, citizenship, disability, English-speaking, and number of children under the age of six in the household.



- Educational attainment-- whether the individual has a High school diploma or equivalent, a bachelor's degree, or an advanced degree.
- Race-- African American, Asian American, Hispanic American, American Indian, or other races.
- Gender-- male or female.

1. Probit Model Results for Construction Business Ownership Probabilities

Table 11.03 presents the Probit regression results for the likelihood or probability of owning a business in the construction industry based on the 14 variables analyzed in this model.

Table 11.03 Construction Industry Probit Model

Variable	Coefficient	Z-score	P-value
Constant	-1.782	-24.01 * ²⁶	0
Age	0.017	10.97*	0
Advanced Degree	0.458	3*	0.003
Bachelor's Degree	0.367	4.66*	0
High school diploma or equivalent	0.018	0.43	0.664
U.S. Citizen	0.157	1.4	0.161
Disability	-0.036	-0.52	0.603
Not speaking English at home	0.180	1.83	0.067
Foreign-born citizen	0.120	1.01	0.315
Married	-0.018	-0.41	0.683
African American	-0.250	-2.69*	0.007
Asian American	-0.256	-1.11	0.269
Hispanic American	-0.561	-5.61*	0
Other races	-0.049	-0.41	0.684

²⁶ Note: * denotes significance at the 95% confidence level. The sign of the coefficients indicates the relationship between the independent variable and dependent variable. The Z-score indicates the significance of the independent variable; a higher Z-score shows the corresponding independent variable has more significant influence on the dependent variable.



Variable	Coefficient	Z-score	P-value
Female	-0.066	-0.55	0.583

The findings of business ownership probabilities in the construction industry are as follows:

- The probability of construction business ownership is associated with increased age. Older individuals are significantly more likely to be business owners.
- An individual with a bachelor's degree or an advanced degree has a significantly lower probability of being a business owner or being self-employed²⁷ in the construction industry.
- African Americans and Hispanic Americans are significantly less likely to be construction business owners.

2. Probit Model Results for Architecture and Engineering Business Ownership Probabilities

Table 11.04 summarizes the Probit regression results for the likelihood of owning a business in the architecture and engineering industry using the 15 variables analyzed in this model.

Table 11.04 Architecture and Engineering Probit Model

Variable	Coefficient	Z-score	P-value
Constant	-1.876	-10.59*	0
Age	0.013	3.92*	0
Advanced Degree	-0.278	-2.41*	0.016
Bachelor's Degree	-0.081	-0.8	0.424
High school education or equivalent	0.360	2.85*	0.004
Citizen	0.454	1.96*	0.05
Disability	0.023	0.13	0.898
Not speaking English at home	0.094	0.52	0.602
Foreign-born citizen	-0.052	-0.25	0.802

²⁷

Note: The terms business owner and self-employed are used interchangeably throughout the chapter.



Variable	Coefficient	Z-score	P-value
Married	0.060	0.62	0.537
African American	0.126	0.69	0.489
Asian American	-0.469	-1.16	0.248
Hispanic American	-0.045	-0.18	0.855
Other races	-0.181	-0.59	0.555
Children under age 6	0.210	0.59	0.557
Females	-0.352	-3.05*	.002

The Probit regression results for the architecture and engineering industry show:

- The likelihood of architecture and engineering business ownership is associated with the increase of age. Older individuals are significantly more likely to be business owners.
- U.S. citizens have a significantly higher probability of being self-employed.
- Individuals with an advanced degree, beyond the baccalaureate level, have a significantly lower probability of being business owners.
- Individuals with a high school diploma or equivalent have a significantly higher likelihood of being self-employed in the architecture and engineering industry.
- Females are significantly less likely to be architecture and engineering business owners.

3. Summary of the Likelihood of Business Ownership Model Results

The regression analysis examined different variables' impact on an individual's likelihood of owning a business in the construction industry and the architecture and engineering industry. Controlling for race- and gender-neutral factors, the Likelihood of Business Ownership Model results show that statistically significant disparities in the likelihood of owning a business exist for all racial minority groups in the construction industry. The same results are found in the architecture and engineering industry, with the exception of African Americans who are not significantly less likely to be self-employed in this industry. Females are also significantly less likely to be business owners in the construction and the architecture and engineering industries. Additionally, persons with disabilities have a significantly lower probability of being self-employed in the construction industry.



B. Business Earnings

Business earnings are represented by the wages of each individual in the dataset for the 12 month period in the year 2000. The dependent variable in the model that examines the disparity of business earnings of minorities and women in the State of Illinois is the individual's business earnings in U.S. dollars. An Ordinary Least Squares (OLS) regression analysis is used to assess the presence of business earning disparities.

The dataset used in this analysis is the same one used for the Likelihood of Owning a Business Model and contains a total of 8,214 individuals in the two industries, construction and architecture and engineering. OLS regressions have been conducted separately for each industry. The independent variables used for the regression are presented below:

- Indicators of the individual's profession, which include non-incorporated business sectors, incorporated business sectors, and State government.
- Ethnic background of the individual, which includes data for African-Americans, Hispanic Americans, Asian Americans, American Indians and other non-Caucasian ethnic groups.
- Age of the individual
- Gender of the individual
- Educational level-- high school or equivalent, bachelor's degree, or advanced degree
- Marital status
- U.S. citizenship
- Being a foreign-born U.S. citizen
- Having children under the age of six
- Disability status

1. OLS Regression Results for Business Earnings in the Construction Industry

Table 11.05 depicts the results of the OLS regression for business earnings in the construction industry based on the 19 variables analyzed in this model.

Table 11.05 Construction Industry OLS Regression

Variable	Coefficient	t-score	P-value
Constant	9.507	201.54*	0
Self-employed (Non-incorporated sector)	-1.094	-7.34*	0
Self-employed (incorporated sector)	-0.226	-4.01*	0



Variable	Coefficient	t-score	P-value
State employee	-0.199	-2.15*	0.032
Age	0.015	13.06*	
Advanced degree	0.179	1.4	0.163
Bachelor's degree	0.139	3.25*	0.001
High school education or equivalent	-0.021	-0.75	0.455
Citizen	0.022	0.29	0.768
Disability	-0.422	-7.55	0
Not speaking English at home	-0.046	-0.71	0.476
Foreign-born U.S. citizen	0.046	0.58	0.565
Married	0.464	15.41*	0
African American	-0.355	-5.67*	0
Asian American	0.004	0.03	0.979
American Indians	0.324	0.98	0.326
Hispanic American	-0.151	-2.59*	0.01
Other races	0.090	1.31	0.191
Children under the age of 6	0.570	0.61	0.542
Females	-0.254	-3.12*	0.002

The OLS regression results for business earnings in the construction industry show:

- Older individuals have significantly higher business earnings in the construction industry.
- Self-employed individual in both the non-incorporated and incorporated business sectors have significantly lower business earnings in the construction industry.
- A State government employee has significantly lower business earnings in the construction industry.
- An individual with a bachelor's degree has significantly higher business earnings in the construction industry.



- Married individuals have significantly higher business earnings in the construction industry .
- Persons with disabilities have significantly lower business earnings in the construction industry .
- African Americans and Hispanic Americans have significantly lower business earnings in the construction industry.
- Females have significantly lower business earnings in the construction industry .

2. OLS Regression Results for Business Earnings in the Architecture and Engineering Industry

The OLS regression results for business earnings in the architecture and engineering industry based on the 19 variables analyzed in this model are depicted in Table 11.06.

Table 11.06 Architecture and Engineering Industry OLS Regression

Variable	Coefficient	t-score	P-value
Constant	10.107	132.36	0
Self-employed (Non-incorporated sector)	-0.621	-1.81*	0.07
Self-employed (incorporated sector)	0.132	1.63	0.104
State employee	-0.255	-3.57*	0
Age	0.009	5.87*	0
Advanced degree	0.520	10.45*	0
BA degree	0.346	7.44*	0
High school education or equivalent	0.102	1.47	0.141
Citizen	-0.116	-1.13	0.259
Disability	-0.435	-4.18*	0
Not speaking English at home	-0.112	-1.48*	0
Foreign-born U.S. citizen	-0.051	-0.59	0.555
Married	0.317	7.42*	0
African American	0.027	0.32	0.751



Variable	Coefficient	t-score	P-value
Asian American	0.162	1.06	0.291
American Indian	0.337	0.76	0.447
Hispanic American	-0.120	-1.13	0.261
Other races	-0.084	-0.65	0.519
Children under age of 6	-0.069	-0.49	0.623
Females	-0.306	-6.62*	0

The OLS regression results for business earnings in the architecture and engineering industry indicate:

- Older individuals have significantly higher earnings business earnings in the architecture and engineering industry.
- State government employees have significantly lower business earnings in the architecture and engineering industry.
- Individuals with a bachelor’s degree or advanced degree have significantly higher earnings business earnings in the architecture and engineering industry.
- Married individuals have significantly higher earnings business earnings in the architecture and engineering industry .
- Persons with disabilities have significantly lower business earnings in the architecture and engineering industry.
- Females have significantly lower business earnings in the architecture and engineering industry.

3. Summary of the Earnings Disparity Model Results

The Earnings Disparity Model regression analysis documented statistically significant disparities in business earnings for minorities and women. African Americans and Hispanic Americans have significantly lower earnings in the construction industry. No statistically significant earning disparities are present for minorities in the architecture and engineering industry. After adjusting for race- and gender-neutral factors such as age, education, and marital status, the business earnings regression results indicate that females have significantly lower earnings in both the construction and architecture and engineering industries. Persons with disabilities also experience significantly lower business earnings in both industries.



C. Likelihood of Business Loan Denial

Access to business capital in the form of loans is measured by the likelihood of loan denial among 3,260 business owners in all industries. The dataset does not contain sufficient information on the construction and architecture and engineering industries to allow for a separate examination of either industry. Therefore, the estimation is based on the entire sample from the 2003 National Survey of Small Business Finances (NSSBF) for the East North Central States region.

Probit regression is used to examine the factors that might explain loan denials for the business owners. The dependent variable is a binary variable where "1" denotes being denied a business loan, and "0" signifies being approved for a business loan. The independent variables describe four sets of factors:

- The business owner's minority and gender group classification
- The business owner's credit and resources
- The business's credit and financial health
- The environment in which the business and lender operate, such as number of institutions the business owner dealt with, and whether the business is a sole trader or a partnership

Within each set, observations that do not vary are deleted from the dataset. For example, among all denied loans, no observations are found for Native American or Asian American business owners; therefore the regression did not include these two groups. The results of the Probit regression for each set of factors are presented in Table 11.07.

Table 11.07 Probit Model for the Likelihood of Business Loan Denial

Variable	Coefficient	Z-score	P-value
Constant	-1.789	-23.49*	0.000
Owner's Minority Group and Gender Classification			
African American	0.532	2.190*	0.028
Hispanic American	0.783	4.090*	0.000
Female	-0.355	-2.580*	0.010
Owner's Credit and Resources			
Age	-0.028	-4.370*	0.000



Variable	Coefficient	Z-score	P-value
Years of experience	0.015	2.410*	0.016
High school education	0.413	2.640*	0.008
Less than high school	0.180	1.220	0.223
Some college	0.129	0.830	0.408
Use owner's personal credit card for business	0.159	1.570	0.116
Average monthly new business expense	0.000	-0.470	0.639
Owner delinquent obligations in past 3 years	0.977	8.360*	0.000
Firm's Credit and Financial Health			
Number of employees	0.002	2.660*	0.008
Age of firm	-0.008	-2.010*	0.045
Checking account balance	0.000	-2.560*	0.010
Savings account balance	0.000	-2.020*	0.044
Firm has a savings account	0.004	0.030	0.979
Collateral required for credit line	0.034	0.150	0.878
Firm has a business mortgage	0.574	2.610*	0.009
Firm has a vehicle loan	0.628	2.650	0.008
Firm has an equipment loan	0.058	0.250	0.803
Number of stockholder loans	0.016	0.440	0.659
Firm has capital leases	-0.190	-0.770	0.443
Total sales	0.000	-0.860	0.390
Total cost of doing business	0.000	0.850	0.398
Yearly profit	0.000	1.010	0.313
Cash on hand	0.000	-2.590*	0.010



Variable	Coefficient	Z-score	P-value
Total assets	0.000	2.330*	0.020
Total principal amount of all outstanding loans	0.000	-0.750	0.451
Total equity	0.000	-3.880*	0.000
More than 60 days delinquent in last 3 years	0.571	5.750*	0.000
Lender Environment and Loan Characteristics			
Partnership	0.444	2.090*	0.037
Sole proprietor	0.330	1.610	0.107
Incorporation	0.365	1.750	0.080
Number of institutions	0.159	7.420*	0.000
100% bank deposits	-0.023	-0.150	0.882
100% bank deposits, 50% thrift deposits	0.069	0.360	0.717
100% bank deposits, 100% thrift deposits	-0.246	-1.680	0.093

The Probit regression results for the Likelihood of Business Loan Denial Model indicate the following:

a. Owner's Credit and Resources

- Business owners with more years of working experience have a significantly higher probability of being rejected for a business loan.
- Older business owners are significantly less likely to be rejected for a business loan.
- Business owners with delinquent obligations in the past three years have a significantly higher probability of being denied a business loan.

b. Owner's Minority Group and Gender Classification

- African Americans and Hispanic Americans have a significantly higher probability of being denied a business loan.
- Female business owners have a significantly lower probability of being denied a business loan.



c. Firm's Credit and Financial Health

- Firms with more employees have a significantly higher probability of being denied a business loan.
- Firms with more years of business operations have a significantly lower probability of being denied a business loan.
- Firms with a business mortgage have a significantly higher probability of rejected for a business loan.
- Firms with a higher total equity are significantly less likely to be denied a business loan.
- Firms with more than 60 days of delinquent history in the past three years are significantly more likely to be denied a business loan.

d. The Environment in which the Firm and Lender Operate

- The more financial institutions a business owner contacts to apply for a loan, the more likely the owner will be denied a business loan.

1. Business Interest Rates among Minorities and Females

The relationship between the business interest rate among different ethnic groups and females are tested and compared using OLS regression. The results are shown in Table 11.08.

Table 11.08 Business Interest Rates among Minorities and Females

Variable	Coefficient	t-score	P-value
Constant	12.353	106.330*	0.000
African American	0.629	0.910	0.360
Hispanic American	1.511	2.340*	0.019
Native American	-1.117	-1.100	0.271
Caucasian	0.0001	1.560	0.119
Female	0.289	0.990	0.323

The findings indicate that Hispanic Americans are significantly more likely to get charged higher interest rates on a business loan than Caucasian, female, and other minority business owners.



2. Summary of the Likelihood of Business Loan Denial Model Results

The Likelihood of Business Loan Denial Model reveals that statistically significant disparities exist for African American and Hispanic American owned businesses. Even after controlling for race-neutral factors, the regression analysis reveals that African American and Hispanic American businesses in both industries have a significantly higher probability of being denied a business loan. In addition, Hispanic Americans are more likely to pay higher interest rates on business loans when compared to similarly situated females, other minority groups, and Caucasian males.

VII. GROWTH INDICATORS FOR MINORITY-OWNED BUSINESSES

This section presents an analysis of findings on minority owned business survival, expansion, and contraction rates as reported in the U.S. Small Business Administration's (SBA) Office of Advocacy report published in 2005. The report tracks the minority-owned businesses over the period 1997-2001.

A. Datasets Analyzed

The data set was provided to the Small Business Administration's Office of Advocacy by the U. S. Census Bureau. The statistical tabulations were extracted from the 1997 Survey of Minority-Owned business Enterprises.²⁸

B. Findings

1. Business Survival Rates

The report examined the survival rates of business enterprises with paid employees other than the owner's family members. Between 1997 and 2001, the survival rate of all minority owned business enterprises was about 4 percentage points lower than that of Caucasian-owned business enterprises. The survival rate for Caucasian-owned employer establishments was 72.6 percent. The survival rates of five ethnic groups are presented in Table 11.09.

²⁸ Lowery, Ying. 2005. "Dynamics of Minority-Owned Employer Establishments, 1997-2001." U.S. Small Business Administration Office of Advocacy. Washington D.C.



Table 11.09 Business Survival Rates

Ethnicity	Business Survival Rate
African American	61.0%
American Indian and Alaska Native	67.0%
Asian and Pacific Islander	72.1%
Caucasian	72.6%
Hispanic American	68.6%

These results demonstrate that MBEs have a lower probability of succeeding, and thus a higher probability of closure, as compared to Caucasian-owned businesses.

2. Business Expansion Rates

During the four year period, Caucasian-owned business enterprises' expansion rate was 27.4 percent. Business expansion rate measures the increase in the number of employees. The expansion rates for five ethnic groups are depicted in Table 11.10.

Table 11.10 Business Expansion Rates

Ethnicity	Business Expansion Rate
African American	25.7%
American Indian and Alaska Native	27.8%
Asian American and Pacific Islander	32.1%
Caucasian	27.4%
Hispanic American	34.0%

The business expansion rate results indicate that Hispanic Americans, Asian and Pacific Islanders, and American Indian and Alaska Native business enterprises exceeded Caucasian-owned business enterprises' expansion rates. However, African American businesses experienced lower expansion rates than Caucasian owned businesses.



3. Business Contraction Rates

Business contraction measures the rate at which a business enterprise reduces the number of employees. The contraction rate of Caucasian owned businesses is 21.1 percent. Table 11.11 depicts the business contraction rates among five ethnic groups.

Table 11.11 Business Contraction Rates

Ethnicity	Business Contraction Rates
African American	19.9%
American Indian and Alaska Native	22.4%
Asian American and Pacific Islander	22.9%
Caucasian	21.1%
Hispanic American	17.8%

Table 11.11 shows that African American and Hispanic American business enterprises have a lower probability of reducing their total number of employees compared to Caucasian owned businesses. Nonetheless, Asian and Pacific Islanders and American Indian and Alaska Native business enterprises have a higher contraction rate than that of Caucasian owned businesses.

VIII. CONCLUSION

This chapter used regression techniques to determine whether there are socio-economic factors in the private sector which might account for the identified statistical disparities between M/WBE availability and utilization documented in the 2010 IDOT/ Illinois Tollway DBE Disparity Study. It also examined growth indicators for various ethnic groups from the findings of an U. S. Small Business administration Office of Advocacy report.

Three regression models were considered for this analysis, the Likelihood of Business Ownership Model, the Earnings Disparity Model, and the Likelihood of Business Loan Denial Model. The findings show that even when controlling for race- and gender-neutral factors such as age and education, minorities and women experience discriminatory business conditions in the State of Illinois and in the five states in the East North Central region.²⁹ The regression analysis examined the level of disparity in the State of Illinois'

²⁹ Counties included Will, Winnebago, DuPage and Cook.



construction and architecture and engineering industries when three economic factors were considered. The three factors which affect business formation and development are: business ownership, earnings, and likelihood of business loan denial.

The Likelihood of Business Ownership Model results show that statistically significant disparities exist in the private sector for all racial minority groups in the construction industry. The same results are found in the architecture and engineering industry, with the exception of African Americans who are not significantly less likely to be self-employed in this industry. Females are significantly less likely to be business owners in both industries. Additionally, persons with disabilities have a significantly lower probability of being self-employed in the construction industry. These findings indicate a presence of race and gender discrimination in the private sector.

