

Illinois Tollway BEP Goods and Services Availability and Disparity Study 2023



ILLINOIS TOLLWAY BEP GOODS AND SERVICES AVAILABILITY AND DISPARITY STUDY 2023

Colette Holt & Associates

16 Carriage Hills · San Antonio, TX 78257

(773) 255-6844

colette.holt@mwbelaw.com

facebook.com/MWBELAW • [twitter: @mwbelaw](https://twitter.com/mwbelaw)

About the Study Team

Colette Holt & Associates (“CHA”), is a national law and consulting firm specializing in issues related to Minority, Women and Disadvantaged Business Enterprise programs, business diversity initiatives, and affirmative action issues. The firm has conducted court-approved disparity studies and designed court-approved programs for over 30 years, including for numerous governments. CHA also provides training, monitoring and investigative services across the country to agencies and businesses. CHA is led by Colette Holt, J.D., the founding principal of Colette Holt & Associates and a nationally recognized attorney and expert. Ms. Holt is also a frequent expert witness, and a media author, on these issues. In addition to Ms. Holt, the firm consists of Steven C. Pitts, Ph. D., who serves as the team’s economist and statistician; Ilene Grossman, B.S., Project Administrator; Glenn Sullivan, B.S., Director of Technology; Victoria Farrell, MBA, Director Qualitative Data Collection; and Joanne Lubart, J.D., Associate Counsel.

Sandi Llano & Associates, Inc. With more than 30 years of experience, Sandi Llano established Sandi Llano & Associates, Inc. to continue advocating for equal access to business opportunities for disadvantaged, minority- and women-owned firms. After retiring as the Disadvantaged Business Enterprise Director for Metra, Ms. Llano provides consulting services to governments and firms on compliance with contracting equity requirements, best practices for M/W/DBE programs, and representation for M/W/DBEs as their mentor and advocate.

L. Binder, Inc., founded by LaTasha Binder in 2014, is a full-service marketing research firm. Ms. Binder has partnered with several organizations for strategic projects, program management, and technical assistance services, such as the Small Business Development Centers, State of Illinois Department of Central Management Services, the City of Chicago, the Women Business Development Center, the Chicago Urban League, National Association of Minority Contractors and more.

Acknowledgments

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I. EXECUTIVE SUMMARY

The Illinois State Toll Highway Authority (“Tollway”) retained Colette Holt & Associates (“CHA”) to perform a disparity study examining its Business Enterprise Program (“BEP” or “Program”) for Minority- and Woman-Owned Business Enterprises (“M/WBEs” or “BEP firms”). In this Study, we determined the Tollway’s utilization of M/WBEs on Tollway goods and services contracts during fiscal years 2015 through 2019; the availability of these firms as a percentage of all firms in the Tollway’s geographic and industry market areas; and any disparities between the Tollway’s utilization of M/WBEs and M/WBE availability. We further analyzed disparities in the Tollway’s marketplace and the wider Illinois economy, where affirmative action in contracting is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. We also gathered qualitative data about the experiences of M/WBEs in obtaining Tollway goods and services contracts and associated subcontracts. Based on these findings, we evaluated the Program for conformance with constitutional standards and national best practices for government contracting affirmative action programs.

The methodology for this Study embodies the constitutional principles of *City of Richmond v. J.A. Croson Co.*,¹ *Adarand Constructors, Inc. v. Peña*,² Seventh Circuit Court of Appeals case law and best practices for designing race- and gender-conscious programs. The CHA approach has been specifically upheld by the federal courts, including the Seventh Circuit. It is also the approach developed by Ms. Holt for the National Academy of Sciences that is now the recommended standard for designing legally defensible disparity studies.

A. Summary of Strict Constitutional Standards Applicable to an Illinois Tollway’s Disadvantaged Business Enterprise Program

To be effective, enforceable and legally defensible, a race-based program for public sector contracts must meet the judicial test of constitutional “strict scrutiny”. Strict scrutiny is the highest level of judicial review. The Tollway must meet this test to ensure that its race- and gender-conscious program is in legal compliance.

Strict scrutiny analysis has two prongs:

-
1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
 2. 515 U.S. 200 (1995).

1. The government must establish its “compelling interest” in remediating race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
2. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.³

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

1. Statistical evidence of the underutilization of minority or woman firms by the agency and/or throughout the agency’s geographic and industry market area compared to their availability in the market area.
2. Anecdotal evidence of race- or gender-based barriers to the full and fair participation of minority and woman firms in the market area and seeking contracts with the agency. Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

The narrow tailoring prong has been met by satisfying five factors to ensure that the remedy “fits” the evidence:

1. The necessity of relief;
2. The efficacy of race-neutral remedies at overcoming identified discrimination;
3. The flexibility and duration of the relief, including the availability of waiver provisions;
4. The relationship of numerical goals to the relevant market; and
5. The impact of the relief on the rights of third parties.

Most federal courts have subjected preferences for Woman-Owned Business Enterprises to “intermediate scrutiny”. Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.⁴ The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to satisfy strict scrutiny. However, appellate courts have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE Program for federally assisted transportation projects⁵ or held that the results would be the same under strict scrutiny.

3. 488 U.S. 469 (1989).

4. *Cf. United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).

5. 49 C.F.R. Part 26.

Proof of the negative effects of economic factors on M/WBEs and the unequal treatment of such firms by actors critical to their success will meet strict scrutiny. Disparity studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of M/WBEs and their actual utilization compared to non-M/WBEs. Specific evidence of discrimination or its absence may be direct or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs. High quality studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored.