The Earnings Disparity Model regression analysis documented statistically significant disparities in business earnings for M/WBEs. After adjusting for race- and gender-neutral factors such as age, education, and marital status, the business earnings regression results indicate that African Americans and Hispanic Americans have significantly lower earnings in the construction industry. No statistically significant earning disparities are present for minorities in the architecture and engineering industry. Females have significantly lower earnings in both the construction and architecture and engineering industries. Additionally, persons with disabilities experience significantly lower business earnings in both industries.

The Likelihood of Business Loan Denial Model reveals that statistically significant disparities exist for African American and Hispanic American businesses in the private sector. Even after controlling for race-neutral factors, African American and Hispanic American businesses have a significantly higher probability of being denied a business loan. In addition, Hispanic Americans are more likely to get charged higher interest rates on business loans when compared to similarly situated females, other minority groups, and Caucasian males. This disparity points to the presence in the State of Illinois of racial discrimination as a significant factor in African Americans and Hispanic Americans' access to business credit. Access to business credit in the private sector constitutes a major factor in business development and continuity. Therefore, reduced access to business credit can adversely impact a business's success and the number of available M/WBEs in the Illinois construction and architecture and engineering industries.

The analysis of business growth indicators examined for various racial groups showed that MBEs have a lower probability of succeeding and a higher probability of closure, as compared to their Caucasian counterparts. The MBE survival, expansion, and contraction rates also demonstrates African American business enterprises experience lower expansion rates than their non-minority counterparts, and Asian and Pacific Islander, and American



Indian and Alaska Native business enterprises have a higher contraction rate than that of similarly situated Caucasian-owned businesses.³⁰

These analyses economic indicators suggest that there are discriminatory factors in the private sector that adversely affect M/WBE formation and growth. The likelihood of business ownership, levels of business earnings, and the likelihood of business loan denial for M/WBEs reveal statistically significant economic disparities which are not accounted for by race- and gender-neutral factors. M/WBEs have significantly lower business earnings and less access to business capital, which is needed to support business growth. In the absence of a race-neutral explanation for the disparities, the facts document the presence of racial and gender discrimination in the private sector. Such discrimination creates economic conditions in the private sector that disadvantage M/WBEs, which are manifested in lower M/WBE formation rates and depressed M/WBE growth and financial stability.

But for these private sector conditions, the M/WBE availability documented in the 2010 IDOT/Illinois Tollway DBE Disparity Study should have been higher. In fact, the Disparity Study availability analysis results indicate that M/WBEs are awarded fewer contracts than they should given their availability. These findings document the presence of marketplace barriers that might explain the fact that a lower number of contracts were awarded during the five year study period to M/WBEs than their white male counterparts.

The finding of statistically significant underutilization of the willing and able M/WBE subcontractors on IDOT/ Illinois Tollway contracts is but another manifestation of the decisions made by the private sector which adversely affect the growth and development of M/WBEs. From the regression results it can be inferred that IDOT/ Illinois Tollway is a passive participant in a system of private sector discrimination against M/WBEs. But for such discrimination, M/WBE availability should be higher in IDOT/Illinois Tollway's market area.

³⁰ These classifications reflect those used in Ying Lowery's 2005 report, "Dynamics of Minority-Owned Employer Establishments, 1997-2001." For the 2010 Illinois Department of Transportation/ Illinois Tollway DBE Disparity Study, Pacific Islanders are included under Asian American, and Alaska Natives are included under Native American.



12

RECOMMENDATIONS

I. INTRODUCTION

This chapter provides specific recommendations for DBEs who were underutilized at a statistically significant level, which constituted a disparity. There are also race and gender-neutral recommendations. The recommendations are based on an analysis of the Disparity Study statistics and the best management practices of other government agencies and relevant regulations. The analysis included a review of contracts for construction and architecture and engineering during the study period of January 1, 2006 through December 31, 2008.

This chapter is organized into six sections. The first is an *Introduction*. A *Review of IDOT's DBE Program* is presented in section two. The third section, *Disparity Findings*, presents the disparity analysis statistical results. Race and gender-conscious recommendations are provided in section four, *Race-Conscious Remedies*. Section five, *Race and Gender-Neutral Remedies* offers race and gender-neutral enhancements. Finally, *Administrative Recommendations* are contained in section six.

II. DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REVIEW

The Illinois Department of Transportation (IDOT) implemented a Disadvantaged Business Enterprise (DBE) Program to create a level playing field on which Disadvantaged Business Enterprises (DBEs) can compete fairly for U.S. Department of Transportation (USDOT)-assisted contracts. The DBE Program was created pursuant to 49 CFR Part 26 to promote the utilization of DBEs to the maximum extent feasible in all aspects of its federally-



assisted contracting. The Office of Small Business Services' Bureau of Small Business Enterprises is responsible for administering the federally-mandated DBE Program.

It is IDOT's policy to ensure that its DBE Program is narrowly tailored in accordance with applicable law and that only firms that meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs.

1. DBE Goals

IDOT sets overall DBE aspirational goals to maximize the participation of available DBEs on the agency's prime and subcontracts, pursuant to 49 CFR Part 26.45. IDOT also sets individual DBE goals to meet the overall DBE goal on its federal and state-funded contracts that have subcontracting opportunities that may be suitable for performance by DBE firms. Individual goals are determined by an assessment of the type of work, the location of the work, and the availability of DBE firms to do a part of the work.

2. DBE Certification

DBEs that are certified by the Illinois Unified Certification Program (IL UCP), in accordance with the requirements set forth in 49 CFR Part 26, can participate in IDOT's DBE Program.

The DBE certification is effective for a period of five years. Certified DBEs are listed in the IL UCP DBE Directory (Directory). The Directory serves as a reference source to assist bidders/proposers in meeting DBE contract goals. DBEs certified by the IL UCP are eligible to participate on contracts awarded by IDOT.

3. Good Faith Effort Requirements

IDOT requires its bidders to take all necessary and reasonable steps to achieve the project DBE goal. Contractors that cannot obtain sufficient DBE commitments to meet a contract goal must document in their utilization plan the good faith efforts made in the attempt to meet the goal. Examples of good faith efforts that must be documented in the utilization plan include:

- Solicit through reasonable and available means to certified DBEs that have the capability to perform the work of the contract, allowing sufficient time for the DBE to respond to the solicitation.
- Unbundle selected portions of the solicited work to increase the likelihood that the DBE goals will be achieved.



- Provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner.
- Negotiate in good faith with interested DBEs by recording the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
- Assure that DBEs were not rejected as being unqualified without sound reasons based on a thorough investigation of their capabilities.
- Make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or prime contractor.
- Make efforts to assist interested DBEs in obtaining the necessary equipment, supplies, materials, or related assistance or services.
- Engage the services of available minority and women community organizations; minority and women contractors' groups; local, state, and federal minority and women business assistance offices; and other organizations to provide assistance in the recruitment and placement of DBEs.

If a determination is made that a good faith effort has not been made, the bidder is notified and provided with reasons why good faith efforts have not been found and may include additional good faith efforts that the bidder could perform.

The bidder is given five days to cure the deficiencies. If a final decision is made by the Reconsideration Officer that a good faith effort was made, the bidder's utilization plan will be approved. Conversely, if the final decision determines that a good faith effort was not made, the bid will be rendered non-responsive.

a. Mentor-Protégé Program

IDOT created a Mentor-Protégé Program (Program) to enhance the capabilities of socially and economically disadvantaged businesses to perform prime contracts and subcontracts and thereby increase the utilization of available DBEs. The Program aims to provide developmental assistance to DBEs to enhance the protégé's business and technical capabilities to do more complex work. Mentors can be reimbursed for administrative costs incurred as a result of specific projects where the mentor uses the protégé as a



subcontractor. The mentor must provide the protégé with a commercially useful function in the performance of the contract.

III. DISPARITY FINDINGS

While the DBE Program is intended to eliminate disparities in the award of contracts to minorities and women, the Disparity Study findings presented in this section of the chapter point out that some disparities exist in the utilization of DBEs. The statistical analysis of DBE utilization is a key component of the Study. The objective of the analysis was to determine if DBE contractors were utilized at the level they were available in IDOT's market area. Where DBEs were underutilized and the underutilization was statistically significant, the finding constitutes a disparity. Recommendations specifically for DBEs are proposed where there was a disparity.

The findings are presented by DBEs and non-DBEs within each industry and at two thresholds. The informal threshold level for both industries is valued at \$25,000 and under. The formal contract level threshold for both industries included contracts under \$500,000.

A. Prime Contracts

IDOT issued 4,129 prime contracts representing \$4,039,185,639 during the January 1, 2006 to December 31, 2008 study period. The 4,129 contracts included 3,688 for construction and 441 for architecture and engineering.

IDOT's formal prime contractor utilization analysis examined the \$435,228,284 expended on construction contracts under \$500,000 awarded during the study period. The formal prime contractor utilization analysis also examined the \$71,514,197 expended on architecture and engineering contracts under \$500,000. The statistical analysis of disparity was limited to contracts in each industry under \$500,000 at the formal level and \$25,000 at the informal level.

B. Subcontracts

A total of 5,683 construction subcontracts and 68 architecture and engineering subcontracts were identified for the January 1, 2006 to December 31, 2008 study period.

Of the subcontracts analyzed, \$1,887,635,993 total dollars were expended during the study period for construction subcontracts and \$18,128,221 total dollars were expended for architecture and engineering.



C. Prime Contractor Disparity Findings

1. Construction Contracts

As indicated in Table 12.01, DBEs were underutilized at both the formal and informal contract levels.

**Table 12.01 Disparity Summary: Construction Contract Dollars,
January 1, 2006 to December 31, 2008**

Group	Construction	
	Formal Contracts under \$500,000	Informal Contracts \$25,000 and under
Disadvantaged Business Enterprises	Yes	Yes

2. Architecture and Engineering Contracts

As indicated in Table 12.02, DBEs were underutilized at the formal contract level.

**Table 12.02 Disparity Summary: Architecture and Engineering Contract Dollars,
January 1, 2006 to December 31, 2008**

Group	Architecture and Engineering	
	Contracts under \$500,000	Informal Contracts \$25,000 and under
Disadvantaged Business Enterprises	Yes	No



D. Subcontractor Disparity Findings

1. Construction Contracts

The construction subcontractor disparity findings are summarized in Table 12.03 below. DBEs were underutilized on construction subcontracts at a statistically significant level.

Table 12.03 Construction Subcontractor Disparity Summary, January 1, 2006 to December 31, 2008

Group	Construction
Disadvantaged Business Enterprises	Yes

2. Architecture and Engineering

The architecture and engineering subcontractor disparity findings are summarized in Table 12.04 below. DBEs were determined to be underutilized at a statistically significant level.

Table 12.04 Subcontractor Disparity Summary, January 1, 2006 to December 31, 2008

Group	Architecture and Engineering
Disadvantaged Business Enterprises	Yes



IV. DBE-SPECIFIC REMEDIES

A. Set Overall DBE Goals

The methodology used to set the goals are pursuant to the two-step process set forth in 49 Code of Federal Regulations Part 26.45.

B. Subcontractor Remedies

- *Contract Specific DBE Goals:* Contract-specific DBE prime contracting goals should be set on all construction and architecture and engineering contracts to address the identified disparity. The goals should reflect the actual availability for each contract that is advertised, or the goals could be set no higher than the actual availability for each advertised contract.
- *Good Faith Efforts:* Detailed and quantifiable good faith effort criteria should be developed and applied to each solicitation with a subcontractor goal. Each criterion, like negotiation in good faith with potential subcontractors, should define and quantify the minimum behavior required to demonstrate an attempt to meet the subcontracting goal.

V. RACE AND GENDER-NEUTRAL RECOMMENDATIONS

A. Pre-Award Recommendations

1. Expand Unbundling Policy

IDOT's 4,129 total prime contracts were awarded to 555 vendors. Of the 555 vendors, 22 received 21.24 percent of the 4,129 prime contracts, and the 22 vendors received \$2,034,640,665 or 50 percent of the contract dollars.

IDOT should make a greater effort to unbundle its contracts to increase the number of businesses participating at both prime contracting and subcontracting levels. A DBE program can support procedures to unbundle large contracts. Decisions to unbundle a contract should be reviewed using the following criteria:



- Determine whether the project will be conducted in multiple locations
- Review the size and complexity of the procurement
- Determine the similarity of the goods and services procured
- Evaluate the sequencing and delivery of the work
- Establish public safety issues and convenience
- Identify options presented by the procurement division

2. Establish a Direct Purchase Program for Construction Contracts

A Direct Purchase Program (Program) would reduce the amount of the construction bid subject to a bond. For the purpose of bonding a job, the cost of supplies could be subtracted from the bid price, thereby reducing the amount of the contractor's bond.

This Program can be beneficial and provide savings for construction contractors, especially small, disadvantaged, minority, and woman-owned businesses because the subject bond is reduced by the material costs included in the direct purchase. The cash flow required to pay suppliers in advance of receiving reimbursement from the prime contractor is also eliminated. The supplier, knowing that it would receive direct payment from IDOT, may also give the bidder a more competitive price, thereby reducing the overall bid price.

3. Form Partnerships with Lending Institutions

Banking relationships with financial institutions to assist small, disadvantaged, minority, and woman-owned businesses with project financing and start-up costs should be leveraged. It is important to develop programs and incentives with lending institutions currently providing financial services to IDOT that can offer financial assistance to small, disadvantaged, minority, and woman-owned businesses that typically face barriers.

4. Remove Brand Name Requirements in Solicitations

IDOT should refrain from requiring specific brand name products in its solicitations because the named supplier may not be available to DBEs. Such requirements restrict competition. Oftentimes large firms receive reduced pricing from major suppliers while smaller firms do not.



5. Revise Insurance Requirements

Insurance requirements should be evaluated to ensure that smaller contracts do not carry a disproportionately high level of coverage. As a general practice, IDOT should implement standard provisions applicable to all of IDOT's contracts. The insurance requirements on small contracts should be set in relation to the actual contract liability. A revision of insurance requirements could attract more bidders and thereby increase competition and reduce project costs. Any revisions to the insurance provisions must comply with statutory requirements.

6. Owner-Controlled Insurance Program

IDOT should also consider establishing an Owner-Controlled Insurance Program (OCIP) to consolidate risk management costs and reduce the burden of the insurance premium for DBEs and small business owners. Under an OCIP or "wrap-up" program, a single insurance program provides insurance for the owner and all eligible (on-site) project contractors and subcontractors. An OCIP could be established in cooperation with other local governmental agencies. IDOT and any other participating governmental agencies would benefit as well, since the vendor passes the fee for the surety bond to IDOT in its pricing. The OCIP could be used to allow coverages for multiple insured entities to be "wrapped up" into a single consolidated insurance program. Additionally, the Program could assist IDOT in leveling the playing field by reducing insurance expenses for DBEs which can be higher than those expenses for large prime contractors.

7. Quantify Good Faith Effort Criteria

IDOT should quantify the good faith effort criteria in its policy in order to measure a prime contractor's efforts to secure the participation of DBEs to meet the contract goal. Table 12.05 below describes the criteria to quantify good faith efforts.

For example, a prime contractor would earn five points for advertising at least twice in the general circulation media, minority focused media, or trade-related publications, ten days prior to submission. Requisite documentation, such as dated copies of the advertisement or an affidavit from the periodical verifying these efforts, would be required from the prime contractors. There would be a minimum overall score for the prime contractor to demonstrate sufficient good faith efforts in lieu of meeting the DBE goal.



Table 12.05 Quantifiable Good Faith Efforts

Criterion	Effort	Documentation
Advertising (5 points)	Advertise at least twice in the general circulation media, minority-focused media, or trade-related publications, ten days prior to submission.	Dated copies of the advertisement or an affidavit from the periodical.
Bonding Requirements (5 points)	Waive or reduce bonding requirements for subcontractors	Copies of bid solicitations waiving or reducing bond requirements

8. Require Prime Contractor Validation of Subcontractor Payments Prior to Receiving Final Payment

All IDOT prime contractors requesting final contract payment should submit with their final payment voucher an affidavit to verify payments to subcontractors. The final payment to the prime contractor should be held until the final and full payment to the listed subcontractors is verified. This practice would ensure that all IDOT subcontractors get paid.

B. Post-Award Recommendations

1. Conduct Bi-Annual Review of the DBE Directory

Some IDOT departments can fall victim to the overutilization of firms that have become familiar. Each department should conduct a bi-annual review of its contracting activities to determine the types of goods and services it procures. This information should be compared against the DBE Directory to identify certified DBEs capable of providing services to IDOT in specific industries but have not been utilized.

2. Publish DBE Utilization Reports

Utilization reports that measure the effectiveness of the DBE Program should present payment and award data organized by industry, department, ethnicity, gender, and M/WBE and DBE certification status. Change orders and substitutions should be identified as well.

The utilization reports should be submitted to IDOT’s Board of Commissioners on a quarterly basis. The fourth quarter report should include an assessment of Program activities



and recommendations for improvement. Exemplary practices and achievements in each department should also be noted in the fourth quarter report. All utilization reports should be posted on IDOT's website and made available to businesses by e-mail.

3. Provide Debriefing Sessions for Unsuccessful Bidders

Debriefing sessions for unsuccessful bidders should be held. These sessions could provide vital information to assist businesses to prepare more competitive submittals.

4. Conduct Routine Post-Award Contract Compliance Monitoring

Monthly contract compliance monitoring should be conducted to ensure that the subcontractor participation listed in bids, proposals, and statements of qualification is achieved throughout the duration of a contract. Regular compliance monitoring would verify that the prime contractors are honoring their subcontracting commitments prior to and after the award of the contract. Consistent contract compliance monitoring would minimize the hardships experienced by small, disadvantaged, minority, and woman-owned businesses due to unauthorized substitutions and late payments.

The following contract compliance monitoring methods are recommended:

- Track and report subcontractor utilization in an electronic database
- Collect copies of the canceled checks written to subcontractors in order to verify payment information on a quarterly basis
- Impose penalties for failure to list or pay a subcontractor for work performed

VI. ADMINISTRATIVE RECOMMENDATIONS

A. Website Enhancements

IDOT's website was evaluated with the goal of assessing its functionality, informational value, and access to contractors wishing to do business with the agency.



1. Provide Contact information for Key Personnel Involved in the Bid Process

Complete contact information for the purchasing department, including buyers, procurement officers, and business diversity/contract compliance officers should be clearly listed. The office location, e-mail address, phone numbers, and fax numbers should be available for the vendors who wish to contact a person at a given department for questions on contracting with the agency. Currently, IDOT lists one main number for the Chief Procurement Office and the names and titles of important personnel. However, each staff person's contact information is not provided and there is no indication of a contact name or hours of availability. The absence of this information can make it hard for contractors to establish a contact with the agency for questions and clarification on bid items and certification, as well as general inquiries.

2. List All Certified Subcontractors on the Website

All certified subcontractors should be listed on IDOT's website. A searchable database should be developed so that prime contractors and various department officials can search for subcontractors with keywords such as business name, industry, location of the business, ethnicity of the business owner, and certification status. This resource should be developed to ensure that information on certified subcontractors and subconsultants are accessible. Currently, IDOT's website lists DBE certified subcontractors in both PDF and Excel files. This information, in addition to information on all vendors, should be included in a searchable database.

3. Make Fiscal Year Reports Available

IDOT should publish yearly fiscal reviews. The fiscal report should reflect the amount of dollars utilized by IDOT on public works projects and purchases, as well as list the industry, ethnicity, gender, and DBE status of the contractors to inform the public of how IDOT is meeting its DBE goals. Making such information public not only ensures the integrity of IDOT's DBE Program, but allows vendors and the local community to view the results and effects of IDOT's DBE Program first hand.

4. Create an Interactive Website Portal for Prime and Subcontractors

IDOT should create a website portal for prime and subcontractors to submit data, which will be made available for the public to view. This website portal should allow all contractors to submit their monthly data in an electronic format using a pin signature system that would



reduce the time spent filling out paperwork. To authenticate and verify that the work being submitted is accurate, a unique pin number should be assigned to each contractor.

B. Administrative and Data Management Enhancements

1. Implement an Oversight Committee

IDOT should create an Oversight Committee to serve as an advisory group with the responsibility of reviewing the relevant documentation concerning the attainment of the DBE goals. The Oversight Committee should be comprised of representatives of DBEs, small business owners, and trade and business organization representatives.

2. Establish Performance Accountability Reviews

Accountability standards to promote and ensure compliance with revised procurement procedures and the enhanced DBE policy should be developed. These standards could be incorporated as part of the management and staff performance reviews. Development of accountability standards reduces potential non-compliance with revised procurement procedures and would function to increase M/WBE awareness of contract opportunities, as well as the number of M/WBEs utilized on IDOT contracts.

3. Develop Department-Wide Manager and Staff Training

A department-wide training manual for increasing the participation of DBEs should be developed. This manual would provide background on the DBE Program and the federal regulations governing the Program. Managers and departmental staff would be required to attend the annual training seminars.

4. Enhance Subcontract Utilization Tracking Database

IDOT's financial management system is not designed to track subcontract utilization data in an efficient manner. A new tracking system should be designed in the form of a relational database that can administer several complex queries, customized forms, and reports. The system should be linked to IDOT's financial management system by a unique contract number. Tracking DBE and non-DBE subcontractors for all contracts would allow IDOT to obtain a more accurate assessment of its subcontractor utilization. To establish comprehensive subcontractor data, bid tabulations, proposals, and statements of



qualification should be reviewed for subcontract information and entered into a database. The information would be both a record of bidders and a source of available businesses. Data on available businesses could be helpful in increasing the pool of certified DBE firms and could also serve as a source to expand IDOT's list of registered vendors or bidders.

The system should minimally have the following components:

- Vendor Information to track all vendor contact information and certification history
- Contract Management to track all prime contract awards, change orders, and payments
- Subcontractor Management to track all subcontract awards, change orders, and payments
- Customized and ad-hoc real time reporting on utilization reports for all projects

Specifically, the following are the minimum recommended fields to be recorded:

- Bid/Project Number
- Name and Address of Prime Contractor
- Prime Contractor Certification Status
- Prime Contractor Bid Amount
- Name and Address of Subcontractor
- Subcontractor Certification Status
- Service or Commodity to be Provided by Each Subcontractor
- Subcontractor Bid Amount



APPENDIX A



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ANECDOTAL QUESTIONNAIRE REPORT

I. SURVEY PURPOSE AND BACKGROUND

The purpose of the Anecdotal Survey was to solicit information from M/WBEs and Caucasian male business owners identified in Illinois Department of Transportation/Illinois Toll Highway Authority (IDOT/Illinois Tollway) DBE Disparity Study as willing to do business with IDOT and the Illinois Tollway. The survey provides an opportunity for more business owners than the 40 interviewed during the anecdotal assessment to express their experience working with or seeking work from IDOT/Illinois Tollway. The survey design was a result of a collaborative effort between IDOT, the Illinois Tollway, and Mason Tillman.

II. SURVEY METHODOLOGY

The approach for conducting the survey included designing the survey instrument, identifying businesses for the survey pool, administering the survey and analyzing the results.

A. Survey Instrument Design

The survey questions were designed to elicit from the respondents (1) general background information (2) experience submitting bids/proposals; (3) experience working with IDOT and the Illinois Tollway; (4) utilization of supportive services; (5) recommendations to help businesses obtain work from IDOT and the Illinois Tollway; (6) interest in additional supportive services; (7) recommendations for IDOT/Illinois Tollway's DBE Programs; and (8) experiences with discrimination on IDOT or the Illinois Tollway projects.

The survey included 20 questions yielding either a yes or no, multiple choice or rating scale response, and two open-ended questions. The survey questions were imported into Survey Monkey™, an on-line research tool which converted the questions into an E-Survey. A copy of the E-survey is attached as Appendix A.

A link to the E-Survey was placed on the Illinois Tollway's website. Business owners could access the survey through the Internet.

B. Identification of the Survey Pool

The distribution list contained 5,248 minority, female-owned, and Caucasian male-owned construction and construction-related firms that were willing to perform IDOT/Illinois Tollway prime contracts and subcontracts. The list was drawn from the availability database produced in the IDOT/Illinois Tollway DBE Disparity Study. A profile of the 5,248 businesses, by ethnicity and gender is presented in Table 1.

Table 1: Profile of Survey Pool by Ethnicity and Gender

Ethnicity/ Gender	Number	Percent
African American	393	7.49%
Asian American	165	3.14%
Hispanic American	284	5.41%
Native American	7	0.14%
Caucasian Female	524	9.98%
Caucasian Male	3875	73.84%
Total	5248	100.00%

Table 2 presents the construction businesses in the survey pool by ethnicity and gender.

Table 2: Construction Businesses in Survey Pool by Ethnicity and Gender

Ethnicity/ Gender	Number	Percent
African American	321	7.6%
Asian American	78	1.85%
Hispanic American	234	5.54%
Native American	7	0.17%
Caucasian Female	398	9.42%
Caucasian Male	3185	75.42%
Total	4223	100.00%

Table 3 presents the construction-related businesses in the survey pool by ethnicity and gender.

Table 3: Construction-Related Businesses in Survey Pool by Ethnicity and Gender

Ethnicity/ Gender	Number	Percent
African American	72	7.02%
Asian American	87	8.49%
Hispanic American	50	4.88%
Caucasian Female	126	12.29%
Caucasian Male	690	67.32%
Total	1025	100.00%

C. Distribution of the Survey Instrument

The E-Survey was emailed to the 5,248 businesses in the availability database. The email transmission included a description of the purpose for the survey and the Uniform Resource Locator (URL) link to the E-Survey. The business owners were encouraged to complete all questions, but were informed that including their company name was optional. In an effort to maximize the number of responses, two reminder emails were sent to the 5,248 businesses encouraging them to complete the survey.

Additionally, the DBE Disparity Study Committee members were solicited for their support to distribute to their members the link to the E-survey. The Committee members were emailed a notice encouraging them to disseminate the link to the business owner invitation and E-Survey link to their members. The following are the organizations represented by the Committee members:

- Asian American Institute
- Associated General Contractors of Illinois
- Black Contractors United, Inc.
- Federation of Women Contractors
- Hispanic American Construction Industry Association
- Illinois Association of Women Contractors
- Metro East Black Contractors Association
- Southern Illinois Builders Association
- Women Construction Owners and Executives

III. SURVEY FINDINGS

The responses to the 22 questions in the anecdotal E-Survey are presented below in three sections—*Profile of the Survey Respondents, Overview of Business Practices, and Best Management Practices.*

A. Profile of the Survey Respondents

A total of 754 surveys were received. The 754 responses represent 14.37 percent of the 5,248 businesses that received an email invitation from Mason Tillman to complete the survey. Some of the surveys received, represented multiple submissions from the same company and the same respondent. More than one response was received from 43 businesses and 138 respondents completed more than one survey. The surveys excluded are presented in Table 4 below.

Table 4: Excluded Survey Responses

Reason	Number	Percent
Answered Twice with Different Responses	46	33.33%
Duplicate Responses	58	42.03%
Same IP, Unknown Firms and Different Answers	23	16.67%
Two or More Response from Same Business	11	7.97%
Total	138	100.00%

Table 5 presents an ethnicity and gender profile of the business surveys analyzed.

Table 5: Ethnicity and Gender Profile of Survey Responses

Ethnicity/ Gender	Number	Percent
African American	45	7.31%
Asian American	25	4.06%
Hispanic American	43	6.98%
Native American	4	0.65%
Caucasian Female	163	26.46%
Caucasian Male	222	36.04%
Not Stated	114	18.51%
Total	616	100.00%

Only one survey was analyzed for each business. Where one person from the same business submitted two surveys the decision was to use the most complete survey. When two different persons from the same business submitted a response the individual with the senior position was selected. Even when adjusted for these two conditions there were 616 valid responses and the response rate was 11.74 percent, which was high for an E-Survey. There were 35 businesses that failed to specify an industry category and 114 that did not indicate ethnicity or gender. The profile of the businesses included in this Anecdotal Survey Analysis is provided in Table 6 by industry.

Table 6: Profile of Respondents by Industry

Business Category	Number	Percent
Construction Businesses		
Heavy Construction	96	15.58%
Material Supply	36	5.84%
Special Trade Contractors	210	34.09%
Trucking	14	2.27%
Construction-Related Businesses		
Architecture and Engineering	107	17.37%
Business Category		
Construction-Related Services	24	3.9%
Information Technology	18	2.92%
Professional Services	76	12.34%
Uncategorized		
Not Stated	35	5.68%

Business Category	Number	Percent
Total	616	100.00%

Table 7 presents the businesses analyzed by ethnicity and gender. There are 114 businesses which did not indicate their ethnicity and gender.

Table 7: Profile of Respondents by Ethnicity and Gender

Ethnicity	Number	Percent
African American	45	7.31%
Asian American	26	4.22%
Hispanic American	43	6.98%
Native American	3	0.49%
Caucasian Female	163	26.46%
Caucasian Male	222	36.04%
Not Stated	114	18.51%
Total	616	100.00%

Table 8 presents the construction businesses in the pool by ethnicity and gender. There are 54 construction businesses that did not indicate their ethnicity and gender.

Table 8: Construction Businesses by Ethnicity and Gender

Ethnicity/ Gender	Construction Businesses
African American	28
Asian American	5
Hispanic American	31
Native American	1
Caucasian Female	100
Caucasian Male	137
Not Stated	54
Total	356

Table 9 presents the construction-related businesses by ethnicity and gender. There are 31 businesses that did not indicate their ethnicity and gender.

**Table 9: Construction-Related Businesses
by Ethnicity and Gender**

Ethnicity /Gender	Construction-Related Businesses
African American	17
Asian American	20
Hispanic American	11
Native American	2
Caucasian Female	59
Caucasian Male	85
Not Stated	31
Total	225

Table 10 presents the number of employees on payroll for construction businesses by ethnicity and gender.

Table 10: Number of Employees for Construction Businesses

Employees on Payroll	2009	2010	Mean
10 and under	145	158	151.5
11 to 20	59	60	59.5
21 to 30	31	33	32
31 to 40	23	20	21.5
41 to 50	12	8	10
Over 50	62	45	53.5
Total	332	324	328

Table 11 presents the number of employees on payroll for construction-related businesses by ethnicity and gender.

Table 11: Number of Employees for Construction-Related Businesses

Employees on Payroll	2009	2010	Mean
10 and under	101	104	102.5
11 to 20	36	32	34
21 to 30	19	16	17.5
31 to 40	12	13	12.5
41 to 50	7	5	6
Over 50	27	27	27
Total	202	197	199.5

Table 12 presents the number of construction businesses by establishment.

Table 12: Construction Business by Establishment

Age of Business	Construction Businesses
Under 5	33
5 to 10	51
11 to 20	77
21 to 30	65
31 to 50	35
Over 51	37
Total	298

Table 13 presents the number of construction-related businesses by establishment.

Table 13: Construction-Related Business by Establishment

Age of Business	Construction -Related Businesses
Under 5	20
5 to 10	44
11 to 20	47
21 to 30	29
31 to 50	30
Over 51	24
Total	194

Tables 14 through 17, present the number of businesses within the two industries by gross revenue for 2008 – 2009, and ethnicity and gender.

Table 14: 2008 Gross Revenue for Construction Businesses by Ethnicity and Gender

2008 Revenue	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
Under 250,000	14	0	7	1	11	15	48
250,000 - 499,000	4	0	1	0	14	13	32
500,000 - 999,000	2	1	0	0	11	7	21
1,000,000 - 4,990,000	1	2	11	0	49	37	100
5,000,000 and Above	6	2	10	0	14	61	93
Total	27	5	29	1	99	133	294

Table 15: 2009 Gross Revenue for Construction Businesses by Ethnicity and Gender

2009 Revenue	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
Under 250,000	14	0	7	1	16	17	55
250,000 - 499,000	3	0	1	0	9	13	26
500,000 - 999,000	2	1	2	0	15	8	28
1,000,000 - 4,990,000	3	1	9	0	43	38	94
5,000,000 and Above	5	3	11	0	16	57	92
Total	27	5	30	1	99	133	295

Table 16: 2008 Gross Revenue for Construction-Related Businesses by Ethnicity and Gender

2008 Revenue	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
Under 250,000	4	5	7	2	22	14	54
250,000 - 499,000	2	4	1	0	8	4	19
500,000 - 999,000	5	3	0	0	8	13	29
1,000,000 - 4,990,000	4	7	2	0	15	30	58
5,000,000 and Above	2	1	1	0	5	21	30
Grand Total	17	20	11	2	58	82	190

Table 17: 2009 Gross Revenue for Construction-Related Businesses by Ethnicity and Gender

2009 Revenue	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
Under 250,000	3	6	6	1	22	16	54
250,000 - 499,000	1	3	2	1	8	8	23
500,000 - 999,000	6	4	0	0	8	11	29
1,000,000 - 4,990,000	4	6	2	0	15	27	54
5,000,000 and Above	2	1	1	0	5	20	29
Total	16	20	11	2	58	82	189

B. Overview of Business Practices

Table 43 presents the number of businesses by ethnicity and gender and legal form. Nearly 75 percent of the respondents were Caucasian male and female-owned businesses.

Table 18: Number of Businesses by Ethnicity, Gender and Legal Form

Ethnicity /Gender	Corporation	Partnership	Subchapter-S Corporation	Sole Proprietorship	Other	Total
African American	19	1	15	7	4	46
Asian American	10	0	14	0	2	26
Hispanic American	11	1	22	3	6	43
Native American	0	0	1	2	0	3
Caucasian Female	46	4	94	4	12	160
Caucasian Male	79	9	107	12	18	225
Total	165	15	253	28	42	503

Tables 19 through 22 compare the legal form of construction and construction-related businesses by revenue for 2008 and 2009. The majority of the businesses were S corporations. According to Subchapter S, Chapter 1 of the [Internal Revenue Code](#), a S corporation must not have more than 100 shareholders.

Table 19: Legal Form of Construction Businesses by 2008 Revenue

2008 Revenue	Corporation	Partnership	Subchapter-S Corporation	Sole Proprietorship	Other	Total
Under 250,000	13	3	25	5	4	50
250,000 - 499,000	7	0	18	5	2	32
500,000 - 999,000	5	1	14	0	1	21
1,000,000 - 4,990,000	43	3	47	4	6	103
5,000,000 and Above	38	2	54	3	3	100
Total	106	9	158	17	16	306

Table 20: Legal Form of Construction Businesses by 2009 Revenue

2009 Revenue	Corporation	Partnership	Subchapter-S Corporation	Sole Proprietorship	Other	Total
Under 250,000	14	3	31	6	3	57
250,000 - 499,000	4	0	19	2	2	27
500,000 - 999,000	10	1	14	1	2	28
1,000,000 - 4,990,000	41	2	44	4	5	96
5,000,000 and Above	37	3	51	3	5	99
Total	106	9	159	16	17	307

Table 21: Legal Form of Construction-Related Businesses by 2008 Revenue

2008 Revenue	Corporation	Partnership	Subchapter-S Corporation	Sole Proprietorship	Other	Total
Under 250,000	11	0	28	7	10	56
250,000 - 499,000	4	1	10	2	2	19
500,000 - 999,000	9	2	17	1	3	32
1,000,000 - 4,990,000	22	3	28	0	6	59
5,000,000 and Above	17	0	14	1	4	36
Total	63	6	97	11	25	202

Table 22: Legal Form of Construction-Related Businesses by 2009 Revenue

2009 Revenue	Corporation	Partnership	Subchapter-S Corporation	Sole Proprietorship	Other	Total
Under 250,000	12	0	27	7	11	57
250,000 - 499,000	5	1	14	2	1	23
500,000 - 999,000	10	1	16	0	3	30
1,000,000 - 4,990,000	19	3	26	2	6	56
5,000,000 and Above	17	0	14	0	4	35
Total	63	5	97	11	25	201

Table 23 lists the five accounting systems used by 73.39 percent of the construction and construction-related businesses. More than half of the businesses reported using an Intuit product.

Table 23: Five Most Frequently Used Commercial Accounting System

Corporation	Accounting System	Number	Percent
Deltek, Inc.	Deltek Versions	33	7.32%
Intuit, Inc.	Quick Book Versions	227	50.33%
Maxwell Systems, Inc.	Maxwell	10	2.22%
Sage Software, Inc.	Peachtree Versions	34	7.54%
Infor Global Solutions	Sage Master versions	27	5.99%
Other		120	26.61%
Total		451	100.00%

Tables 24 and 25 present the business accounting systems identified by 91.56 percent of the respondents. A commercial accounting system was used by 72.08 percent of the businesses. A proprietary or customized accounting system were used by 5.03 percent of the businesses, and 14.45 percent reported that their business did not use a business accounting system.

Table 24: Business Accounting System by Type Used

Corporation	Accounting System	Number
Accivity	AccountEdge	1
AccuBuild, LLC	Accui-Build	1
Applied Computer System	Job Power	1
A-System Corporation	A-Systems Jobview	1
BST Global	BST	3
CBS	CBS	3
Computer Ease, Inc.	Computer Ease	11
Construction Computer Solution	Construction Computing	2
Construction Industry Solution	Coins	1
CSS, Inc.	CSSI	1
Custom Software Inc.	Custom	7
Deltek System, Inc.	Costpoint	1
Deltek, Inc.	Advantage (Deltek)	32
Dexter and Chaney, Inc.	Forefront, Spectru, Spreadsheet	4
Foundation Software, Inc.	Foundation	4
IBM	Lotus	1
Info Global Solutions	AMSI, Starbuilder	4
Intersoft Systems	Intersoft	2
Intuit, Inc.	Ajera, Quickbooks, Intuit Master Builder	239
James Hamlin	James Hamlin	1
Lawson Software	Lawson	1
Maxwell	Maxwell	9
Maxwell Systems	American Contractor, Contract Systems	10
Microsoft	Excel, Great Plains, Win2	7
MICS, Inc.	Builders Information System	1
Open Systems, Inc.	Open Systems	1
Oracle	Oracle	2
P2 Energy Solutions Inc.	Excalibur	1
PCS Software, Inc.	PCS Express	1
Sage Software, Inc.	MAS, Master Builder, Peachtree	68
VERSYSS	Versyss Construction Management	1
View point Software	Viewpoint, Visual Contract System	8
Vision Software	Vision	5
Wynne Systems, Inc.	Rentalman	1
XTS Software Corporation	AXIUM	2
Unknown	Accrual	1
Unknown	ANITA	1
Unknown	CRM	1
Unknown	EPSI uses Money Business software.	1
Unknown	Outside accounting firm	1
Unknown	General Monthly	1
Total		444

Table 25: Business Accounting Systems Used by Business Category

Business Category	No	Yes	Total
Architecture and Engineering	20	87	107
Construction-Related Services	3	19	22
Heavy Construction	6	89	95
Information Technology	0	18	18
Material Supply	4	30	34
Professional Services	12	60	72
Special Trade Contractors	39	163	202
Trucking	5	9	14
Grand Total	89	475	564

A total of 475 businesses reported using a business accounting system. Table 26 presents the utilized business accounting systems by ethnicity and gender.