B. The Illinois Tollway’s Business Enterprise Program

1. Program History and Objectives

The Business Enterprise for Minorities, Women, and Persons with Disabilities Act (“Act”) was adopted by the State of Illinois in 1989 to foster continuing economic development of minority-owned and woman-owned businesses. The Act applies to all state agencies and state universities, including the Illinois Tollway. The state has also adopted Program provisions under the Act to promote and encourage the development of businesses owned by persons with disabilities.

BEP seeks to promote fair and equitable contracting opportunities for M/WBEs. This program applies to goods and services procured by the Illinois Tollway that are subject to the Illinois Procurement Code, under the Joint Committee on Administrative Rules.

The State’s program was amended in 2016, 2018 and 2021. Our firm conducted a Disparity Study in 2015 that supported the inference that barriers based on race and gender continued to impede opportunities on state projects for each racial and ethnic minority group, for White women, for minorities as a whole and for M/WBEs as a whole.

2. Program Administration

The State of Illinois’ Commission on Equity and Inclusion (“CEI”) is the primary agency in charge of setting the program’s overall policies, procedures and regulations to ensure that each state agency, including the Tollway, is utilizing minority, women and persons with disabilities in its procurement process. CEI’s BEP program authority includes, but is not limited to, the following:

- Ensuring that BEP Goals are established on contracts worth more than \$100,000.
- Conducting conflict of interest reviews on bids and offers from responsive bidders, offerors, vendors, or contractors with an annual value of more than \$50,000.
- Reviewing contracts for purposes of equity and inclusion, if deemed necessary.
- Reviewing proposals, bids, or contracts and issuing a recommendation to void a contract or reject a proposal or bid based on any violation of the Illinois Procurement Code governing equity and inclusion.

The Business Enterprise Program Council assists with implementing, monitoring and enforcing the goals of the program. The Council is responsible for:

- Reviewing compliance plans submitted by the Tollway.
- Reviewing BEP certification application appeals.
- Setting BEP Council Meeting Agendas.
- Maintaining a list of all businesses certified as businesses with 51% or greater ownership by minorities, females, or persons with disabilities.

The Tollway is required to file an annual compliance plan with the Council that states its goals for contracting with BEP firms and how it will reach those goals.

Two Tollway departments administer the program's policies and procedures. The routine administration of the program is managed by the Contract Compliance Team in the Department of Procurement. The Department of Diversity and Strategic Development ("Diversity Department") assists with implementing initiatives that facilitate BEP participation in the program.

The Tollway's Board of Directors has established the Diversity & Inclusion Committee to focus on diversity issues and policies, create access to sustainable jobs and foster increased opportunities for firms of all sizes and types.

3. Program Eligibility

The Tollway is not a certifying agency. To participate as a BEP vendor, firms must be certified by CEI. Certifications are processed through CEI's Business Enterprise Program Certification Division and must meet the following requirements:

- At least 51% of the applicant's ownership must be owned by a minority, woman, or person with a disability.

- At least 51% of the applicant's control must be by one or more minority groups, women, or persons with a disability.
- The owner must be a citizen of the United States or a legal permanent resident alien.
- The applicant must have annual gross sales of less than \$150M based on federal income tax returns of the business.

Vendors have four certification options each with varying documentation requirements, turnaround times and expiration periods.

- The full application process requires most recent company financial statements, a U.S. Corporate or LLC partnership income tax return, U.S. individual federal income tax returns and other documentation validating ownership information and gross sales. Certification is valid for seven years.
- The BE Enrolled Business Enterprise Certification Program offers automatic certification to businesses certified with the City of Chicago and/or Cook County. This certification is valid for the same period as the City or County certification.
- The FastTrack Certification allows vendors who are certified by the Chicago Minority Supplier Development, Mid-States Minority Supplier Development Council or the Women's Business Development Center a seven-business day turnaround. FastTrack Certification is valid for one year.
- The Transportation Recognition Certification is a scaled-down version of the Full Certification process, with reduced documentation requirements. The Transportation Recognition Certification is valid for one year.

4. Race- and Gender-Neutral Measures

a. Small Business Set-Aside Program

The Small Business Set-Aside Program provides for bidding only by small firms on designated contracts without consideration of the firm's minority or gender status. To qualify, retail or service business must have revenues of less than \$8M, wholesale companies must have less than \$13M and manufacturing companies must have fewer than 250 employees. The program includes 66 small business set-aside categories with over 600 product and service categories at any dollar amount. Firms are listed in the small business database on the Illinois Procurement Gateway.

b. Technical Assistance Program

The Department of Commerce and Economic Opportunity has established Procurement Technical Assistance Centers throughout Illinois to provide assistance and training to small businesses who are interested in contracting with the state. Small Business Development Centers are also available to help entrepreneurs start and sustain small businesses.

c. Information Access and Dissemination

The Tollway's Buying Plan for Goods and Services provides potential vendors a list of upcoming services, equipment and materials the Tollway expects to purchase. The detailed list includes the initial term of each contract, the tentative timeframe for when the solicitation will be issued, and an estimated contract value range to provide prospective vendors with information they need to prepare to bid on Tollway contracts.

5. BEP Policies and Procedures

a. Business Enterprise Program Goals

As of January 2022, the state's annual, aggregated aspirational goal is to spend at least 30% of its total non-construction and non-professional services dollars with firms certified through BEP. This overall goal is allocated as follows: MBEs 16%; WBEs 10%; and businesses owned by persons with disabilities 4%.

b. Contract Goals

Contract goals are based on the availability of BEP certified vendors and the scope of work for the contract. The overall contract goal is the cumulative amount of the availability of certified BEP firms in each percentage weighted scope of work. The Tollway's Compliance Department performs the initial goal setting using the BEP Project Goal Setting Form. The final goal is then determined by the CEI BEP Compliance Officer.

Goals are not set on procurements that do not offer subcontracting opportunities or where there is insufficient BEP availability to ensure adequate competition. Exemptions of entire classes of contracts and individual contract exemptions must be made in writing by the Tollway to the BEP Council.

c. Counting BEP Participation Towards Contract Goals

Only the value of payments made for services performed and/or actual supplies/goods/equipment provided by BEP certified vendors is counted

towards the contract goal. This includes fees or commissions charged by second-tier BEP firms for providing a *bona fide* service and 100% of expenditures for materials and supplies required under the contract and obtained from a BEP certified vendor manufacturer, regular dealer, or supplier, as long as it is customary. For joint ventures, only the portion of the total dollar value of the specific work performed by the BEP certified joint venture vendor on the contract is counted.

To be credited towards a contract goal, the BEP firm must perform a Commercially Useful Function (“CUF”), as defined in 49 C.F.R. §26.55(c).⁶

d. Sheltered Market

The Sheltered Market Program is administered by CEI. Under this program, certain Tollway contracts may be selected and specifically set aside for bidding only by BEP firms through competitive solicitations.

6. Pre-Award Bidding Procedures

a. Submission of BEP Utilization Plans

For a contract with BEP goals, the vendor must submit, at bid time, a completed Utilization Plan indicating how it will meet the goal or documenting its Good Faith Efforts (“GFE”) to do so. Failure to include a completed Utilization Plan will render the bid or offer nonresponsive.

A BEP bidder meeting the goal through self-performance is also required to submit a Utilization Plan. When the bidder is a joint venture, each joint venture partner must provide an attestation to the Utilization Plan.

Approved Utilization Plans and Participation Agreements become part of the contract upon award.

b. Good Faith Efforts to Meet Contract Goals

A bidder unable to meet the contract goal must demonstrate it made GFE to do so. A Good Faith Efforts Contact Log and Checklist must be submitted with the bid and the bidder must provide supporting documentation outlining its GFE to achieve the goal.

The BEP Council or its delegate is responsible for considering bids that do not meet the contract goal. The Council considers numerous factors set by CEI policy that include the quality, quantity, and intensity of the vendor’s

6. A CUF is performed when a firm is responsible for the execution of a distinct element of the work of the contract and carries out its responsibilities by actually performing, managing, and supervising the work involved, or by fulfilling its responsibilities in a joint venture.

efforts, as well as the performance of other bidders in meeting the contract goal on contracts of a similar nature.

c. Cure Period

A “cure” period of up to 10 days from the date of notification of contract award is allowed for an otherwise successful bidder to demonstrate its GFE to meet the contract goal(s). The “deficiency” in the bid or proposal may only be cured by contracting with additional BEP subcontractors who are certified at the time of bid submission. The Tollway’s Procurement Officer must notify CEI of all bids or offers that fail to include a utilization plan or that include a utilization plan with deficiencies.

It is important to note that vendors are given only one chance to cure their deficiencies.

Only a deficient Utilization Plan submitted at the time of bid may be cured. Once a determination has been made by CEI, the identified deficiencies are then sent to Tollway Compliance to draft a letter listing the deficiencies. The vendor will have 10 days to cure the deficiencies and return the revised Utilization Plan. Compliance forwards the revised Utilization Plan to CEI for final review and determination of responsiveness.

7. Contract Performance Compliance

The Tollway monitors vendor compliance with its Utilization Plan and the terms of the contract during performance. The Tollway uses the B2Gnow® Diversity Contract Compliance Reporting System software to track real time payments to prime vendors and track and analyze prime payments to subcontractors.

Changes to commitments in the Utilization Plan, including BEP substitutions after contract award, must be approved in writing by the Tollway. All requests for changes must also be reported to the BEP Council or its delegate.

The Tollway’s Contract Compliance Team is responsible for approving or denying any requests, except for GFEs, according to CEI policy. Any unauthorized changes are considered a breach of contract and can result in a declaration of default, termination of the contract, and/or imposition of remedies and sanctions provided for in the contract or by law.

The prime vendor must also obtain the Tollway’s approval to hire a vendor for any scope of work that was not previously disclosed. The vendor must make GFE to ensure that BEP firms have a fair opportunity to bid on the new scope of work.

8. Sanctions for Non-Compliance

Sanctions may be imposed on the prime vendor or BEP subcontractor for not complying with the Utilization Plan. A vendor is considered out of compliance if it fails to provide requested information or provides false or misleading information or statements concerning compliance, the certification status of BEP firms, GFE or any other material fact.

Upon determination of non-compliance, a report is filed with the Secretary of CEI. If the Secretary determines that the vendor did not fulfill the contract goals or did not make sufficient GFE to do so, the vendor may be subject to remedies or sanctions for breach of contract, including withholding payment, termination of the contract, disqualification of the contractor from doing business with the state for a period of not more than one year, cancellation of any contract entered into by the vendor or any other remedies provided for in the contract, at law or in equity.

9. Outreach and Training

a. Mentor-Protégé Program

CEI offers a mentor-protégé program to assist BEP firms to develop capacity and to enhance their core capabilities through partnering with larger, more experienced firms. The mentor must utilize the protégé for at least ten percent of the total contract amount. The protégé must be certified and perform a CUF under the contract.

b. Online Training

The Tollway conducts virtual workshops and training sessions specifically designed to assist vendors with BEP program requirements. These webinars are available on the Tollway's website to view at any time. Workshops offered include:

- Goods and Services Special Provisions Compliance
- Good Faith Efforts Training
- Eight Approved Reasons for a Prime to Substitute BEP Vendors Working in Goods and Services Contracts
- BEP Policies & Procedures Procurement Department
- How to Navigate the BidBuy Procurement System
- How to do business with the Tollway

c. CEI Outreach and Support

The Tollway's program is also supported by CEI's broader effort to promote minority, woman and persons with disabilities contracting on state procurements. CEI partners with local assist agencies that conduct virtual and in-person events to encourage participation in Tollway goods and services contracts and to provide technical support to BEP firms.