Table 26: Business Accounting Systems Used by Ethnicity and Gender

Ethnicity/Gender	No	Yes	Total
African American	17	25	42
Asian American	4	22	26
Hispanic American	6	37	43
Native American	1	2	3
Caucasian Female	22	135	157
Caucasian Male	25	194	219
Not Stated	14	60	74
Total	89	475	564

Table 27 presents by industry the businesses that use a business accounting system

Table 27: Business Accounting Systems Used by Industry

Business Category	No	Yes	Total
Construction	54	291	345
Construction Related	35	184	219
Total	89	475	564

Table 28 presents the use of business accounting system by business category within the construction industry.

Table 28: Business Accounting System by Construction Business Category

Business Category	No	Yes	Total
Heavy Construction	6	89	95
Material Supply	4	30	34
Special Trade Contractors	39	163	202
Trucking	5	9	14
Total	54	291	345

Table 29 presents the 2009 revenue level for all businesses using an accounting system.

Table 29: Business Accounting System by 2009 Revenue

Revenue	No	Yes	Total
Under 250,000	35	75	110
250,000 - 499,000	10	40	50
500,000 - 999,000	9	48	57
1,000,000 - 4,990,000	12	136	148
5,000,000 and Above	5	127	132
Total	71	426	497

Table 30 presents by ethnicity and gender the businesses that bid on IDOT construction contracts as a prime contractor. Less than 30 percent of the businesses bid on an IDOT prime contract.

Table 30: Bid as Prime to IDOT by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	28	9	37
Asian American	17	1	18
Hispanic American	24	9	33
Native American	2	1	3
Caucasian Female	95	25	120
Caucasian Male	113	73	186
Total	279	118	397

Table 31 presents the businesses that bid on IDOT construction contracts as a subcontractor by ethnicity and gender. Less than 50 percent of the businesses bid as a subcontractor on an IDOT contract.

Table 31: Bid as Subcontractor to IDOT by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	20	19	39
Asian American	12	4	16
Hispanic American	19	21	40
Native American	2	1	3
Caucasian Female	84	58	142
Caucasian Male	91	94	185
Total	228	197	425

Table 32 presents the ethnicity and gender of the businesses that submitted a proposal as a construction-related prime consultant on an IDOT contract. Less than 50 percent of the businesses submitted a proposal as a prime contractor on an IDOT contract.

Table 32: Submitted Proposal as Prime to IDOT by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	24	9	33
Asian American	15	8	23
Hispanic American	22	6	28
Native American	2	1	3
Caucasian Female	85	31	116
Caucasian Male	102	76	178
Total	250	131	381

Table 33 presents the ethnicity and gender of the businesses that submitted a proposal as a construction-related subconsultant on an IDOT contract. Less than 50 percent of the businesses submitted a proposal as a subconsultant on an IDOT contract.

Table 33: Submitted Proposal as Subconsultant to IDOT by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	19	14	33
Asian American	10	12	22
Native American	2	1	3
Hispanic American	18	14	32
Caucasian Female	81	49	130
Caucasian Male	90	86	176
Total	220	176	396

Table 34 presents the businesses that bid on the Illinois Tollway construction contracts as a prime contractor by ethnicity and gender. Less than 20 percent of the businesses bid on Illinois Tollway prime contracts.

Table 34: Bid as Prime Contractor to the Illinois Tollway by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	29	6	35
Asian American	16	1	17
Hispanic American	27	4	31
Native American	2	1	3
Caucasian Female	112	10	122
Caucasian Male	152	28	180
Total	338	50	388

Table 35 presents the businesses that bid on the Illinois Tollway construction contracts as a subcontractor by ethnicity and gender. Less than 40 percent of the businesses bid to Illinois Tollway as a prime contractor.

Table 35: Bid as Subcontractor to the Illinois Tollway by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	27	12	39
Asian American	12	3	15
Hispanic American	18	21	39
Native American	2	1	3
Caucasian Female	102	34	136
Caucasian Male	132	49	181
Total	293	120	413

Table 36 presents the ethnicity and gender of the businesses that submitted a proposal as a construction-related prime consultant on the Illinois Tollway contract. Less than 20 percent submitted a proposal for an Illinois Tollway contract.

Table 36: Submitted Proposal as Prime Contractor to the Illinois Tollway by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	27	6	33
Asian American	14	8	22
Hispanic American	24	3	27
Native American	2	1	3
Caucasian Female	104	14	118
Caucasian Male	151	26	177
Total	322	58	380

Table 37 presents the ethnicity and gender of the businesses that submitted a proposal as a construction-related subconsultant on an Illinois Tollway contract. Less than 30 submitted a proposal as a subconsultant on an Illinois Tollway contract.

Table 37: Submitted Proposal as Subconsultant to the Illinois Tollway by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	22	10	32
Asian American	10	10	20
Hispanic American	19	11	30
Native American	2	1	3
Caucasian Female	100	30	130
Caucasian Male	137	38	175
Total	290	100	390

Table 38 presents by ethnicity and gender the businesses that bid as a prime contractor on construction contracts at another public agency. A majority of the businesses bid to other public agencies as a prime contractor. This is a significantly higher percentage of the businesses than bid to either IDOT or the Illinois Tollway.

Table 38: Bid as Prime Contractor to a Public Agency by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	14	20	34
Asian American	8	11	19
Hispanic American	15	17	32
Native American	2	1	3
Caucasian Female	64	59	123
Caucasian Male	62	127	189
Total	165	235	400

Table 39 presents by ethnicity and gender the businesses that bid as a subcontractor on construction contracts at another public agency. A majority of the businesses bid to other public agencies as subcontractors. This is a significantly higher percentage of the businesses than the businesses that bid on either IDOT or the Illinois Tollway contracts.

Table 39: Bid as Subcontractors to a Public Agency by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	11	27	38
Asian American	8	9	17
Hispanic American	12	26	38
Native American	2	1	3
Caucasian Female	56	79	135
Caucasian Male	64	117	181
Total	153	259	412

Table 40 presents the ethnicity and gender of the businesses that submitted a proposal as a prime contractor to another public agency on construction-related contracts. A majority of the businesses submitted proposals to other public agencies as a prime contractor. This is a significantly higher percentage of the businesses than submitted proposals for either IDOT or the Illinois Tollway contracts.

Table 40: Submitted Proposal as Prime Contractor to a Public Agency by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	13	19	32
Asian American	7	16	23
Hispanic American	12	16	28
Native American	2	1	3
Caucasian Female	52	64	116
Caucasian Male	51	126	177
Total	137	242	379

Table 41 presents the ethnicity and gender of the businesses that submitted a proposal as a subconsultant to another public agency on construction-related contracts. A majority of the businesses submitted proposals as subconsultant on other public agencies' contracts. This is a significantly higher percentage of the businesses than submitted proposals as subconsultants for either IDOT or the Illinois Tollway contracts.

Table 41: Submitted Proposal as Subconsultants to a Public Agency by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	9	24	33
Asian American	6	16	22
Hispanic American	9	22	31
Native American	2	1	3
Caucasian Female	50	79	129
Caucasian Male	57	115	172
Total	133	257	390

Table 42 presents by ethnicity and gender the businesses that bid as a prime contractor on construction contracts to a private sector business. The percentage of the businesses that bid on private sector contracts is also greater than the percentage that bid to either IDOT or Illinois Tollway.

Table 42: Bid as Prime Contractor to Private Sector by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	17	17	34
Asian American	9	9	18
Hispanic American	7	25	32
Native American	2	1	3

Ethnicity /Gender	No	Yes	Total
Caucasian Female	54	68	122
Caucasian Male	35	158	193
Total	124	278	402

Table 43 presents by ethnicity and gender the businesses that bid as a subcontractor on construction contracts to a private sector business. A greater number of the businesses bid as subcontractors on private sector contracts than bid as subcontractors on either IDOT or Illinois Tollway contracts.

Table 43: Bid as Subcontractors to Private Sector by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	5	30	35
Asian American	5	13	18
Hispanic American	7	29	36
Native American	2	1	3
Caucasian Female	42	96	138
Caucasian Male	38	141	179
Total	99	310	409

Table 44 presents the ethnicity and gender of the businesses that submitted a proposal as a prime contractor to a private sector business on construction-related contracts. An even greater number of the businesses submitted proposals for private sector contracts than submitted proposals on either IDOT or Illinois Tollway contracts.

Table 44: Submitted Proposal as Prime Contractor to Private Sector by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	14	20	34
Asian American	7	17	24
Hispanic American	5	22	27
Native American	2	1	3
Caucasian Female	38	79	117
Caucasian Male	21	158	179
Total	87	297	384

Table 45 presents the ethnicity and gender of the businesses that submitted a proposal as a subconsultant to a private sector business on construction-related contracts. A greater number of the businesses submitted proposals for private sector subcontracts than submitted proposals for subcontracts on either IDOT or Illinois Tollway contracts.

Table 45: Submitted Proposal as Subconsultant to Private Sector by Ethnicity and Gender

Ethnicity /Gender	No	Yes	Total
African American	9	23	32
Asian American	5	16	21
Hispanic American	6	24	30
Native American	2	1	3
Caucasian Female	40	92	132
Caucasian Male	29	143	172
Total	91	299	390

The IDOT geographic districts where the respondents perform prime contract and subcontract work are presented in Table 46 by the ethnicity and gender of the business. The majority of the businesses reported working in four districts—District 1, District 2, District 3, and District 4.

Table 46: Prime Contract and Subcontract Businesses Work in IDOT Districts by Ethnicity and Gender

IDOT District	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
District 1	11	2	19	1	34	58	125
District 2	7	1	9	1	19	39	76
District 3	8	1	8	1	19	40	77
District 4	7	1	6	1	10	27	52
District 5	5	1	4	1	11	27	49
District 6	5	1	2	1	13	23	45
District 7	5	1	2	1	12	21	42
District 8	4	1	2	1	14	23	45
District 9	2	1	2	1	11	16	33
Total	54	10	54	9	143	274	544

The IDOT districts where the respondents perform construction prime contract and subcontract work are presented in Table 47 by the ethnicity and gender.

Table 47: Prime Contract and Subcontract Construction Businesses Work in IDOT Districts by Ethnicity and Gender

IDOT District	African American	Asian American	Hispanic American	Caucasian Female	Caucasian Male	Total
District 1	10	1	18	28	48	105
District 2	6	0	8	15	30	59
District 3	6	0	7	14	33	60
District 4	6	0	5	8	22	41
District 5	4	0	3	8	23	38
District 6	4	0	1	10	20	35
District 7	3	0	1	9	17	30
District 8	3	0	1	12	19	35

IDOT District	African American	Asian American	Hispanic American	Caucasian Female	Caucasian Male	Total
District 9	1	0	1	9	12	23
Total	43	1	45	113	224	426

The IDOT districts where the respondents perform construction-related prime contract and subcontract work are present in Table 48 by ethnicity and gender. The majority of the businesses reported working in four districts—District 1, District 2, District 3, and District 7.

Table 48: Prime Contract and Subcontract Construction-Related Businesses Work in IDOT Districts by Ethnicity and Gender

IDOT District	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
District 1	1	1	1	1	4	10	18
District 2	1	1	1	1	4	9	17
District 3	2	1	1	1	5	7	17
District 4	1	1	1	1	2	5	11
District 5	1	1	1	1	3	4	11
District 6	1	1	1	1	3	3	10
District 7	2	1	1	1	3	4	12
District 8	1	1	1	1	2	4	10
District 9	1	1	1	1	2	4	10
Total	11	9	9	9	28	50	116

Table 49 presents for construction businesses the 2009 gross revenue by income source. The private sector was the most significant source of revenue for most businesses.

Table 49: 2009 Construction Business Revenue by Income Source

Major Income Source	Total
IDOT Contracts	48
Illinois Tollway Contracts	15
Private Contracts	128
Public Agency Contracts	84
Other Source	18
Total	293

Table 50 presents for construction-related businesses the 2009 gross revenue by income source. The private sector and public agencies were the most significant source of revenue for most businesses.

Table 50: 2009 Construction-Related Business Revenue by Income Source

Major Income Source	Total
IDOT Contracts	9
Illinois Tollway Contracts	3
Private Contracts	85
Public Agency Contracts	77
Other Source	15
Total	189

Table 51 presents by ethnicity and gender the IDOT districts where construction prime contractors work. The majority of the minority and Caucasian female-owned businesses reported working in District 1.

Table 51: IDOT Districts Where Construction Primes Work by Ethnicity and Gender

IDOT District	African American	Hispanic American	Caucasian Female	Caucasian Male	Total
District 1	3	9	12	31	55
District 2	2	6	8	20	36
District 3	3	5	7	23	38
District 4	2	3	3	16	24
District 5	1	2	3	18	24
District 6	1	0	5	15	21
District 7	1	0	4	14	19
District 8	1	0	3	14	18
District 9	1	0	4	9	14
Total	15	25	49	160	249

Table 52 presents by ethnicity and gender the IDOT districts where construction subcontractors work. The majority of the minority- and Caucasian female-owned businesses reported working in District 1.

Table 52: IDOT Districts Where Construction Subcontractors Work by Ethnicity and Gender

IDOT District	African American	Asian American	Hispanic American	Caucasian Female	Caucasian Male	Total
District 1	10	1	18	25	42	96
District 2	6	0	8	13	27	54
District 3	6	0	7	12	29	54
District 4	6	0	5	7	18	36
District 5	4	0	3	7	19	33
District 6	4	0	1	8	17	30
District 7	3	0	1	8	12	24
District 8	3	0	1	11	14	29
District 9	1	0	1	8	8	18

IDOT District	African American	Asian American	Hispanic American	Caucasian Female	Caucasian Male	Total
Total	43	1	45	99	186	374

Table 53 presents by ethnicity and gender the IDOT districts where construction-related prime contractors work. The majority of the minority and Caucasian female-owned businesses reported working in District 1 and 3.

Table 53: IDOT Districts Where Construction-Related Prime Contractors Work by Ethnicity and Gender

IDOT District	African American	Asian American	Native American	Caucasian Female	Caucasian Male	Total
District 1	1	1	1	3	4	10
District 2	1	1	1	2	4	9
District 3	2	1	1	3	3	10
District 4	1	1	1	0	2	5
District 5	1	1	1	1	2	6
District 6	1	1	1	1	1	5
District 7	2	1	1	1	2	7
District 8	1	1	1	0	2	5
District 9	1	1	1	0	2	5
Total	11	9	9	11	22	62

Table 54 presents by ethnicity and gender the IDOT districts where construction-related subcontractors work. The majority of the minority and Caucasian female-owned businesses reported working in District 1 and 2.

Table 54: IDOT District Where Construction-Related Subcontractors Work by Ethnicity and Gender

IDOT District	African American	Asian American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
District 1	1	1	1	1	3	8	15
District 2	1	1	1	1	4	7	15
District 3	1	1	1	1	4	5	13
District 4	1	1	1	1	2	3	9
District 5	1	1	1	1	2	2	8
District 6	1	1	1	1	3	2	9
District 7	1	1	1	1	2	2	8
District 8	1	1	1	1	2	2	8
District 9	1	1	1	1	2	2	8
Total	9	9	9	9	24	33	93

Table 55 presents by ethnicity and gender the Illinois Tollway counties where construction prime contractors work. The majority of the minority and Caucasian female-owned businesses reported working in the counties of Cook and DuPage.

Table 55: The Illinois Tollway Counties Where Construction Prime Contractors Work by Ethnicity and Gender

Ethnicity /Gender	African American	Hispanic American	Caucasian Female	Caucasian Male	Total
Boone	1	2	1	5	9
Cook	2	4	6	22	34
DuPage	1	4	5	20	30
DeKalb	1	3	1	13	18
Kane	1	3	3	14	21
Lake	1	4	4	17	26
Lee	1	1	0	6	8
McHenry	1	2	2	15	20
Ogle	1	2	1	5	9
Whiteside	1	1	0	6	8
Will	1	3	3	17	24
Winnebago	1	2	1	9	13
Outside Illinois	1	0	1	2	4
Total	14	31	28	151	224

Table 56 presents by ethnicity and gender the Illinois Tollway counties where construction subcontractors work. The majority of the minority and Caucasian female-owned businesses reported working in the counties of Cook and DuPage.

Table 56: The Illinois Tollway Counties Where Construction Subcontractors Work by Ethnicity and Gender

Ethnicity /Gender	African American	Asian American	Hispanic American	Caucasian Femal	Caucasian Male	Total
Boone	1	0	4	8	13	26
Cook	9	1	19	21	36	86
DuPage	2	1	15	19	37	74
DeKalb	1	0	9	10	26	46
Kane	2	0	14	13	32	61
Lake	3	1	16	17	31	68
Lee	1	0	3	6	10	20
McHenry	1	0	11	12	30	54
Ogle	1	0	5	9	12	27
Whiteside	1	0	3	5	12	21
Will	3	0	12	12	28	55
Winnebago	1	1	5	9	16	32
Outside Illinois	1	0	2	3	5	11
Total	27	4	118	144	288	581

Table 57 presents by ethnicity and gender the Illinois Tollway counties where construction-related prime contractors work. The majority of the minority and Caucasian female-owned businesses reported working in four counties-Cook, DuPage, Lake, and Will.

Table 57: The Illinois Tollway Counties Where Construction-Related Prime Contractors Work by Ethnicity and Gender

Ethnicity /Gender	African American	Asian American	Native American	Caucasian Female	Caucasian Male	Total
Boone	0	0	1	1	1	3
Cook	4	1	1	3	3	12
DuPage	2	0	1	3	3	9
DeKalb	0	0	1	2	2	5
Kane	0	0	1	2	2	5
Lake	1	0	1	2	2	6
Lee	0	0	1	1	0	2
McHenry	1	0	1	2	1	5
Ogle	0	0	1	1	1	3
Whiteside	0	0	1	1	0	2
Will	1	0	1	2	2	6
Winnebago	0	0	1	1	1	3
Outside Illinois	0	0	1	1	0	2
Total	9	1	13	22	18	63

Table 58 presents by ethnicity and gender the Illinois Tollway counties where construction-related subcontractors work. The majority of the minority and Caucasian female-owned businesses reported working in the counties of Cook and DuPage.

Table 58: The Illinois Tollway Counties Where Construction-Related Subcontractors Work by Ethnicity & Gender

Ethnicity /Gender	African American	Hispanic American	Native American	Caucasian Female	Caucasian Male	Total
Boone	0	0	1	1	2	4
Cook	3	1	1	4	2	11
DuPage	2	1	1	3	2	9
DeKalb	0	0	1	2	2	5
Kane	0	0	1	3	2	6
Lake	1	0	1	1	2	5
Lee	0	0	1	1	0	2
McHenry	1	0	1	2	2	6
Ogle	0	0	1	1	0	2
Whiteside	0	0	1	1	0	2
Will	1	0	1	2	2	6
Winnebago	0	0	1	2	2	5
Outside Illinois	0	0	1	1	0	2
Total	8	2	13	24	18	65

Table 59 presents construction prime contractor’s use of IDOT supportive services by ethnicity and gender. Caucasian male prime contractors’ use of IDOT supportive services was comparable to that of minority and Caucasian female-owned businesses.

Table 59: Prime Constructor Construction Business Use of IDOT Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Management Assistance	Technical Assistance	Other	Total
African American	1	1	0	2
Hispanic American	4	3	2	9
Caucasian Female	3	2	3	8
Caucasian Male	8	5	3	16
Total	16	11	8	35

Table 60 presents the IDOT supportive services construction subcontractors have used by ethnicity and gender. Caucasian male subcontractors’ use of IDOT supportive services was comparable to that of minority and Caucasian female-owned businesses.