10. Staff Training

The Diversity Department and Contract Compliance staff regularly attend the American Contract Compliance Association's annual National Training Institute, where they receive extensive training on national best practices for D/M/WBE programs. Staff also attend the annual B2Gnow® User Training Conference and participate in B2Gnow® online training.

11. Experiences with the Tollway's Business Enterprise Program

To explore the impacts of the Tollway's program, we interviewed 62 individuals about their experiences and solicited their suggestions for changes. We also collected written comments from 106 M/WBE and non-M/WBE businesses about their experiences with the Tollway's program through an electronic survey.

a. Business and Stakeholder Interviews

Access to information and decisionmakers: Several firm owners reported it was sometimes difficult to access information about upcoming Tollway opportunities to participate on Tollway goods and services contracts.

Obtaining work with the Tollway: Contract goals were seen as critical to many firms' ability to obtain work from the Tollway and other governments. The program has also helped some firms to participate on state contracts. However, other firms had not been successful in using the program.

Supportive services to BEPs and small firms: Many M/WBEs supported various supportive services programs. Mentor-protégé programs were reported to be especially valuable. Firms that had not had the opportunity to participate in a mentor-protégé program were eager to do so.

Meeting BEP Contract Goals: Most non-certified firms that submit as prime vendors reported that they meet the contract goals but it was often a challenge to do so on goods and services contracts because of limited subcontractable scopes.

b. Electronic Survey Responses

Impact of the BEP program: Many minority and woman respondents supported the program as essential for obtaining Tollway contracts. One BEP firm complimented the Tollway's administration on the program. However, for some, the program's benefits were inconsistent.

BEP certification process and standards: Several BEP firms requested reciprocity with other certifying entities to make the process less cumbersome. One respondent felt that White woman-owned firms were "fronts" for White men.

Access to Tollway BEP contracting opportunities: Some suggested "unbundling" projects into smaller contracts to open more prime opportunities and allow smaller firms to take on more work. Higher BEP goals were suggested by several. Set aside contracts for BEPs and small firms was another recommendation. Several M/WBEs felt the same firms are repeatedly used. Several M/WBEs believed that the number of contracts procured under the program has decreased over time.

Tollway program compliance: Many BEP respondents requested more oversight to ensure prime contractors comply with goal requirements.

Contracting policies and requirements: One BEP respondent suggested updating the program's insurance requirements to reflect the risks associated with professional services firms. Another BEP firm questioned whether small BEP firms should be required to complete the Commitment to Diversity Form when submitting as a prime. Several M/WBEs suggested more technical services would help them to be more successful in submitting bids and RFP responses.

Access to information and networks: Some M/WBEs reported receiving late notifications or no notifications about upcoming contracting opportunities. Many M/WBEs requested more networking opportunities with prime contractors. One suggestion was to hold more virtual networking events. Another was more targeted outreach to firms based on their industry.

Experiences with business supportive services: Those who had participated in business support services generally found them helpful. However, some requested more information and assistance. Assistance in obtaining working capital was a frequent request.

Experiences with mentor-protégé programs and teaming arrangements: Most M/WBEs that had participated in mentor-protégé programs and teaming arrangements found them helpful. Some did not find their participation in mentor protégé or joint venture relationships fruitful.

C. Utilization, Availability and Disparity Analyses of the Illinois Tollway's Goods and Services Contracts

We analyzed data for the Tollway's goods and services contracts for fiscal years 2015 through 2019. To conduct the analysis, we constructed all the fields necessary where they were missing in the Tollway's contract records (*e.g.*, industry type; zip codes; six-digit North American Industry Classification System ("NAICS") codes of prime contractors and subcontractors; and firm information, including payments, race and gender).

The resulting Final Contract Data File ("FCDF") contained 214 prime contracts and 71 subcontracts. The net dollar value of the contracts to prime contractors and subcontractors was \$499,622,603.

Table 1-1 presents data on the 63 NAICS codes contained in the FCDF. The third column represents the share of all contracts to firms performing work in a particular NAICS code. The fourth column presents the cumulative share of spending from the NAICS code with the largest share to the NAICS code with the smallest share.

Table 1-1: Industry Percentage Distribution of Illinois Tollway Contracts by Dollars