Table 60: Subcontractor Construction Business Use of IDOT Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Management Assistance	Technical Assistance	Other	Total
African American	5	7	1	13
Asian American	0	1	1	2
Hispanic American	7	4	5	16
Caucasian Female	7	7	8	22
Caucasian Male	8	5	3	16
Total	27	24	18	69

Table 61 presents the IDOT supportive services construction-related prime contractors have used by ethnicity and gender. Only a few contractors reported using IDOT supportive services.

Table 61: Prime Construction-Related Business Use of IDOT Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Management Assistance	Technical Assistance	Other	Total
African American	0	1	2	3
Asian American	0	0	0	0
Native American	0	0	0	0
Caucasian Female	1	0	1	2
Caucasian Male	0	0	0	0
Total	1	1	3	5

Table 62 presents the IDOT supportive services construction-related subcontractors have used by ethnicity and gender. Fewer construction-related subcontractors used IDOT supported services than prime contractors.

Table 62: Subcontractor Construction-Related Business Use of IDOT Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Management Assistance	Technical Assistance	Other	Total
African American	0	0	0	0
Asian American	0	0	0	0
Hispanic American	0	0	0	0
Native American	0	0	0	0
Caucasian Female	0	0	3	3
Caucasian Male	0	0	0	0
Total	0	0	3	3

Table 63 presents the Illinois Tollway supportive services construction prime contractors have used by ethnicity and gender.

Table 63: Prime Contractor Construction Business Use of the Illinois Tollway Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Earned Credit	Mentor-Protégé	Other	Total
African American	0	0	0	0
Hispanic American	2	1	0	3
Caucasian Female	0	0	1	1
Caucasian Male	5	1	1	7
Total	7	2	2	11

Table 64 presents the Illinois Tollway supportive services construction subcontractors have used by ethnicity and gender.

Table 64: Subcontractor Construction Business Use of the Illinois Tollway Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Earned Credit	Mentor-Protégé	Other	Total
African American	1	0	3	4
Asian American	0	0	1	1
Hispanic American	3	1	4	8
Caucasian Female	0	0	2	2
Caucasian Male	5	1	2	8
Total	9	2	12	23

Table 65 presents the Illinois Tollway supportive services construction-related prime contractors have used by ethnicity and gender.

Table 65: Prime Contractor Construction-Related Business Use of the Illinois Tollway Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Earned Credit	Mentor-Protégé	Other	Total
Asian American	0	0	1	1
African American	0	0	0	0
Native American	0	0	0	0
Caucasian Female	0	0	0	0
Caucasian Male	0	0	0	0
Total	0	0	1	1

Table 66 presents the Illinois Tollway supportive services construction-related subcontractors have used by ethnicity and gender.

Table 66: Subcontractor Construction-Related Business Use of the Illinois Tollway Supportive Services by Ethnicity and Gender

Ethnicity /Gender	Earned Credit	Mentor-Protégé	Other	Total
African American	0	0	0	0
Hispanic American	0	0	0	0
Native American	0	0	0	0
Caucasian Female	0	0	2	2
Caucasian Male	0	0	0	0
Total	0	0	2	2

C. Recommended Best Management Practices

Tables 67 through 74 present recommended best management practices which construction contractors report would support their effort to obtain work with IDOT/Illinois Tollway. The data is reported by ethnicity and gender. More businesses reported that timely payment, from both IDOT/Tollway and their prime contractors was a best management practice that would support their effort to obtain work with IDOT/Illinois Tollway.

Table 67: Access to Credit Services — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	15	3	3	21
Asian American	1	1	3	5
Hispanic American	13	2	7	22
Native American	0	1	0	1
Caucasian Female	29	18	23	70
Caucasian Male	21	23	59	103
Total	79	48	95	222

Table 68: Unbundling of Contract Services — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	16	3	3	22
Asian American	5	0	0	5
Hispanic American	13	7	4	24
Native American	1	0	0	1
Caucasian Female	32	24	9	65
Caucasian Male	38	35	29	102
Total	105	69	45	219

Table 69: Assistance with Bond/ Insurance Services — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	14	4	3	21
Asian American	1	1	3	5
Hispanic American	13	6	5	24
Native American	0	1	0	1
Caucasian Female	23	15	32	70
Caucasian Male	23	15	68	106
Total	74	42	111	227

Table 70: DBE Rotation Program Services — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	15	4	4	23
Asian American	2	3	0	5
Hispanic American	12	5	3	20
Native American	0	1	0	1
Caucasian Female	18	22	21	61
Caucasian Male	18	17	49	84
Total	65	52	77	194

Table 71: Removal of Brand Name Requirement Services — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	10	2	7	19
Asian American	0	0	4	4
Hispanic American	10	1	11	22
Native American	0	1	0	1
Caucasian Female	14	16	33	63

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
Caucasian Male	21	28	49	98
Total	55	48	104	207

Table 72: Timely Payments from Primes — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	19	1	2	22
Asian American	2	1	1	4
Hispanic American	20	1	2	23
Native American	1	0	0	1
Caucasian Female	64	5	7	76
Caucasian Male	77	11	20	108
Total	183	19	32	234

Table 73: Timely Payments from IDOT/Illinois Tollway — Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	17	1	3	21
Asian American	2	1	1	4
Hispanic American	19	1	1	21
Native American	1	0	0	1
Caucasian Female	62	3	6	71
Caucasian Male	84	8	16	108
Total	185	14	27	226

Table 74: Publish Payments to Prime Contractors — a Service That Would Help Construction Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Grand Total
African American	14	2	3	19
Asian American	2	0	2	4
Hispanic American	18	1	2	21
Native American	0	0	1	1
Caucasian Female	52	6	10	68
Caucasian Male	50	11	32	93
Total	136	20	50	206

A total of 14 additional services were listed by 18 respondents. The recommended services are presented in Table 75.

Table 75: Recommended Services — Would Help Construction Contractors

Requested Services
Bonding.
Easier bidding requirements.
Enforce non discrimination based on union affiliation.
Have fair business ethics. Do not hand over work to friend or relatives.
Lessen certification requirements for small businesses to obtain general contractor status.
More building mix in the scope.
Provide subcontractor list in addition to prime list.
Publish Engineer's Estimate.
Receive invitations to bid.
Remove union and prevailing wage requirements.
Require landscape architectural consultants on project engineering teams.
Stop putting all bids into small business set asides.
Ability to receive DBE status.
Use DBE and local Illinois firms instead of out-of-state firms.

Tables 76 through 83 present services which construction-related contractors report would help their business obtain work with IDOT/Illinois Tollway by ethnicity and gender. Timely payment from prime contractors and IDOT/Illinois Tollway was identified by most respondents as the service which would help their business.

Table 76: Access to Credit Services — Would Help Construction-Related Consultants

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	7	3	1	11
Asian American	0	4	5	9
Hispanic American	4	0	3	7
Native American	0	1	0	1
Caucasian Female	6	6	17	29
Caucasian Male	6	5	44	55
Total	23	19	70	112

Table 77: Unbundling of Contract Services — Would Help Construction-Related Consultants

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	8	4	0	12
Asian American	5	0	2	7
Hispanic American	4	2	2	8
Native American	1	0	0	1
Caucasian Female	13	9	10	32
Caucasian Male	20	20	19	59
Total	51	35	33	119

Table 78: Assistance with Bond/Insurance Services — Would Help Construction-Related Consultants

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	5	2	4	11
Asian American	3	0	4	7
Hispanic American	3	1	3	7
Native American	0	0	1	1
Caucasian Female	4	4	15	23
Caucasian Male	3	8	43	54
Total	18	15	70	103

Table 79: DBE Rotation Program Services — Would Help Construction-Related Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	6	0	4	10
Asian American	1	1	3	5
Hispanic American	1	0	4	5
Native American	0	0	0	0
Caucasian Female	3	5	13	21
Caucasian Male	6	5	33	44
Total	17	11	57	85

Table 80: Removal of Brand Name Requirement — Would Help Construction-Related Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	4	1	4	9
Asian American	0	3	2	5
Hispanic American	2	1	3	6
Native American	0	0	0	0
Caucasian Female	3	2	18	23
Caucasian Male	9	3	34	46
Total	18	10	61	89

Table 81: Timely Payments from Prime Contractors — Would Help Construction-Related Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	8	1	1	10
Asian American	5	0	1	6
Hispanic American	3	1	3	7
Native American	0	0	0	0
Caucasian Female	14	10	11	35
Caucasian Male	25	8	25	58
Not Stated	0	0	4	4
Total	55	20	45	120

Table 82: Timely Payments from the Illinois Tollway and/or IDOT — Would Help Construction-Related Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	12	0	2	14
Asian American	6	1	1	8
Hispanic American	4	1	3	8
Native American	0	0	1	1
Caucasian Female	12	10	14	36
Caucasian Male	32	10	17	59
Grand	66	22	38	126

Table 83: Publish Payments to Prime Contractors Service — Would Help Construction-Related Contractors

Ethnicity /Gender	Often/ Frequently	Sometimes	Never/ Rarely	Total
African American	8	0	1	9
Asian American	4	1	1	6
Hispanic American	2	2	3	7
Native American	0	0	1	1
Caucasian Female	12	7	12	31
Caucasian Male	13	9	31	53
Total	39	19	49	107

A total of 12 additional services were listed by 13 respondents. The recommended services are presented in Table 84.

Table 84: Other Services— That Would Help Construction-Related Consultants

Requested Services
Allow non engineering firms to do environmental sampling and testing.
Allow small businesses to be prime contractors.
Unbundle archaeological work from group ISAS.
Give other companies opportunities, more diversity.
IDOT pre-qualification for Project Controls.
Less DBE requests or better qualified DBEs.
No pay to play.
Provide assistance to small, veteran owned businesses.
Require internal communication with IDOT and State Regulators.
Show interest in small Caucasian male contractors.
Encourage primes to use new DBE, WBE or MBE firms.
Unbundling or having the opportunity to work with professional services primes.

Table 85 presents the supportive services that construction M/WBEs expressed interest in receiving from the Illinois Tollway.

Table 85: M/WBE Construction Businesses Interest in the Illinois Tollway Supportive Services

Supportive Services	Interested M/WBE
Informational Meetings	99
Bid Assistance	95
DBE Certification	67
Total	261

Table 86 presents the supportive services construction-related M/WBEs expressed interest in receiving from the Illinois Tollway.

Table 86: M/WBE Construction-Related Businesses Interest in the Illinois Tollway Supportive Services

Supportive Services	Interested M/WBE
Informational Meetings	70
Bid Assistance	70
DBE Certification	46
Total	186

Table 87 presents by ethnicity and gender the frequency that M/WBE construction businesses used to meet public sector M/W/DBE goals are also used on contracts without goal requirements. Caucasian female-owned businesses are used more frequently on contracts without goals than minority businesses.

Table 87: The Use of IDOT/Illinois Tollway M/WBE Construction Businesses on Contracts without Goals

Ethnicity /Gender	Frequently	Sometimes	Seldom	Never	Total
African American	4	7	5	11	27
Asian American	0	1	1	3	5
Hispanic American	3	8	11	5	27
Native American	0	0	0	0	0
Caucasian Female	19	26	15	10	70
Total	26	42	32	29	129

D. DBE Program Recommendations

Detailed below are the detailed best management practices received from 169 businesses regarding their recommendations to improve goal achievement within IDOT/Illinois Tollway's DBE programs. The responses are grouped into five categories.

1. Restructure The DBE Program

a. Dismantle DBE Program

Cease the use/earmarking of DBE-required work percentages.

Open up subcontracts to white male-owned businesses. The DBE program is a gift that keeps on giving and discriminates against White-owned businesses.

Remove the fraud in the DBE program or remove the DBE program completely. All it does is drive up construction costs and give companies a new device for fraud.

Discontinue the program. Due to the DBE program, my 50-year family business is in the process of liquidating. The playing field is unfairly tipped towards DBE firms, sinful!

Get rid of the DBE Program—it's a crock.

The DBE program is broken because the DBEs know they are going to get work so they overcharge and underperform. DBEs need to compete on a level playing field, and the requirements for prime contractors to use them needs to be relaxed.

Using DBEs is a waste of money. You're paying more for the work because most of the DBEs can't perform the work correctly.

Lower or eliminate the goals; the program has always been plagued with problems of incompetence and deception. The cost to taxpayers drastically exceeds the minimal societal benefit.

Discontinuing the program is the only option that will be acceptable.

IDOT could remove the goals so that my company and others like me can get some work!

Stop people who cheat the system. Just give work to local contractors. Money made and spent in Illinois.

Eliminate minority status to obtain work.

Let small White contractors who are solvent bid.

Eliminate DBE requirements.

Get rid of these goals, they are discriminating against White males and cost the taxpayers.

b. Diversify Trade Categories/Trade-Specific DBE Goal Enforcement

Make engineering projects use architectural services to allow architectural firms to grow and diversify. As it is now, Architectural and engineering firms restrict their participation in very narrow or specialized supporting services.

Have trade-specific DBE requirements.

Use Illinois companies versus out-of-state entities that have lower wage standards.

Set DBE goals for the different trades.

Bidding on contracts in sheet metal fabrication is needed.

DBE set-asides for professional services are need.

Include landscape architectural requirements on engineering design projects.

c. Expand DBE Program's Qualifications/Requirements

Have the DBE do something besides landscape, trucking, and guard rails. They need to expand and learn new areas that would give them room to grow.

d. Establish a Small Business Program

Would love to see more opportunities for small businesses who are not DBEs.

Small businesses owned by non-minority American males seem to be disadvantaged. We have applied for projects for over 10 years and have not been selected. Please help us understand the process.

e. Establish a Veteran-Owned Business Program

Allow veterans –owned business as part of the goal.

Service Disabled Veteran-Owned Small Businesses (SDVOSB) are not usually discussed at pre bid conferences.

Hire veteran-owned businesses.

Include SDVOBs on IDOT and the Illinois Tollway work.

f. Increase DBE Goals

Set higher goals on all trades.

DBEs should be contacted when there is a need on short-term assignments for engineers and designers.

Raise the goals so more subs can perform work. Too many generals use the same DBE firms for all the work.

More projects with DBE percentage within our district are needed.

Increase the goal setting and encourage developing DBE and other small businesses. High quality, well operated small businesses are critical for the state of Illinois' future economic and job growth!

Need more diversity. Give other companies opportunities to work and build relationships with IDOT.

Increase the percentage needed for participation so one major trade cannot meet the requirement.

There should be more bidding regarding IDOT/Illinois Tollway projects so WBEs can bid.

g. Institute an Alternate Rotational System

There should be somewhat of a rotational system. There should be a list of minority and female business owners, especially non-White firms to give them an opportunity to bid on these jobs.

Give more work to the DBEs before giving it out to outsiders.

I think the DBE program would better serve its participants if the DBE firms were on some type of rotation list, similar to the towing program the state and cities have in place. Thus enabling many, if not all DBEs to benefit from the program in some small way.

h. Lower DBE Goals

Lower the requirements and go back to collecting DBE plans within seven days of the bid. Trying to determine DBE participation the night before the letting is extremely difficult, let alone pinpointing an exact amount, especially if you are coming up short.

Lower the percentage or make it a goal.

The DBE goals should be lowered. There is insufficient DBE capacity to meet the goals without substantially increasing the project costs.

Lower or eliminate the goals; the program has always been plagued with problems of incompetence and deception. The cost to taxpayers drastically exceeds the minimal societal benefit.

Lower the ratio.

i. Require Prime Contractors to Subcontract to DBEs

When the primes are not meeting their requirements and have to pay penalties, those contract opportunities should be mandated to us who have not been given a chance to participate. Many times the primes would rather just give money back than give us a chance.

Enforce DBE requirements and penalize prime consultants that routinely do not meet their DBE goals.

Eliminate waivers. Eliminate racist, biased employees and engineers.

IDOT should have a mandatory requirement for DBE utilization.

Require larger prime contractors to at least try to use the DBEs in their district or the district where the work is being performed.

Understanding by the primes that the services provided by our company are not pre-qualifiable services and that they can still use our company when those services are needed.

j. Set-Aside Contracts for DBEs

As a first time WBE, give us more than a set aside. Insist that one new WBE or MBE or DBE be on each bid so we can participate.

Do not give business to a prime contract. Give us a fair chance to work on projects we are capable. With E-M you could have a source for custom made enclosures for emergency/police equipment, brackets, racks, lockers, panels. These are small samples.

You all should have set asides for DBE businesses. The State of Illinois does, and I have found it to be quite effective.

Minority consultants should get more prime contracts.

Advertise separate DBE contracts and eliminate the responsibility from any other contract.

Set aside some projects for DBE firms to submit proposals as prime consultants.

Use DBE set asides for professional services.

k. Simplify Bidding and Contracting Process

Please make the process easier and keep information previously submitted on file.

Need easier access to bid documents.

No PLAs! Let every contractor bid. Also, list DBE requirements on the Notice of Letting Item Descriptions.

Remove IDOT requirement for participation statements being submitted with bids. Contractors are bidding on very large numbers of projects, and we are unable to have any time for them to answer scheduling or other job-related questions.

Less paperwork.

I would like to have the percentage of DBE participation placed in the Notice of Letting/Item descriptions. It would assist in reviewing the projects.

Simplify.

Electronically submit subs' bids.

Outline the IDOT/Illinois Tollway project process, including required forms, invoicing requirements, etc. Very intimidating to work for the State without knowing how it all works.

Create a small size project only for DBE participation.

Do away with the new forms to be turned in on bid day! These are a hassle! You can't ever get the DBE contractor to send you pricing on the items you need them to quote!

Cut out the tons of paperwork. Make the bid process easy.

Make it easier to understand.

I. Unbundle Large Contracts

IDOT should implement the programs that they indicated they would as part of the lawsuit on the program, which includes assistance with bonding, unbundling, and other race and gender-neutral plans.

Unbundle projects. Size projects to a reasonable size where DBEs can submit as a prime.

Unbundle the IDOT/Illinois Tollway contracts.

They should structure their contracts in a way that small businesses who have small office staff can easily handle the project. The Illinois Tollway contracts require such a big organization that small businesses cannot afford to bid their projects.

Breaking the contracts down so small firms like mine can participate.

Unbundle projects and make the prequalification process more transparent.

Break the projects into reasonable size and level the playing field by minimizing subjectivity.

Projects need to be unbundled so that small businesses can give competitive bids.

2. Improve Communication and Networking

a. Increase Access to the List of IDOT/ Illinois Tollway Recommended DBEs

Need introduction to prime contractors and assistance to gain access to contracts as subcontractors.

Listing of specialty of DBEs preferred by IDOT/Illinois Tollway is needed.

Need more DBE subcontractors to choose from to meet the goals.

Material suppliers contact information is needed.

Need list of DBE companies to work with in special areas.

IDOT should provide current listings of all approved DBEs with work they are qualified for.

Provide a list of DBE participants ranked according to job performance and completed contracts.

b. Increase and Provide Earlier Notifications Pertaining to Bid Awards or Upcoming Bids

Inform DBEs where IDOT/Illinois Tollway contracts are advertised.

I'm a certified DBE through the Illinois Uniform Certification Program. Would be very helpful if IDOT supported a centralized website location where participating agencies were required to post RFPs for professional services.

Please let us know if we did not get the bid.

Need better dissemination of information/peer review of contracts to encourage new MBE/WBEs to participate.