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	28.8%	28.8%
541511	Custom Computer Programming Services	22.2%	50.9%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	6.7%	57.6%
518210	Data Processing, Hosting, and Related Services	4.7%	62.3%
541512	Computer Systems Design Services	4.6%	67.0%
238210	Electrical Contractors and Other Wiring Installation Contractors	4.0%	70.9%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	3.8%	74.8%
221122	Electric Power Distribution	3.6%	78.3%
488490	Other Support Activities for Road Transportation	3.0%	81.3%
561320	Temporary Help Services	2.5%	83.9%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
423690	Other Electronic Parts and Equipment Merchant Wholesalers	2.1%	85.9%
541612	Human Resources Consulting Services	1.9%	87.8%
424690	Other Chemical and Allied Products Merchant Wholesalers	1.7%	89.5%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.4%	90.9%
541611	Administrative Management and General Management Consulting Services	1.3%	92.2%
238290	Other Building Equipment Contractors	1.2%	93.4%
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers	0.8%	94.2%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	0.6%	94.8%
561612	Security Guards and Patrol Services	0.6%	95.4%
423840	Industrial Supplies Merchant Wholesalers	0.6%	95.9%
424950	Paint, Varnish, and Supplies Merchant Wholesalers	0.5%	96.5%
523150	Investment Banking and Securities Intermediation	0.5%	96.9%
424320	Men's and Boys' Clothing and Furnishings Merchant Wholesalers	0.3%	97.2%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	0.3%	97.5%
541110	Offices of Lawyers	0.3%	97.8%
811111	General Automotive Repair	0.3%	98.0%
541330	Engineering Services	0.2%	98.2%
323111	Commercial Printing (except Screen and Books)	0.2%	98.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.1%	98.5%
237310	Highway, Street, and Bridge Construction	0.1%	98.7%
333318	Other Commercial and Service Industry Machinery Manufacturing	0.1%	98.8%
238990	All Other Specialty Trade Contractors	0.1%	98.9%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.1%	99.0%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
424120	Stationery and Office Supplies Merchant Wholesalers	0.1%	99.1%
541211	Offices of Certified Public Accountants	0.1%	99.2%
236220	Commercial and Institutional Building Construction	0.1%	99.3%
423830	Industrial Machinery and Equipment Merchant Wholesalers	0.1%	99.4%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.1%	99.4%
541990	All Other Professional, Scientific, and Technical Services	0.1%	99.5%
562119	Other Waste Collection	0.05%	99.5%
424130	Industrial and Personal Service Paper Merchant Wholesalers	0.05%	99.6%
423860	Transportation Equipment and Supplies (except Motor Vehicle) Merchant Wholesalers	0.04%	99.6%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.04%	99.7%
624190	Other Individual and Family Services	0.04%	99.7%
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	0.03%	99.7%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.03%	99.8%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	0.03%	99.8%
238910	Site Preparation Contractors	0.03%	99.8%
423710	Hardware Merchant Wholesalers	0.02%	99.8%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.02%	99.9%
561421	Telephone Answering Services	0.02%	99.9%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.02%	99.9%
562998	All Other Miscellaneous Waste Management Services	0.02%	99.9%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.02%	99.9%
488410	Motor Vehicle Towing	0.01%	100.0%
621999	All Other Miscellaneous Ambulatory Health Care Services	0.01%	100.0%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	0.01%	100.0%
423420	Office Equipment Merchant Wholesalers	0.01%	100.0%
561439	Other Business Service Centers (including Copy Shops)	0.01%	100.0%
441228	Motorcycle, ATV, and All Other Motor Vehicle Dealers	0.01%	100.0%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.003%	100.0%
238350	Finish Carpentry Contractors	0.002%	100.0%
562920	Materials Recovery Facilities	0.001%	100.0%
TOTAL		100.0%	

Source: CHA analysis of Illinois Tollway data

To determine the geographic market area, we applied the standard of identifying the firm locations that account for close to 75% of contract and subcontract dollar payments in the FCDF.⁷ Firm location was determined by zip code and aggregated into counties as the geographic unit. Six counties in Illinois— Cook, Dupage, Kane, Lake, McHenry, and Will— captured 82.7% of the FCDF. Therefore, we used these six counties as the geographic market.

We next determined the dollar value of the Tollway’s utilization of M/WBEs, as measured by payments to prime firms and subcontractors and disaggregated by race and gender.⁸ Table 1-2 presents the summary of distribution of contract dollars. Chapter IV provides detailed breakdowns of these results.

7. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 (“*National Disparity Study Guidelines*”), at p. 29.

8. For our analysis, the term “DBE” includes firms that are certified by government agencies and minority- and woman-owned firms that are not certified.

Table 1-2: Percentage Distribution of Contract Dollars by Race and Gender
(share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
Total	0.9%	1.8%	16.7%	0.0%	21.7%	41.1%	58.9%	100.0%

Source: CHA analysis of Illinois Tollway data

Using the modified “custom census” approach to estimating availability and the further assignment of race and gender using the FCDF, the Master M/WBE Directory developed by CHA and other sources, we determined the unweighted availability of BEP firms in the Tollway’s market area. For further explanation of the role of unweighted and weighted availability and how these are calculated, please see Chapter IV and Appendix D.⁹

We next determined the aggregated unweighted availability of M/WBEs, and then the availability of M/WBEs weighted by the Tollway’s spending in its geographic and industry markets. Table 1-3 presents these results.

Table 1-3: Aggregated Weighted Availability for Illinois Tollway Contracts

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
2.3%	1.1%	1.6%	0.0%	5.0%	9.9%	90.1%	100.0%

Source: CHA analysis of Illinois Tollway data; Hoovers; CHA Master Directory

We calculated disparity ratios for total M/WBE utilization compared to the total weighted availability of M/WBEs, measured in dollars paid.

A *disparity ratio* is the relationship between the utilization and weighted availability, determined above. Mathematically, this is represented by:

$$DR = U/WA$$

Where DR is the disparity ratio; U is utilization rate; and WA is the weighted availability.

The courts have held that disparity results must be analyzed to determine whether the results are “significant”. There are two distinct methods to measure a result’s significance. First, a “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. A substantively significant disparity supports the inference that the

9. The USDOT “Tips for Goal Setting” urges recipients to weight their headcount of firms by dollars spent. See Tips for Goal-Setting in the Disadvantaged Business Enterprise Program, <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

result may be caused by the disparate impacts of discrimination.¹⁰ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone.¹¹ A more in-depth discussion of statistical significance is provided in Chapter IV and Appendix C.

Table 1-4 presents the disparity ratios for each demographic group. The disparity ratio for Blacks, Native Americans, and non-M/WBEs is substantively significant. All the disparity ratios are statistically significant at the 0.001 level.

Table 1-4: Disparity Ratios by Demographic Group

	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE
Disparity Ratio	39.8% ^{‡***}	163.4% ^{***}	1051.0% ^{***}	0.0% ^{‡***}	435.9% ^{***}	413.2% ^{***}	65.4% ^{‡***}

Source: CHA analysis of Illinois Tollway data

‡ Indicates substantive significance

**** Statistically significant at the 0.001 level*

D. Analysis of Disparities in Illinois Tollway's Marketplace

Evidence of the experiences of M/WBEs outside of contracting affirmative action programs is relevant and probative of the likely results of the Tollway using only race- and gender-neutral measures. To examine the outcomes throughout Illinois Tollway's Marketplace, we explored two Census Bureau datasets and the government and academic literature relevant to how discrimination in the Tollway's goods and services industry market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the Tollway's prime contract and subcontract opportunities.

We analyzed the following data and literature:

- The Census Bureau's *American Community Survey* from 2015 through 2019 for the seven-county Illinois Tollway geographic market. This rich data set

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

11. A chi-square test – examining if the utilization rate was different from the weighted availability – was used to determine the statistical significance of the disparity ratio.

establishes with greater certainty any causal links between race, gender and economic outcomes. We employed a multiple regression statistical technique to examine the rates at which minorities and women form firms. In general, we found that even after considering potential mitigating factors, business formation rates by Blacks, Hispanics and White women are lower compared to White males. The data indicate that non-Whites and White women receive lower wages and Blacks and White women receive lower business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-Whites and White women entrepreneurs.

- State of Illinois Industry Data from the Census Bureau's 2017 *Annual Business Survey*, the most recent data available. This dataset indicated large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), and the payroll of employer firms.
- Surveys and literature on barriers to access to commercial credit and the development of human capital. These sources further establish that minorities and women continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed. These results support the conclusions drawn from the anecdotal interviews and analysis of the Tollway's contract data that M/WBEs face obstacles to achieving success on contracts outside of contracting affirmative action programs.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall marketplace discrimination without some type of affirmative intervention. This evidence supports the conclusion that the Tollway should consider the use of race- and gender-conscious contract goals to ensure a level playing field for all firms.

E. Qualitative Evidence of Race and Gender Barriers in the Illinois Tollway's Market for Goods and Services Contracts

In addition to quantitative data, anecdotal evidence of firms' marketplace experiences is relevant to evaluating whether the effects of current or past discrimination continue to impede opportunities for M/WBEs such that race-conscious contract goals are needed to ensure equal opportunities to compete for agency prime contracts. To explore this type of anecdotal evidence, we received input from 62 participants in four small group interviews. We also received 106 net

responses to an electronic anecdotal survey and written comments during the study period.

1. Business Owner Interviews

Many minority and woman owners reported that while progress has been made in integrating their firms into public and private sector contracting opportunities through race- and gender-conscious contracting programs like the Tollway's, significant barriers on the basis of race and/or gender remain.

- Many minority or woman owners encountered biases about their competency. There was often a stigma attached to being an M/WBE.
- Several interviewees stated that after other firms become familiar with their capabilities, biases are overcome. One owner felt there was no stigma associated with race or gender.
- Most M/WBEs reported that contract goals and the overall BEP program remain necessary to ensure equal opportunities to compete.

2. Electronic Business Survey

Results from the electronic survey were similar to those of the interviews. Among M/WBEs, 40.8% reported that they still experience barriers to equal contracting opportunities; 31.1% said their competency was questioned because of their race or gender; and 13.6% indicated that they had experienced job-related sexual or racial harassment or stereotyping.

Responses to the survey's open-ended questions expressed these experiences in further detail. The following is a summary of the most common responses.

- Minority business owners reported that they continue to experience negative assumptions and perceptions about their competency and capabilities.
- Several minority respondents reported that fair opportunities to compete for contracts were not available because of systemic racial barriers.
- Some respondents noted that it can be difficult, if not impossible, to know whether they had been subjected to discrimination.
- Many woman owners reported sexism, negative perceptions about their competency and stereotyping about their roles and authority. The male employee or associate was often assumed to be in charge.
- M/WBEs reported entrenched relationships and "good 'ole boy" networks impede access to contract opportunities.

- Some M/WBEs reported high rates and discriminatory obstacles when trying to obtain financing, bonding and insurance that are necessary to compete on an equal basis. Small and new firms face particularly large challenges.
- Some minority and woman respondents reported that they are often under pressure to reduce their pricing relative to their White male counterparts.
- Some M/WBEs believed they have been charged higher pricing for materials based on their race, ethnicity and gender. However, some M/WBEs attributed the higher supplier pricing to their small size.

F. Recommendations the Illinois Tollway's Business Enterprise Program

The quantitative and qualitative data in this study provide a thorough examination of the experiences of minority- and woman-owned firms in the Tollway's geographic and industry markets for goods and services contracts and associated sub-contracts. The results provide the Tollway with the evidence necessary to narrowly tailor its Business Enterprise Program as required by the federal courts.

The following suggestions will support current efforts and activities to provide greater opportunities for all firms to compete on a level playing field for Tollway goods and services opportunities.

1. Enhance Race and Gender-Neutral Measures

The courts require that an agency use race-neutral approaches to the maximum feasible extent to meet its race- or gender-conscious goals. This is a critical element of narrowly tailoring the program, so that the burden on non-M/WBEs is no more than necessary to achieve the Tollway's remedial purposes. Increased participation of M/WBEs through race-neutral measures will also reduce the need to set contract goals.

a. Conduct Increased Outreach

Many M/WBEs requested assistance with accessing information about the Tollway's goods and services contracts. Regular "meet and greets" with Tollway staff and large prime vendors would be helpful to assist these small firms to learn about upcoming opportunities and make important connections. In addition, the Tollway should focus on subindustries where M/WBEs have received few, if any, Tollway dollars. We suggest meetings with firms certified in the areas in which the agency spends significant dollars,

but in which M/WBEs do not participate at the level of their availability. The Tollway should also consider conducting early and targeted outreach about specific solicitations to expand the areas in which M/WBE obtain agency work.

b. Increase Prime Contracting Opportunities

While M/WBEs other than Black-owned firms did not experience disparities in access to Tollway contracts overall, contracts for prime work are out of reach for most M/WBEs (especially Black vendors). We recommend the Tollway place special emphasis on reducing barriers to prime awards for goods and services contracts.