Notice needed to DBE immediately that prime contractor has identified your firm for participation on the following project, including amount and copy of C1 paper submitted.

Send e-mails for future projects directly to our firm.

Earlier forecast of projects needed.

Let us know who got the bid, instead of making a lot of calls with no response.

Bid opportunities needed.

Make proposed projects for bid available to all, before the project is awarded. Each time I've followed-up on a "proposed project," I learn that it was already awarded.

Transparency—put schedule online.

Email bid notifications.

Put info in newspapers.

Email reminder of critical dates such as RFP advertisement, proposal due dates, etc., would be helpful.

I am a WBE and would like to see more bidding regarding these projects.

Need pre-notification of upcoming opportunities, BEFORE the big guys get it.

c. Increase Networking Opportunities between Prime Contractors, DBE Subcontractors, and Suppliers

As a materials supplier, if these agencies want to purchase the materials directly, it would allow all supply companies to have a level playing field in the bid process. We find it is hard to get into the arena.

More networking events where DBE firms can meet prime consultants are needed.

Solicit and certify more DBEs in Northern Illinois.

Need contacts with prime contractors to apply for subcontract projects requiring woman or disadvantaged business. Need input on hiring employees that will enable the business to gain some credits, tax breaks, etc.

Need networking opportunities, to market DBEs to prime consultants and contractors.

The main problem I have as a subcontractor is the fact that all my local primes use a certain sub and will not give us a chance. I have called and called and sent bid proposals; however, they will not utilize us, even times when we have been low bidder.

Assistance in locating/approaching prime contractors is needed.

Need networking events around the state for prime contractors to meet more subcontractors and to meet IDOT purchasing agents.

As a supplier, I have a hard time finding out from GCs which subcontractors are bidding to them so that I may supply a quote or materials. Is there an easier or more efficient way to connect with the bidding process? I just want a chance to show that I can do the job.

d. Provide Remedy to Address the Lack of Access to Qualified DBEs in Area

Recognize the areas that have few qualified minority subs.

There aren't many DBE companies available in our area.

We often work in rural areas, and DBE employers and employees are hard to find. No competitive bids—too far to travel.

We need more local DBEs in Lake County. To achieve DBE goals, we have to hire outside of Lake County too often.

3. Offer Bid-Related Assistance

a. Assist DBEs in Understanding Post-Award Expectations

The following respondents reported that DBEs need assistance in understanding post-award expectations:

IDOT needs to provide mentoring services from experienced personnel to assist DBE contractors in estimating, contract administration, and project management. There are quite a few DBE contractors wanting to succeed but lack the experience.

Open bid process to require primes to provide assistance with DBEs.

We need better education to the subcontractors (both DBE and non-DBE) as to the expectations of public work. For example, it is very possible that a company will have no or little success bidding due to the competition.

We do not have the resources to train the DBEs in doing projects, so the agencies should have training and award them contracts directly, to supervise them in running a business.

Need help in reading drawings.

Provide small DBE contractors who have not previously worked on IDOT or the Illinois Tollway projects with information as to what will be expected of them on the jobsite. They should be chosen by a prime to do work on an IDOT or the Illinois Tollway project.

b. Bidding Process Assistance

The following respondents reported that assistance is needed with the bidding process:

More detailed needed on submissions to these agencies.

Assistance needed in preparing bids and proposals.

Feedback on Statements of Interest would be very helpful.

Small businesses owned by non-minority American males seem to be disadvantaged. We have applied for projects for over 10 years and have not been selected. Please help us understand the process.

Outline the IDOT/the Illinois Tollway project process, including required forms, invoicing requirements, etc. Very intimidating to work for the State without knowing how it all works.

Need assistance.

c. Institute a Mentor/Protégé Program

The following respondents reported that a mentor/protégé program should be instituted:

ID OT needs to provide mentoring services from experienced personnel to assist DBE contractors in estimating, contract administration, and project management of projects. There are quite a few DBE contractors wanting to succeed but lack the experience.

Mentor/Protégé Program. Not familiar with it. We participate in the Federal SBA Mentor/Protégé Program.

Need mandatory Mentor/Protégé program on some percentage of the projects.

Help develop DBE and minority contractors to become primes.

d. Provide More Information on DBE Certification

The following respondents reported that more information should be provided on DBE certification:

Need introduction to prime contractors and assistance to gain access to contracts as subcontractors.

What is involved in making this family-owned business a WBE? We're currently just under 50 percent and have done business since 1972.

Need help in filling out paper work for MBE/DBE programs.

Metra meeting this past week gave out a lot of information and contacts willing to help complete application process.

Enhance the certification process to qualify rather than disqualify. As a minority company located within a HubZone area, I have gone through red tape trying to get my company certified as a DBE from IDOT, and it seems they are trying to disqualify me.

Allow someone like myself who has tried six times to be a DBE to be approved as a DBE contractor, as I now have almost two decades of experience in construction. In turn, other females may say, "Well she did it, I can try."

Assist us better in obtaining DBE certification.

Information on the registration process to get certified as a WBE with IDOT and the Illinois Tollway is needed.

Need information on how to get family-owned business into the DBE program.

Provide certification assistance.

We are working on WBE status. I was a little confused in regards to understanding some of the questions.

e. Simplify Certification Process

The following respondents reported that the certification process should be simplified:

Simplify the DBE certification program. For a small business it takes about a week to complete and costs \$250 in this challenging economy.

The DBE program is very difficult, and it takes valuable time away from actually doing and performing work. I finally gave up completing it because it was too time consuming and didn't prove profitable for me to even mess with the process.

I was recently denied the DBE label and am currently in protest. For all of the time and money investment I had in filing out the application, the denial and IDOT's reasoning was insulting. The person who interviewed me seemed confused throughout the entire process.

f. Unify Certification Process Across Agencies

The following respondents reported that the certification process across agencies should be unified:

I have recently been certified through CMS, who required the same information as IDOT. This process took over a year so they were very thorough. A shorter process once one is certified or agencies working together to verify this would be helpful.

A fast-tracked process is needed when certified with other Illinois government agencies or with the acceptance of other certifications. And low or no cost for certification.

4. More Stringent Monitoring Of Program Regulations

a. Enforce Prime Contractors' Actual Use of DBEs (Post-Award)

The following respondents reported that prime contractors' actual use of DBEs should be enforced:

Enforce DBE requirements and penalize prime consultants that routinely do not meet their DBE goals.

When a prime contractor includes a DBE in their bid, make sure they actually use their services. Ensure consistency in applying the rules within the agency and reporting them to the prime contractors.

b. Stricter Monitoring of Prime Contractors (Post-Award)

The following respondents reported that stricter monitoring of prime contractors is needed:

Mandatory procurement meetings for ALL primes that do work are needed.

Better monitoring of primes in using minorities is needed.

Monitor and eliminate pass-through clients.

c. Change How DBE Participation is Counted on Contracts

The following respondents reported that how DBE participation is counted on contracts should be changed:

More regulation of DBE waiver policies and procedures is needed.

If goals are getting higher, this should be a factor in the 50.1 percentage goal that the prime has to do.

Make goals realistic for region, taking into account DBE availability and capacity.

d. Stricter Monitoring of DBEs (Post-Award)

The following respondents reported that stricter monitoring of DBEs is needed:

Stricter standards on the DBEs are needed. Example: a DBE business that is trying to stay below the \$17 million revenue limit does not seem to us disadvantaged if they can attain that level of revenue.

Monitor and eliminate pass-through clients.

Provide information to subcontractors of payments to prime contractors and information on DBE compliance.

e. Stricter Monitoring of Qualifications to Become a DBE

The following respondents reported that stricter monitoring of qualifications to become a DBE is needed:

Women and minority integration into full staffing is needed. Many firms are qualified DBEs but hire mostly men.

Eliminate “front companies.”

The DBE goal should be based on total workers on the project rather than the use of a single owner DBE subcontractor.

Clear knowledge of a firm's eligibility is needed.

Need to better monitor the length of time that a DBE is truly disadvantaged.

You need to assess the reality of the firm actually being disadvantaged. Some of the DBE firms listed make a million to \$3 million a year. How are they disadvantaged?

Implement a system to better monitor the trucking in the DBE program.

Set up diversity goals based on employees doing the work not who owns the firm.

5. Provide Financial Assistance

a. Enforce Timely Payment

The following respondents reported that timely payment should be enforced:

Getting paid in a timely fashion is important.

We struggle when it comes to being paid in a timely manner. It has a domino effect for us when we don't get paid and then our suppliers don't get paid. We also have experienced issues with change orders being slowly processed.

Prompt payments are needed.

The majority of the time, general contractors use DBE/MBEs, but do not pay in a timely fashion, and they pit DBE/MBEs against each other. And the end result is that the MBE/DBE takes a job too cheap just to get their foot in the door, only to go out of business.

b. Provide Bonding Assistance

The following respondent reported that bonding assistance should be provided:

IDOT should implement the programs that they indicated they would as part of the lawsuit on the program, which includes assistance with bonding, unbundling, and other race and gender-neutral plans.

Bonding and access to capital are needed.

c. Provide Credit Assistance

The following respondent reported that credit assistance should be provided:

Need access to credit/less credit restrictions and limits to number of larger companies bids open.

E. Respondent's Discrimination Experience

Detailed and summarized below are the descriptions of experiences received from 86 businesses regarding discrimination involving IDOT or the Illinois Tollway. Their responses are grouped in four categories.

1. No, Did Not Encounter Discrimination With IDOT/Illinois Tollway

A total of 36 respondents reported that they had encountered no discrimination with IDOT/Illinois Tollway.

Following is a selection of expanded responses:

I have not specifically encountered any form of discrimination from IDOT or the Illinois Tollway. As a young firm, however, it is rather difficult to have access to key staff.

I don't consider any of the experiences as discriminatory, just the growing pains of a new business. My experience of bidding directly to the agencies is a much better chance of receiving the award than bidding to the subs.

Thank God for goals, if it wasn't for that we would never grow especially in this industry.

2. Yes, Encountered Discrimination With IDOT/ Illinois Tollway

A total of 44 respondents reported that they did encounter discrimination with IDOT/Illinois Tollway.

a. Incidents of Reverse Discrimination

The following respondents reported on incidents of reverse discrimination:

Currently, we can compete economically with any contractor but are excluded.

Do not qualify as a DBE and have been told that we can't qualify because of this stipulation. I have been the only bidder on several projects and have been rejected because I was not Black, female, Hispanic, Pacific Islander, or whatever you have to be.

Equal access to State resources should be available to all participating contractors.

White male firms that do landscape/restoration have a hard time doing work since DBE percentage is required, and the DBEs are given the non-critical time work.

There is special treatment of minority firms in the selection process. It is apparent that former DBE firms and DBE firms are being given preferential treatment in being selected as primes. Non-minority firms are wasting their time and resources submitting on projects.

I feel this program is full of corruption and fraud. It is a way to discriminate against other subcontract (non-minority) companies that are not willing to cheat the system and have a "front man" pushing paperwork as a minority and charging a premium.

Discrimination toward capable and experienced contractors which causes them to be cast aside so that companies can meet lofty DBE goals by forcing them to use companies with poor track records who do not perform.

We applied for DBE status in 2009 and were declined; we feel unjustifiably. And as a result, we were unable to partake in the bidding process on a large IDOT project in our area. This project had a 22 percent DBE goal.

We have been used, going in on a bid, only to lose the job due to DBE requirements.

Many DBE firms are founded just to get IDOT work. They are owned by qualified minorities/females but hire mostly male employees. We are mostly male-owned but hire many females.

Discrimination against White males occurs.

Higher cost is the result of the DBE program (actually the real cost, but non-DBE firms cannot get that much due to competition). Lack of compliance with paperwork (knowledge of contract, inspection and payroll) from DBE firms occurs as well.

As a White male-owned firm, we have experienced reverse discrimination since the goals have forced us to subcontract work to others that we could perform more economically and smoothly ourselves.

My company gets eliminated from consideration because we aren't DBE. They'll pay 1/3 more for a DBE just to meet the goals. How is that fair to our company?

I am finding it difficult in getting consistent work and planning for the future because I am not a DBE. I am in a line of work that has DBE firms available, and they seem to be getting the work.

I feel I have been heavily discriminated against by IDOT, as I have been denied DBE status after six tries. I have been in the construction field for over 18 years now, with the same company, and each time I am denied.

Our only discrimination is from IDOT. Large firms that use us on private sector jobs don't use us on IDOT jobs because we do not help them meet quotas for DBE even though we are owned by a minority female.

We have frequently been low bidder as a sub but did not get the contract because we are NOT a DBE, resulting in a higher cost to the taxpayers.

There was one week this winter that we were used for a prime bid, and lost after the bid for minorities.

Yes, we're not DBE so we can't bid a lot of projects. This makes it hard to get good bids when you exclude most of the really good contractors.

We cannot get work because we are NOT a minority. The system is faulty at best.

When 90 percent of the rebar installers are part of the DBE program, the item should be removed from the program. Why do the Illinois Tollway and IDOT pay more for the services of a DBE?

You don't let small White solvent contractors bid.

We have been discriminated against because we are not a MBE or DBE firm. We provide specialty engineering services as a subconsultant to primes, and they sub out our services routinely, so they sub 98 percent or more of those services to MBE/DBE.

I respect the DBE program but I believe it is being abused and merely enriches the career DBE firms/owners instead of fostering new DBE

entrepreneurship. The DBE percentage requirements are too high and this severely limits our ability to get any IDOT or the Illinois Tollway work.

I feel woman-owned businesses such as myself that are not certified WBE companies should be given the same recognition as WBE-certified companies.

b. Due to Gender

The following respondents reported that they have been discriminated against because of gender:

My discrimination with IDOT goes back to when I worked for the department. As a woman, I was not given information necessary to complete my job as a legislative liaison. I was not invited to meetings that I should have been in my position.

I have been turned down by IDOT due to not having a record of my start up monies from 1990 also due to my husband and my son who work for me. I truly felt I was being discriminated against when the inspector came out to do her inspections.

Sometimes the field personnel do not want to deal with me as a female. Sometimes they still hang up when I say I am the estimator.

Prime contractors call and want to speak with my general manager, who is a male, rather than discussing their project with a female. They apparently do not feel I am smart enough to help them with what they need.

Women are treated well and respected, but we have to work harder to earn the trust and respect on the sites.

c. Not Union

The following respondents reported that they have experienced discrimination because their business is non-union:

Discrimination is constantly allowed based on union affiliation.

My company is discriminated because we are not 100 percent union. Local unions will not sign project labor agreements; they demand that you join the union and use their staff. This is not feasible for us.

I am not allowed to subcontract from the primes because I am non-union. Start using more non-union primes.

d. Program Doesn't Include Veterans

The following respondents reported that they have experienced discrimination because the DBE program does not include veterans:

I am a male Caucasian. I have never seen the destruction of businesses as I have with the DBE program. I am unable to find work on the State level due to the high DBE goals. I am a certified veteran on the federal level (VOSB) and still this is no help.

I am frustrated that Veteran-owned businesses are not included on IDOT and the Illinois Tollway work.

e. Selection Bias/Good Old Boys Network

The following respondents reported that they have experienced discrimination because of selection bias or the good old boys network:

Almost all archaeology goes to the Illinois State Archaeology Survey (formerly ITARP) affiliated with the UI-CU. WBE/DBE firms such as ours rarely have an opportunity.

Have been to many sessions for minority awareness looking for referrals. Got info, but people are coming to those meeting only to comply with your requirements. Business is handed only to the people they already know, someone who is paying them.

Form of discrimination is that IDOT or the Illinois Tollway selects the same large national firms on consecutive PTBs and tend to suggest which DBE firms to be subs to those firms.

It's not discrimination, it's simply the same old firms get all the contracts. The same MBEs team up with the good old boys network.

IDOT and the Illinois Tollway are comfortable with consultants they know. There is little room for new/small companies.

Not exposed to the available jobs. Too many jobs go out to the same companies all the time

We have been submitting our proposals to IDOT and the Illinois Tollway since 1997, and as of yet we have not received any jobs.

I am an engineer who worked for IDOT. I thought becoming a DBE would open the doors, but I find that most firms do not want to use my hydraulics

certification with IDOT. They want to use their in-house resources or else they want to use the same WBE or other company.

Those agencies have bias against people they do not know. No matter what level of experience is brought to their project, you do not stand a chance if proposed staff is not known by them.

f. Racial Discrimination

The following respondent reported that he/she has experienced discrimination based on race:

In 2009 [company name withheld] was discriminated against by several Resident Engineers in Region 2. One who said, "I don't want any niggers or spicks installing any pavement markings on my roads in my district." Our civil rights were violated.

3. Yes, Encountered Discrimination With Prime Contractors

A total of 19 respondents reported that they have experience discrimination with prime contractors.

a. Lack of Confidence in DBEs

The following respondents reported that they have experienced discrimination from prime contractors because of their lack of confidence in DBEs:

There is a severe shortage of project capable DBE subcontractors that consistently meet the project requirements unsupervised.

Neither entity encourages its consultants to work directly with the subcontractor. The Illinois Tollway states everything needs to go through the prime which leaves the subcontractor usually out on major issues directly related to them.

One prime in particular stated that they have a hard time finding DBEs, but don't use current certified DBE for personal reasons against the DBE.

My only experience is not discrimination, but the perception of the general contractors or big engineering companies is that if the company is a DBE (minority company) it does not have the experience, and they are forced to subcontract part of the work.

I don't think discrimination comes from IDOT or the Illinois Tollway. I think it comes from contractors who have certain preconceived notions about WBE and DBE firms. Many of us just want an opportunity to show what we can do.

b. Has Preferred Subcontractors Already

The following respondents reported that they have experienced discrimination from prime contractors because they use preferred subcontractors:

Not so much as discrimination, but I feel that prime contractors are sharing bid quotes with those subs they want to have.

I have tried to reach out to steel fabricators to work with them, but they do not respond.

None directly, but indirectly by the GC who try and use you to get the job because of your status as a DBE/MBE, and then they get the job, and turn around and give the work to their buddies.

Not having the opportunity to "TEAM" with Prime Contractors is an issue. Additionally, no diversity. The same companies are used for every major project.

c. Use DBEs to Fulfill Goal and Not Work

The following respondents reported that they have experienced discrimination by prime contractors because they use DBEs to fulfill goals but not to work:

We believe that contracts bundled with specialty work get shopped around from the general contractors. Also, DBE requirements at times render our prices non-competitive.

Primes underuse the subcontractors so they do not pay for the services that were allotted for the job. They then have a higher profit margin. If you complain, you become blacklisted.

I've been told by Generals that they do not need any more minorities on the job, the goals have been met.

My feeling is that DBEs and other minorities businesses are just a scam. Most minority businesses don't do any work on projects and really just offer their service of being a minority so that White business owners can get the jobs.

The generals are playing games with the DBE participation.

Generally speaking, I don't know how prime contractors are meeting their goals. It seems like requirements are a guide and not a rule.

Minority firms and subcontractors are subject to delayed payments due to systematic non-approvals of minor issues to hold up large completed work pay estimates. Deletion of bid items from the job with no input from us (sub DBE) materially affects our business.

4. Problems With the DBE Program Itself

A total of 12 respondents did not indicate if they experience discrimination, but did report that they experienced problems with the DBE program. Following is a selection of their responses:

The DBE program is broke, and several current WBE and DBE companies should not be allowed to have certification, as they are not disadvantaged. Until it is fixed I have no faith in the program.

Due to the continued increase of DBE goal, 2009 was our last active year of business.