We suggest extending the Small Business Initiative to include goods and service contracts. The SBI has been successful in creating opportunities for SBEs to serve as construction prime contractors.

Another important race- and gender-neutral method to reduce barriers would be to “unbundle” contracts. In conjunction with reduced experience and insurance requirements where possible, unbundled contracts would permit smaller firms and M/WBEs to bid as prime contractors, as well as enhance their subcontracting opportunities. Unbundling must be conducted within the constraints of the need to ensure efficiency and limit costs to taxpayers.

c. Expand Technical Assistance Offerings

The concentration analyses in Chapter IV suggest that M/WBEs could benefit from efforts to expand the subindustries in which they receive work. M/WBEs had received few to no dollars in some NAICS codes and utilization was highly concentrated in a small number of M/WBEs. Further, many M/WBEs requested additional training on specific aspects of doing business with the Tollway. Assistance is currently focused on the construction industry, so expanding offering to goods and services will help to increase the utilization and capacities of M/WBEs in these industries.

d. Enhance Contract Data Collection and Reporting

A critical element of this study and a major challenge was data collection of full and complete prime contract and associated subcontractor records. The Tollway is a large and complex organization and, as is very common, did not have all of the information needed for the analysis. Based on our experiences collecting contract records for this report, we suggest the following:

1. Collect full information on all contacts regardless of size, procurement method or certification status for all firms, both prime contractors and subcontractors. This should include email addresses, six-digit

NAICS codes for the work performed or the goods/services provided on the contract, race and gender ownership, and certification status disaggregated by race and gender.

2. Conduct ongoing and follow-up training on how to use the B2Gnow® system for Tollway personnel, prime contractors and subcontractors.
3. Provide training to Tollway staff on how to assign NAICS codes for contract goal setting.
4. Delineate reporting of BEP participation by whether the dollars were achieved using BEP contract goals or through race- and gender-neutral approaches (*i.e.*, SBI contracts, and BEP prime dollars on open market contracts).

e. Integrate All Program Aspects into One Department

In 2020, the Tollway split off the compliance component of program administration from the outreach, community engagement and technical support component of its supplier diversity programs. Whatever the intention, firms of all types reported this has caused confusion, delays and unnecessary complications. In our experience, it is highly unusual for program elements to be siloed in this manner. To the contrary, such fragmentation serves only to hinder coordination, communication and consistency. The Tollway would benefit from “one stop shopping” for its programs, so that it speaks with one voice and presents a smooth operation to its vendors and to the public. We therefore recommend that all program functions be again centralized in one department, with various divisions focused on specific program aspects.

2. Continue to Implement a Narrowly Tailored Business Enterprise Program

The Tollway’s program has been very successful in opening opportunities for minority and woman firms on its contracts. As reported in Chapter IV, overall, M/WBEs have reached parity with non-M/WBEs in receiving Tollway dollars, except Black-owned firms. Further, when we examined whether firms were concentrated within an industry, or between industries, because of race or gender, a picture emerged of unequal outcomes for M/WBEs compared to non-M/WBEs. Further, the utilization was highly concentrated amongst a small number of firms, which suggests that market wide barriers have not been overcome for all groups.

In addition, as documented in Chapter V, when examining outcomes in the wider economy, it is clear that minority- and woman-owned firms do not yet enjoy full and fair access to opportunities to compete for construction and

construction-related services contracts. Data from the Census Bureau's Survey of Business Owners indicate very large disparities between M/WBEs and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms. The results of numerous small business credit surveys reveal that M/WBEs, especially Black-owned firms, suffer significant barriers to business financing. There are also race-based barriers to the development of the human capital necessary for entrepreneurial success.

Our interviews with individual business owners and stakeholders and the results of our other studies for Chicago and Illinois governments further buttress the conclusion that race and sex discrimination remain persistent barriers to equal contracting opportunities. Many minority and female owners reported that they still encounter barriers based on their race and/or gender and that without affirmative intervention to increase opportunities through contract goals, they will continue to be denied full and fair chances to compete.

We therefore recommend that the Tollway continue to implement narrowly tailored race- and gender-based measures.

a. Use the Study to Set Narrowly Tailored BEP Contract Goals

The Tollway should use the study's detailed unweighted availability estimates as the starting point for contract specific goals. This methodology involves four steps to develop goals that are transparent, replicable and legally defensible¹².

1. Weight the estimated dollar value of the scopes of the contract by NAICS codes, as determined during the process of creating the solicitation.
2. Determine the unweighted availability of M/WBEs in those scopes, as estimated in this study.
3. Calculate a weighted goal based upon the scopes and the availability of at least three available BEP firms in each scope.
4. Adjust the result based on geography and current market conditions (for example, the volume of work currently underway in the market, project location, the entrance of newly certified firms, specialized nature of the project, etc.), past achievement on similar projects and any other relevant factors.

12. See www.contractgoalsetting.com, for instructions on correct contract goal setting. Our firm, in conjunction with B2Gnow®, developed this free site to provide the methodology and forms for contract goal setting.

This constitutionally mandated approach may result in no goals where there are insufficient subcontracting opportunities (as is often the case with supply contracts) or an insufficient number of available BEP firms. Written procedures spelling out these steps should be drafted. The Tollway uses the B2Gnow® electronic diversity management system to support supplier diversity program implementation. We have worked with this firm to develop a contract goal setting module to assist with the process of setting narrowly tailored goals that are legally defensible and administratively feasible.