Both IDOT and the Illinois Tollway need to give preference to firms within the State of Illinois. It makes no sense to send our tax dollars to another state when Illinois is bankrupt and needs jobs here.

About three years ago they had a program that we felt was good and working, and they then put in a new program without explaining fully the change and what it meant when you submitted your bid and your DBE Participation but have come down with big penalties for not complying.

We have used DBE firms to fulfill DBE requirements on our contracts. On most of these, the DBE firms have larger staffs, higher annual volume and revenue of work, and substantially higher payroll rates across the board than our firm.

My project was abruptly terminated in 2007 under flimsy and unsubstantiated excuses. This slowed my business down considerably for lack of bonding up till now. How can the same govt. entity in pursuit of DBE advancement go to that level?

IV. SUMMARY

The E-Survey was distributed to 5,248 minority, female-owned, and Caucasian male-owned construction and construction-related firms that were willing to perform IDOT/

Illinois Tollway prime contracts and subcontracts. The majority of the respondents were Caucasian male-owned construction and construction-related businesses representing 73.84 percent. The E-Survey findings were presented in the three sections—*Profile of the Survey Respondents, Overview of Business Practices, and Best Management Practices*. The significant findings for each section are described below.

- **Profile of the Survey Respondents**

Special trades represented the majority of the construction businesses and professional services were the majority of the construction-related businesses. Caucasian males and females were the highest responding ethnic group representing 62.5 percent. MBEs represented 19 percent of the total respondents for the E-Survey.

The majority of respondents had 10 or less employees for construction and construction – related businesses. The businesses on average had been established for 11 to 20 years. The gross revenues for the majority of MBE construction and construction-related businesses were reported at \$250,000 and under for 2008 and 2009. The gross revenues for the majority of Caucasian male and Caucasian female construction and construction-related businesses were \$1,000,000 to \$4,999,999 for the same years.

- **Overview of Business Practices**

A total of 253 respondents reported that their businesses were formed as an S Corporation pursuant to Subchapter S, Chapter 1 of the Internal Revenue code. The use of a commercial accounting system was reported by 72.08 percent of the businesses. Five accounting systems were used by 73.39 percent of the businesses. The five accounting systems were Deltek™, Quick Books™, Maxwell™, Peachtree™ and Sage Master™.

Less than 30 percent of the businesses reported bidding on an IDOT construction prime contract, while less than 50 percent of the businesses bid to IDOT's primes as a subcontractor. And, less than 50 percent of the businesses submitted a proposal as a prime contractor on an IDOT contract.

For the Illinois Tollway, less than 40 percent of the businesses reported bidding to the Illinois Tollway as a prime contractor, while less than 20 percent submitted a proposal. However, a significantly higher percentage of businesses reported bidding to a private sector business or a public agency other than IDOT or the Illinois Tollway.

The majority of the respondents reported that the work they performed for IDOT was in District 1, District 2, District 3, and District 4. For the Illinois Tollway, the majority of the MBE and WBE businesses reported working in Cook and DuPage counties. The majority of the respondents reported receiving the majority of their business revenue from the private sector for both construction and construction-related services in 2009.

It should be noted that most respondents reported that they did not utilize the supportive services provided by IDOT and the Illinois Tollway.

- **Recommended Best Management Practices**

A total of 169 respondents recommended several best management practices that they believed would support their effort to obtain work with IDOT/Illinois Tollway. The recommendations are summarized below which include suggestions to dismantle the program and many others to enhance and expand the program.

- **Restructure the DBE Program**

- Dismantle DBE Program
- Diversify Trade Categories/Trade-Specific DBE Goal Enforcement
- Expand DBE Program's Qualifications/Requirements
- Establish a Small Business Program
- Establish a Veteran-Owned Business Program
- Increase DBE Goals
- Implement an Alternate Rotational System
- Lower DBE Goals
- Require Prime Contractors to Subcontract to DBEs
- Set-Aside Contracts for DBEs
- Simplify Bidding and Contracting Process
- Unbundle Large Contracts

- **Improve Communication and Networking**

- Increase Access to the List of certified IDOT/ Illinois Tollway DBEs
- Increase and Provide Earlier Notifications Pertaining to Bid Awards or Upcoming Bids
- Increase Networking Opportunities between Prime Contractors, DBE Subcontractors, and Suppliers
- Provide Remedy to Address the Lack of Access to Qualified DBEs in Area

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- Increase Networking Opportunities between Prime Contractors, DBE Subcontractors, and Suppliers
- Provide Remedy to Address the Lack of Access to Qualified DBEs in Area

- **Offer Bid-Related Assistance**
 - Assist DBEs in Understanding Post-Award Expectations
 - Provide Bidding Process Assistance
 - Implement a Mentor/Protégé Program
 - Provide More Information on DBE Certification
 - Simplify Certification Process
 - Unify Certification Process Across Agencies

- **More Stringent Monitoring Of Programs Regulations**
 - Enforce Prime Contractors' Actual Use of DBEs (Post-Award)
 - Stricter Monitoring of Prime Contractors (Post-Award)
 - Change How DBE Participation is Counted on Contracts
 - Stricter Monitoring of DBEs (Post-Award)
 - Stricter Monitoring of Qualifications to Become a DBE

- **Provide Financial Assistance**
 - Enforce Timely Payment
 - Provide Bonding Assistance
 - Provide Credit Assistance

Additionally, a total of 86 respondents described their experiences with discrimination that involved IDOT or the Illinois Tollway. Specifically, the responses were grouped into four categories:

1. No, did not encounter discrimination with IDOT/Illinois Tollway

36 respondents reported no experience with discrimination with IDOT/Illinois Tollway.

2. Yes, encountered discrimination with IDOT/Illinois Tollway

44 respondents reported that they did encounter discrimination with IDOT/Illinois Tollway.

3. Yes, encountered discrimination with prime contractors

19 respondents reported that they have experienced discrimination with prime contractors.

4. Problems with the DBE Program

12 respondents did not indicate if they experienced discrimination, but did report that they experienced problems with the DBE program.

Appendix A

1. Please complete the following information (Optional).

Name:

Title:

Business Name:

E-mail Address:

2. Does your firm use a business accounting system?

Yes

No

If yes, please specify type:

3. Has your business submitted a bid or proposal to the Illinois Department of Transportation in the past five years?

	Prime Contractor	Sub Contractor
Bid	<input type="text"/>	<input type="text"/>
Proposal	<input type="text"/>	<input type="text"/>

4. Has your business submitted a bid or proposal to the Illinois Tollway in the past five years?

	Prime Contractor	Sub Contractor
Bid	<input type="text"/>	<input type="text"/>
Proposal	<input type="text"/>	<input type="text"/>

5. Has your business submitted a bid or proposal to any other public agency in Illinois in the past five years?

	Prime Contractor	Sub Contractor
Bid	<input type="text"/>	<input type="text"/>
Proposal	<input type="text"/>	<input type="text"/>

6. Has your business submitted a bid or proposal to any private sector business in Illinois in the past five years?

	Prime Contractor	Sub Contractor
Bid	<input type="text"/>	<input type="text"/>
Proposal	<input type="text"/>	<input type="text"/>

Appendix A

7. In what year was your business established?

8. Check the box for the category that best describes your business.

Heavy Construction - e.g., highways, streets, bridges, tunnels, sewers, railroads, airports.

Special Trade Contractors - e.g., electrical, painting, demolition, underground utilities, excavation.

A/E Services - e.g., architectural services and structural, civil, mechanical, electrical, other engineering services.

Construction-Related Services - e.g., feasibility studies, surveying, construction inspection, interior design, and telecommunications systems.

Trucking

Information Technology - e.g., electronic information-processing hardware and software, maintenance, telecommunications, associated consulting services.

Material Supply - e.g., related to transportation/highway construction.

Professional Services - e.g., accountants, consultants, appraisers, land surveyors, bonding and insurance, and financial services.

Other (please specify)

9. How many employees has your firm had on its payroll, including all full-time and part-time employees, for the following years? (please select only ONE for each year)

	2009	2010
0-5	€	€
6-10	€	€
11-15	€	€
16-20	€	€
21-25	€	€
26-30	€	€
31-35	€	€
36-40	€	€
41-45	€	€
46-50	€	€
Over 50	€	€

Appendix A

10. What is the legal form of organization of your firm?

Sole Proprietorship

Partnership

Subchapter - S Corporation

1120 Corporation (C Corporation)

Non-profit

Other (please specify)

Appendix A

11. Select the ethnic group that best describes the owner(s) of your business (please check ALL that apply and indicate the percentage of ownership for each group)

% African American	<input type="text"/>
% Asian American	<input type="text"/>
% Caucasian Female	<input type="text"/>
% Caucasian Male	<input type="text"/>
% Hispanic American	<input type="text"/>
% Native American	<input type="text"/>

12. What was your firm's gross revenues for the following years?

	2008	2009
Under \$250,000	€	€
\$250,000 to \$499,999	€	€
\$500,000 to \$999,999	€	€
\$1,000,000 to \$4,999,999	€	€
\$5 million or more	€	€

13. What was the approximate percentage of your firm's 2009 gross revenues that was derived from the following sources?

% IDOT contracts	<input type="text"/>
% Illinois Tollway contracts	<input type="text"/>
% Other public agency contracts	<input type="text"/>
% Private contracts	<input type="text"/>
% Other	<input type="text"/>

Appendix A

14. In which IDOT highway districts does your firm work? (please select ALL that apply)

1

2

3

4

5

6

7

8

9

15. In which Illinois Tollway counties does your firm work?(please select ALL that apply)

Boone

Cook

DuPage

DeKalb

Kane

Lake

Lee

McHenry

Ogle

Whiteside

Will

Winnebago

County outside Illinois

Don't know

Appendix A

16. In the past five years, has your firm utilized DBE Supportive Service Assistance offered through IDOT's DBE Program? (please check ALL that apply)

Management Assistance (e.g. bonding and financing, certification, obtaining work and equipment, etc.)

Technical Assistance (e.g. estimating, bidding, negotiations, reading specifications and plans, etc.)

Other (please specify)

17. In the past five years, has your firm participated in the following programs offered by the Illinois Tollway? (please check ALL that apply)

Earned Credit Program

Mentor-Protégé Program

Other (please specify)

Appendix A

18. On a scale of 1 to 5, would the following factors help your business obtain work with IDOT or the Illinois Tollway? (1:never; 2:rarely; 3:sometimes; 4:frequently; 5:often)

	never	rarely	sometimes	frequently	often	N/A
Access to credit	j0	j0	j0	j0	j0	j0
Unbundling of contracts	j0	j0	j0	j0	j0	j0
Assistance with bond/insurance	j0	j0	j0	j0	j0	j0
DBE rotation program for construction contracts	j0	j0	j0	j0	j0	j0
Removal of brand name requirements in solicitations	j0	j0	j0	j0	j0	j0
Timely payments from prime contractors	j0	j0	j0	j0	j0	j0
Timely payments from IDOT and/or Illinois Tollway	j0	j0	j0	j0	j0	j0
Publish payments to prime contractors	j0	j0	j0	j0	j0	j0

Other (please specify)

19. On a scale of 1 to 3, would you be interested in the following services from the Illinois Tollway? (1:very interested; 2:somewhat interested; 3:not interested)

	very interested	somewhat interested	not interested	N/A
Informational meetings on public procurement process	j0	j0	j0	j0
Bid/proposal preparation assistance	j0	j0	j0	j0
DBE certification assistance	j0	j0	j0	j0

Other (please specify)

Appendix A

20. How often do prime contractors who use your firm as a subcontractor on public-sector projects with requirements for minority, woman, and/or disadvantaged businesses also use your firm on public-sector or private-sector projects without such goals or requirements?

Frequently

Sometimes

Seldom

Never

Not Applicable

21. What information or services do you feel IDOT and the Illinois Tollway can provide to better assist goal achievement of the DBE Program?

22. (OPTIONAL) Please describe any experiences you have had with discrimination with either IDOT or the Tollway that you think could be beneficial to this study.

APPENDIX B



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Dun & Bradstreet Study

I. INTRODUCTION

The objective of this Availability Study (Study), as set forth in Mason Tillman Associates, Ltd.'s contract, is to describe and calculate the number of minority and women-owned business enterprises (M/WBEs) and non-M/WBEs in the state of Illinois willing to perform the construction and architecture and engineering services the Illinois Department of Transportation (IDOT) and the Illinois Tollway (Tollway) procure. Dun & Bradstreet (D&B) MarketPlace, a commercial resource containing business financial profiles developed for corporate users, was specified as the source to be used to perform the analysis since it had been used in the 2004 IDOT Disadvantaged Business Enterprise Availability Study (2004 Availability Study) by National Economic Research Associates (NERA). However, D&B is discontinuing MarketPlace and its replacement product is the Selectory Business Database (Selectory).

MarketPlace is a D&B sales and marketing product that contains financial records customized by geographical area and industry. For a fee, MarketPlace produces business listings for a particular market area with specific industries drawn from the D&B Credit Database and provided on a CD-Rom. The dataset from MarketPlace's successor, Selectory, is also drawn from the D&B Credit Database, and the only distinction is that all records are managed online, allowing the client to download the records directly from the internet. An acknowledged limitation of both MarketPlace and Selectory, as a commercial resource, is the fact that business owner ethnicity and gender are not available. IDOT's 2004 Availability Study reported that MarketPlace did not include M/WBEs.

The Selectory dataset purchased encompassed all construction and architecture and engineering firms domiciled in Illinois. This dataset was used to identify willing businesses by the NAICS codes identified in the 2010 IDOT/Tollway Disadvantaged Business Enterprises Disparity Study (2010 Disparity Study). A sample was drawn from the dataset to survey businesses for their willingness to contract with IDOT/Tollway. Results from the survey determined that D&B does not serve as a reliable source for construction and architecture and engineering firms domiciled in the state of Illinois.



II. STUDY METHODOLOGY

A. Dun & Bradstreet MarketPlace Dataset

As of August 2010, D&B's MarketPlace, which was stipulated in Mason Tillman's contract as the database source to be used to perform the availability analysis, was no longer being marketed by D&B. As a comparable resource for the enumeration of businesses by industry and geographical area, D&B offered Selectory from its sales and marketing product line.

B. Selectory As a Source for Market Area Business Data

Selectory, like MarketPlace, is a database compiled from D&B's Credit Database which, according to D&B, features over 153 million records with current contact information for businesses and executives worldwide.¹ The only difference is that MarketPlace is updated quarterly and provided on a CD-Rom and Selectory is updated monthly and provided online. According to D&B, there are 14 million businesses located in the United States² and they are all captured in Selectory. It is notable that D&B's count of all United States businesses is less than the number reported by the 2004 U.S. Census Bureau.³

Selectory is backed by the DUNSRight process, a proprietary data quality application.⁴ DUNSRight reportedly subjects the records in the D&B Credit Database, where Selectory drawn from, to over 2,000 separate, automated checks on a monthly basis in order to ensure that the thousands of business telephone numbers and addresses are current.⁵

In August 2010, Mason Tillman purchased access to Selectory for records of all construction and architecture and engineering businesses within the state of Illinois. In lieu of MarketPlace, the Selectory database was used to estimate the number of businesses with the IDOT/Tollway NAICS codes that were available to do business with IDOT/Tollway.

¹ Telephone conversation on September 28, 2010 with D&B Sales & Marketing Solutions Division.

² <http://www.selectory.com>

³ Statistics about Business Size, 2004 listed a total of 25,409,525 firms in the United States: www.census.gov/epcd/www/smallbus.html

⁴ http://www.dnb.com/us/about/db_database/dnbinfoquality.html

⁵ Given the reputed power of DUNSRight, the expectation was that Selectory could produce a comprehensive and accurate database of all construction and architecture and engineering businesses in the state of Illinois. Illinois is the market area for IDOT and 6 counties within the state constitute the market area for the Tollway.



C. Specifications for the Dataset

Mason Tillman registered online at www.selectory.com to purchase the Selectory dataset from D&B. The purchase allowed internet access to view all firms domiciled in Illinois. A total of 60,000 records of construction and architecture and engineering firms were downloaded onto Mason Tillman's local area network, where they were saved in a Microsoft Access database.

The download was defined by the NAICS code classification of the contractors utilized in the 2010 Disparity Study. The utilization data from the 2010 Disparity Study was classified by Mason Tillman into 12 NAICS codes, which included 11 of the 20 NAICS codes recorded in the 2004 Availability Study. Only 11 of the 20 NAICS codes in the 2004 Availability Study applied to the contracts examined in the 2010 Disparity Study. In addition, there was one NAICS code that was in the 2010 Disparity Study but not in the 2004 Availability Study.

IDOT's 2004 Availability Study also classified the industries by SIC code. The SIC codes and NAICS codes used in the 2004 Availability Study, which were not found in the contracts examined in the 2010 Disparity Study, are depicted below in Table 1.

Table 1: NAICS/SIC Codes Not Utilized in 2010 Disparity Study

NAICS CODE	NAICS CODE DESCRIPTION	SIC CODE	SIC CODE DESCRIPTION
2361	Residential Building Construction	8741	Management Services
3241	Petroleum and Coal Products Manufacturing	2951	Paving Mixtures and Blocks
3274	Lime and Gypsum Product Manufacturing	3274	Lime
3323	Architectural and Structural Metals Manufacturing	3441	Fabricated Structural Metal
4233	Lumber and Other Construction Materials Merchant Wholesalers	5032	Brick, Stone, and Related Construction Materials
4235	Metal and Mineral (except Petroleum) Merchant Wholesalers	5051	Metals Service Centers and Offices
4247	Petroleum and Petroleum Products Merchant Wholesalers	5172	Petroleum Products Wholesalers, Except Bulk Stations & Terminals
5416	Management, Scientific, and Technical Consulting Services	8748	Business Consulting



The list of 12 NAICS codes defined by the contracts examined in the 2010 Disparity Study is presented in Table 2. The corresponding SIC code classifications for each of the 12 NAICS codes are also presented below in Table 2.

Table 2: 2010 Disparity Study NAICS Code Classifications

NAICS CODE	NAICS CODE DESCRIPTION	SIC CODE	SIC CODE DESCRIPTION
2123	Nonmetallic Mineral Mining and Quarrying	1422, 1429, 1422	Construction Sand and Gravel; Crushed and Broken Limestone
2362	Nonresidential Building Construction	1541, 1542	General Contractors; Nonresidential Building Other Than Industrial Buildings and Warehouses
2373	Highway, Street, and Bridge Construction	1611	Highway and Street Construction
2379	Other Heavy and Civil Engineering Construction	1629	Heavy Construction
2381	Foundation, Structure, and Building Exterior Contractors	1771	Concrete Work
2382	Building Equipment Contractors	1731	Electrical Work
2383	Building Finishing Contractors	1721	Painting and Paper Hanging
2389	Other Specialty Trade Contractors	1795, 1622	Wrecking and Demolition Work; Bridge, Tunnel, and Elevated Highway
3273	Cement and Concrete Product Manufacturing	3273, 3272, 3271	Ready-Mixed Concrete; Concrete Products, n.e.c.; Concrete Brick and Block
4249	Miscellaneous Nondurable Goods Merchant Wholesalers	5198	Paints, Varnishes, and Supplies
4842	Specialized Freight Trucking	4212	Local Trucking Without Storage
5413	Architectural, Engineering, and Related Services	8711, 8712, 8713	Engineering Services; Architectural Services; Surveying Services



A total of 42,816 records from the 60,000 Illinois businesses downloaded as either construction or architecture and engineering were classified in one of the 12 relevant NAICS codes. In order to draw the sample necessary to conduct the survey, select NAICS codes that had relatively few businesses listed were merged based on similarity of the goods or service. Once the select NAICS codes were combined, there were seven

relevant NAICS codes. The sample was drawn from the 20,707 businesses listed with the seven NAICS codes.

Before drawing the survey sample, it was necessary to determine if the businesses that were utilized or determined to be available in the 2010 Disparity Study were in the Selectory dataset. Several queries were run to verify the integrity of the Selectory dataset. The expectation was that the Selectory dataset would be clean and comprehensive, since D&B reports that over 2,000 separate, automatic, monthly data verification checks are performed by its DUNSRight process to verify the accuracy of the data.

III. STUDY FINDINGS

A. Integrity Verification Queries

Before drawing the sample, the three queries were run to compare the unique utilized and available businesses identified in the 2010 Disparity Study to the records in the entire Selectory dataset. The expectation was that all available businesses identified in the 2010 Disparity Study and IDOT utilized businesses would be identified in the Selectory dataset since it purported to contain all Illinois construction and architecture and engineering firms.

One query was run to determine how many businesses IDOT utilized in the 2010 Disparity Study were in Selectory. The second query determined whether the businesses identified in the 2010 Disparity Study as available but not utilized were in Selectory. The third query determined whether M/WBEs identified as available in the 2010 Disparity Study were in Selectory. Table 3 presents the results of the three queries which compared the 2010 Disparity Study data to the businesses listed in Selectory. The calculation represents the percentage of the construction and architecture and engineering of businesses from the 2010 Disparity Study found in Selectory.

Table 3: Illinois Businesses in Selectory by Industry and Ethnicity

CATEGORIES OF BUSINESSES	CONSTRUCTION BUSINESSES LISTED IN SELECTORY		ARCHITECTURE & ENGINEERING BUSINESSES LISTED IN SELECTORY	
	NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
Utilized Businesses	379	91.99%	157	95.15%
Available Businesses	2,297	67.84%	1,110	70.27%
MBE Available Businesses	476	46.25%	242	23.52%



CATEGORIES OF BUSINESSES	CONSTRUCTION BUSINESSES LISTED IN SELECTORY		ARCHITECTURE & ENGINEERING BUSINESSES LISTED IN SELECTORY	
	NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
WBE Available Businesses	342	47.07%	183	25.23%
Non-M/WBE Available Businesses	1,480	52.27%	685	24.21%

B. Summary of Integrity Verification Issues

The businesses IDOT utilized in the 2010 Disparity Study that were not in the Selectory represent 10.03 percent, which includes 6.92 percent of construction and 3.11 percent of architecture and engineering utilized businesses. Selectory contained records for 80.34 percent of the available construction and architecture and engineering businesses identified in the 2010 Disparity Study. Both M/WBEs and non-M/WBEs were undercounted.

In total, 43.64 percent of the unique utilized and available businesses, 39.63 percent of the unique utilized and available M/WBEs, and 50.11 percent of the unique utilized and available non-M/WBEs were not found in the Selectory dataset.

1. Missing M/WBEs

Selectory significantly undercounted M/WBEs. The fact that the D&B database undercounted M/WBEs had been reported in IDOT’s 2004 Availability Study, although the extent of the undercount was not measured in that Study.⁶

The results from the survey of 12,131 businesses revealed findings about the representation of M/WBEs in Selectory with an error factor of less than five percent. 50.17 percent of the M/WBEs in the availability dataset prepared for the 2010 Disparity Study were not listed in the Selectory.

2. Missing Non-M/WBEs

While it was reported that the M/WBE status would not be coded in Selectory, it was not anticipated that there also would be non-M/WBEs that would not be recorded in Selectory. This finding is particularly notable since D&B’s website reports that all businesses domiciled in the United States are in its Credit Database from which the Selectory dataset of Illinois businesses was drawn. A total of 17.85 percent of the non-M/WBEs in the availability dataset prepared for the 2010 Disparity Study were not listed



⁶ “As extensive as it is, MarketPlace itself does not adequately identify businesses owned by minorities or women.” 2004 IDOT DBE Availability Study by NERA, p. 21.

in Selectory. Even more notable is the fact that 8.32 percent of the utilized non-M/WBEs domiciled in Illinois were not listed in the Selectory dataset.

C. *Miscoded NAICS Codes and Incorrect Records*

The other unanticipated finding from the survey was that a significant number of businesses in the Selectory dataset were miscoded or without a current telephone number. Of the 12,131 businesses surveyed, there were 2,757 categorized under Wrong Number, Out of Business, Business Not Applicable, and No Answer. Table 4 presents an account of the miscoded and incorrect records.

Table 4: Survey Results of Miscoded NAICS Codes and Incorrect Records

NO ANSWER	WRONG TELEPHONE NUMBERS	OUT OF BUSINESS	RESIDENTIAL/ CELL PHONE	BUSINESS NOT APPLICABLE
1,206	698	186	204	463

The 463 miscoded businesses in the Selectory dataset that did not offer the services as described in their D&B NAICS code classification represent 22.73 percent of the 12,131 businesses surveyed. Table 5 presents the miscoded businesses according to their actual business type.

Table 5: Miscoded Businesses

DESCRIPTION	COUNT
Residence/Cell phone	204
Agriculture Products and Services	27
Residential Building and Design	124
Food	14
Home Supplies	20
Paper Products	14
Pools	9
Flowers	13
Random Objects	51
Trading, Investment Firm, or Legal Services	17
Manufacture, Move, or Package Product	40
Consulting	7
Cemeteries	4



DESCRIPTION	COUNT
Church	1
Municipality	2
Hair/Cosmetic Services	9
Animal Care	19
Computer Services	36
Non-Profit	4
Books	13
Human Care	13
Commercial Building Services	16
Nurseries	10
TOTAL	463

There were 698 businesses identified in the 12,131 survey calls that did not have a current telephone number. For this group, it was not possible to determine the appropriateness of the NAICS code because the businesses could not be surveyed.

These quality control issues were identified in Selectory despite the D&B report that the DUNSRight Process sweeps its Credit Database monthly to ensure the accuracy of the records and the appropriateness of the coding.

D. Sampling Plan

The sampling plan was designed to estimate the number of available construction and architecture and engineering businesses in the market area with less than a five percent error factor. The sampling plan required 400 surveys to be completed in each NAICS code category. The businesses in the sample were called to solicit responses to two short questions:

- Does your company have an interest in bidding on projects funded by IDOT/Tollway?
- What is the ethnicity and gender of the owner of this company?

A random sample of 6,517 businesses was initially drawn for the seven NAICS codes. Table 5 presents the number of businesses in the initial sample by NAICS code.



Table 5: Businesses in the Sample by NAICS Code

NAICS CODE	NAICS CODE DESCRIPTION	1ST SET	2ND SET	TOTAL
2123	Nonmetallic Mineral Mining and Quarrying	517	690	1,207
2362	Nonresidential Building Construction	1,000	2,500	3,500
2373	Highway, Street, and Bridge Construction	1,000	1,000	2,000
2382	Building Equipment Contractors	1,000	2,500	3,500
2389	Other Specialty Trade Contractors	1,000	2,500	3,500
4249	Miscellaneous Nondurable Goods Merchant Wholesalers	1,000	2,500	3,500
5413	Architectural, Engineering, and Related Services	1,000	2,500	3,500
TOTAL		6,517	14,190	20,707

The quota of 400 completed calls was not achieved after the first round of calls to the 6,517 businesses in the initial random sample because nearly 13.59 percent of the records in the sample had incorrect or irrelevant information. 13.59 percent of the sample reached by telephone during the first round of calls were either out-of-business, wrong numbers, personal telephone numbers, or inapplicable businesses such as morticians, animal feed stores, restaurants, and clothing stores—all unrelated to the NAICS code to which the businesses had been classified in Selectory. It could not be determined whether the industry of the businesses with out-of-business telephone numbers was also improperly classified in Selectory. While the findings document at least 13.59 percent of businesses in the Selectory dataset had incorrect or irrelevant information, the finding is just one facet of the data integrity problem with Selectory.

After the first round of calls was completed, due to the fact that Selectory had so many businesses improperly classified, an additional sample of 14,190 records was drawn for a second round of calls in order to achieve the quota of 400 completed calls per NAICS code. A total of 12,131 telephone survey calls were completed to estimate the number of willing businesses in the pool of 42,816 businesses within the seven NAICS codes.

E. Calculating the Estimate of Available Businesses

The requirement was to calculate the availability of M/WBEs and non-M/WBEs in the market area using Selectory. As noted above, the research documented a serious issue with both the accuracy and comprehensiveness of the Selectory dataset. Nevertheless, the calculation to estimate the number of M/WBEs was undertaken with consideration to the limitations of applying the findings and recognition that the findings would have to be interpreted with caution because of the errors documented in the dataset. In addition, there was a documented bias in the dataset because M/WBEs were underreported from Selectory at a higher rate than non-M/WBEs, as illustrated in Table 3.



F. Estimating the Number of Minority- and Woman-Owned Businesses in the Market Area

Once it was determined that the Selectory did not code its records by ethnicity and gender, nor did it include many of the M/WBEs and non-M/WBEs identified in the 2010 Disparity Study, the decision was made to utilize the 2010 Disparity Study availability database to supplement the Selectory dataset. Only the unique businesses that were in the 2010 Disparity Study availability database and were not listed in Selectory were added to the list of completed surveys by NAICS code.

In addition, all available unique non-M/WBEs from the 2010 Disparity Study were also added to the list of completed surveys by NAICS code. To compile the list of available M/WBEs and non-M/WBEs for the 2010 Disparity Study, a number of different sources were used. Table 6 presents the list of sources used to compile the 2010 Disparity Study availability database.

Table 6: 2010 Disparity Study Availability Source Lists

SOURCES OF GOVERNMENT LISTINGS
Arlington Heights Vendor List
City of Bloomington Contractor List
City of Des Plains Contractor List
Illinois Department of Central Management Services Vendor List
Illinois Department of Transportation and Illinois State Toll Highway Authority Business Survey
Illinois Contractor Prequalification List
Illinois Department of Transportation Bidders List
Illinois Department of Transportation Utilized Prime Contractors
Illinois Engineer Consultant Prequalification List
Illinois State Toll Highway Authority Bidders List
Illinois State Toll Highway Authority Utilized Prime Contractors
Lake County Bidders List
McLean County Highway Department Contractor List
Missouri Department of Transportation Bidders List
Missouri Department of Transportation Utilized Prime Contractors



SOURCES OF CERTIFICATION LISTS

City of Chicago Procurement Directory of Disadvantaged Minority and Woman-owned Business Enterprises
Cook County Office of Contract Compliance Certified Minority and Woman-owned Business Enterprise List
Illinois Business Enterprise Program
Illinois Small Business Set-Aside Program
Illinois Unified Certification Program
Indiana Department of Transportation Certification List
Lambert Airport Certification List
Metro Certification List
Missouri Department of Transportation Disadvantaged Business Enterprise Certification List
Missouri Department of Transportation Minority and Woman-owned Business Enterprise Certification List
Missouri Regional Certification Committee
Small Business Administration: Illinois and Missouri Procurement Marketing and Access Network

SOURCES OF TRADE ASSOCIATION AND CHAMBER OF COMMERCE MEMBERSHIP LISTS

American Council of Engineering Companies of Illinois
American Institute of Architects Illinois
Associated General Contractors of Illinois
Associated General Contractors of Missouri
Bloomington Normal Home Builders Association
Canton Area Chamber of Commerce
Chillicothe Chamber of Commerce Member Directory
Chinatown Chamber of Commerce
Consulting Engineer Council
East Peoria Chamber of Commerce
Fairbury Chamber of Commerce
Federation of Women Contractors



**SOURCES OF TRADE ASSOCIATION AND
CHAMBER OF COMMERCE MEMBERSHIP LISTS**

Fox Valley Associated General Contractors
Gibson Area Chamber of Commerce, Member Directory
Greater Springfield Chamber of Commerce
Havana Chamber of Commerce - Business Directory
Home Builders Association of Greater Chicago
Home Builders Association of Greater Peoria
Home Builders Association of Illinois
Home Builders Association of Rockford
Illinois Valley Chamber of Commerce
Independent Electrical Contractors of Greater St. Louis
Jacksonville Area Chamber of Commerce
Kankakee Regional Chamber of Commerce
Lincoln-Logan County Chamber of Commerce
Mendota Area Chamber of Commerce
Metro East Black Contractors Organization
Monmouth Area Chamber of Commerce
National Association of Women Business Owners, St. Louis
Northern Illinois Building Contractors Association
Pekin Chamber of Commerce
Peoria County Purchasing Division Contractor
Philippine American Chamber of Commerce of Greater Chicago
Pontiac Chamber of Commerce
Puerto Rican Chamber of Commerce of Illinois
Rantoul Area Chamber of Commerce
Southern Illinois Builder's Association
Streater Chamber of Commerce
Union Contractors for Eastern Missouri Laborers Union 2009

As noted, the source lists contain government and non-government sources. During the 2010 Disparity Study, the non-government sources were surveyed to verify NAICS code



classification and to determine if the businesses were willing to bid on government contracts. Businesses on the non-government lists that did not meet the two criteria were not included in the 2010 Disparity Study availability dataset used to perform the disparity analysis. Therefore, the M/WBEs included in the 2010 Disparity Study were willing to do business with IDOT/Tollway.

IV. ANALYSIS OF SURVEY FINDINGS

The firms that were found to be out-of-business or coded under industries that were inapplicable to the Study were excluded from the calculation of the completed surveys. After 400 surveys were completed for each NAICS code, the number and percentage of willing firms was calculated by ethnicity, gender, and NAICS code. These percentages were applied to the population for each NAICS code in Selectory to approximate the number of unique M/WBEs and non-M/WBEs. The percentage of businesses by ethnicity, gender, and NAICS code that were in the 2010 Disparity Study was also determined. All unique M/WBEs and non-M/WBEs from the 2010 Disparity Study were then added to the respective populations for each NAICS code. The combination of these two numbers was used to calculate the final availability numbers for each NAICS code.

Table 7 below shows the final percentages of available firms by NAICS codes.

Table 7: Available Businesses Identified in the Completed Surveys

NAICS CODES	M/WBE PERCENTAGE BY NAICS CODES	M/WBE	NON-M/WBE	TOTAL
2123	9.54%	28	199	227
2362	30.32%	409	940	1,349
2373	26.72%	139	354	493
2382	36.69%	420	738	1,158
2389	28.44%	308	727	1,035
4249	25.37%	52	128	180
5413	32.71%	690	1,477	2,167
TOTAL M/WBE Availability Percentage for the Combined NAICS Codes				30.96%

The calculation of the M/WBE availability percentage based on D&B must be viewed with caution because of the documented flaws in the Selectory dataset. The dataset had a documented bias against M/WBEs. In addition, it was not a comprehensive dataset and nearly one in five of the records were miscoded.



V. CONCLUSIONS

The dataset used for this Study contained inaccurate contact information, improperly classified businesses, and businesses no longer in business. Flawed records characterize 20.97 percent of the businesses included in the sample of 12,131 businesses surveyed. One out of five of the businesses surveyed had at least one of several flaws:

- Disconnected, wrong number, or a residential telephone number
- Out-of-business establishments, as many as ten years
- Simply inappropriate records such as morticians, food purveyors, and livestock suppliers

There were also 50.17 percent of the M/WBEs in the 2010 Disparity Study availability dataset that were not listed in the Selectory, the D&B dataset from which the sample was drawn. These errors in the Selectory database seriously compromises the validity of any estimate calculated using the survey results. The type of errors identified in the Selectory dataset cause the availability estimates for M/WBEs to be biased downward from the actual availability of the ethnic and gender groups. Given the flaws documented in the survey, the D&B dataset of Illinois construction and architecture and engineering businesses is determined not to be comprehensive or carefully scrubbed. Extreme caution therefore must be exercised in using this product to estimate the true availability of either M/WBEs or non-M/WBEs.

The database integrity issues with Selectory are not surprising since D&B was developed to perform credit ratings on manufacturers and other large companies, and not to serve as a business census. Given its primary function, D&B would periodically ask the listed businesses to update their financial records. Relevant information on a business' financial health found in D&B reports are retrieved from management interviews, payment experiences, bank account information, lawsuit filings, business liens, business registrations, judgments, and bankruptcies. The thoroughness of the routine quality control measures referred to as the DUNSRight Process is called into question by the findings of this Study.

The flaws documented in this D&B dataset are at best illustrative of the difficulty of establishing a comprehensive national dataset of businesses in a milieu where the integrity of the dataset is tied to the willingness of businesses in the market area to submit relevant information in a timely manner. Clearly it is a very formidable challenge to capture the formation of new businesses and record the demise of established businesses without notification directly from the businesses.

D. J. Storey in his analysis of D&B as a research tool makes the point that the data was never intended as a census.⁷ He cautions that one of the first mistakes a user of the D&B database makes is to observe that in many instances where the coverage is quite good and

⁷ Storey, D.J. (2000). *Small Business: Critical Perspectives*, p. 432-440.



to then assume that an effort at undertaking a complete census was made and simply failed. The fact is that D&B is not a census, and as Storey reports, the content of the financial records maintained on businesses in its database are inconsistent because there is a reliance on information from the listed businesses to maintain a current record. Storey also noted that the business profile is not regularly updated. Mason Tillman's research documented that the D&B database is, in fact, unreliable in tracking the existence of market area businesses and the records of listed businesses are not regularly updated.

Selectory is certainly marketed as a current and accurate database of 14 million businesses in the United States. Yet the process for cleaning and updating the records present in Selectory assumes there is accurate, complete, and timely information available through the DUNSRight Process. However, the survey Mason Tillman performed indicates that there may be a serious problem with one or several aspects of the extensive data cleaning and updating process described in the DUNSRight Process. There may be any number of explanations for the obvious errors in the Selectory dataset of Illinois construction and architecture and engineering businesses Mason Tillman purchased from D&B. These problems may be that:

- The DUNSRight Process is not as robust as described in the marketing literature
- The processes used to capture the relevant business data incorporated in DUNSRight is flawed
- The relevant data D&B has customarily used to maintain current contact information for large businesses may not be accessible for the small and medium sized businesses in its Credit Database
- D&B's historical concentration on the manufacturing sector is a business model that may not have been adequately adapted to its current broader business focus

Also, computerized records in D&B's Credit Database, which are utilized in its credit operations and sold to others for the purpose of billing, mailing list preparation, and marketing, are still reliant on some of the old data collection models which required the cooperation of the listed businesses to perform the update. D&B's traditional methods of updating its database may not be feasible when applied to the growing pool of small businesses or in the presence of new technologies and standards for assessing credit worthiness.

There is an additional problem when applying the D&B management model to a population of businesses that are overwhelmingly small. Storey reports that the most important bias in the D&B data stems from its underreporting of the emergence of new businesses. In general, a business enters the D&B Credit Database when there is a requirement for their credit information. There is, however, no formal process for the migration from the Credit Database when the business ceases operation.

But for the understatement of the M/WBEs and the other integrity issues with the D&B database, the M/WBE percentages calculated would no doubt be considerably higher as evidenced by the availability findings reported in the 2010 Disparity Study.



Given the documented level of misclassification and bias evident in the D&B dataset, extreme caution should be exercised in utilizing the D&B Credit Database as a business census. Since it is possible to perform an actual headcount of M/WBEs and non-M/WBEs, the utility of D&B's Credit Database should be carefully reassessed given the extent of its flaws as identified in this Study.





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