We further urge the Tollway to bid some goods and services contracts without BEP goals that it determines have significant opportunities for BEP firm participation. These control contracts can illuminate whether certified firms are used, or even solicited, in the absence of goals. The development of some “unremediated markets” data, as held by the courts, including the Seventh Circuit in upholding the Illinois Department of Transportation’s DBE program, will be probative of whether the program remains needed to level the playing field for minorities and women. The legal standard is that an agency must use race-neutral methods to the “maximum feasible extent” and the outcomes of “no goals” contracts will illuminate how effective race-neutral measures are in achieving non-discriminatory outcomes.

We further recommend that contract goals be reviewed when there is a change order greater than some minimum amount (e.g., 10%). This could result in an increase, a decrease or no change in the contract goal, but it will ensure the constitutionally required flexibility that is the hallmark of a narrowly tailored goal setting and implementation methodology.

b. Enhance Program Policies and Procedures

BEP operates well, as a general matter. We suggest some revisions, however, based on the feedback of business owners and Tollway staff and national best practices. We note that some of these enhancements will require more staff resources.

- More transparency about how BEP contract goals are set would be helpful. As discussed above, we recommend using the highly detailed data in this study to set contract goals. This is a narrowly tailored, legally defensible, transparent and replicable methodology that should allay concerns about how goals are set. In addition to using this approach, a list of the six-digit NAICS codes used to set the goal could be listed in the bid documents to provide guidance on how to meet the target for that solicitation.
- Clarify that bids or proposals will be accepted based on the bidder’s submission of GFE. Flexibility is a critical requirement of a

constitutionally sound program, and the Tollway should ensure that its GFE review process is robust and that firms understand it is possible to use it. We suggest that the Tollway develop training materials, which could include video instructions, on GFE to ensure that everyone understands the criteria and that the standards are being followed.

- Drop the ability of a low bidder to supplement its BEP participation or GFE (beyond any clarifying information) where it did not meet the contract goal. While well intentioned, this undercuts the concept that BEP compliance is an integral part of the bidding process. It has the further pernicious effect of encouraging bid shopping of BEP firms because the as-read low bidder now has a committed price and the certified firms can be shopped until one agrees to whatever the bidder presented for that item in its bid.
- Increase monitoring of BEP compliance was urged by certified firms and Tollway staff. This may require more training for Tollway staff.

c. Develop Performance Measures for Program Success

The Tollway should develop quantitative performance measures for the overall success of the program. To evaluate its effectiveness in reducing the systemic barriers identified in this Report, possible benchmarks might be:

- Increased participation by Black-owned businesses as prime contractors and subcontractors.
- Increased prime contract awards to certified firms.
- Increased variety in the industries in which minority- and woman-owned firms are awarded prime contracts and subcontracts.

d. Conduct Regular Program Reviews

The federal courts require a race-conscious program to have a sunset date. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, the Tollway must ensure that they remain narrowly tailored.

II. LEGAL STANDARDS FOR LOCAL GOVERNMENT CONTRACTING AFFIRMATIVE ACTION PROGRAMS

A. Summary of Constitutional Equal Protection Standards

To be effective, enforceable, and legally defensible, a race-based affirmative action program for public sector contracts, regardless of funding source, must meet the judicial test of constitutional “strict scrutiny”.¹³ Strict scrutiny constitutes the highest level of judicial review.¹⁴ The strict scrutiny analysis is comprised of two prongs or elements:

1. The government must establish its “compelling interest” in remediating race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
2. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.¹⁵

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

1. Quantitative evidence of the underutilization of minority- or woman-owned firms by the agency and/or throughout the agency’s geographic and industry market area as compared to their availability in the market area.
2. Qualitative evidence of race- or gender-based barriers to the full and fair participation of minority- and woman-owned firms in the market area or in

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

14. Strict scrutiny is used by courts to evaluate governmental action that classifies persons on a “suspect” basis, such as race. It is also used in actions purported to infringe upon fundamental rights. Legal scholars frequently note that strict scrutiny constitutes the most rigorous form of judicial review. *See, for example*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA Law Review 1267, 1273 (2007).

15. *Croson*, 488 U.S. at 510.

seeking contracts with the agency.^{16,17} Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

The narrow tailoring prong has been met by satisfying the following five factors to ensure that the remedy “fits” the evidence upon which the agency relies:

1. The necessity of relief;¹⁸
2. The efficacy of race-neutral remedies at overcoming identified discrimination;¹⁹
3. The flexibility and duration of the relief, including the availability of waiver provisions;²⁰
4. The relationship of numerical goals to the relevant labor market;²¹ and
5. The impact of the relief on the rights of third parties.²²

In *Adarand Constructors, Inc. v. Peña*,²³ the United States Supreme Court extended the analysis of strict scrutiny to race-based federal enactments such as the United States Department of Transportation (“USDOT”) federal Disadvantaged Business Enterprise (“DBE”) program for federally assisted transportation contracts.²⁴ Just as in the local government context, the national legislature must have a compelling governmental interest for the use of race-conscious programs adopted by state and local governments, and the remedies adopted must be narrowly tailored to that evidence.²⁵

Most federal courts, including the Seventh Circuit,²⁶ have subjected preferences for Woman-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny”.²⁷ Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.²⁸ The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to satisfy strict scrutiny. However, appellate courts have applied strict scrutiny to the

16. *Id.* at 509.

17. For this Study, CHA has included the qualitative or anecdotal evidence collected for our Chicago area and Illinois studies.

18. *Id.* at 507; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-238 (1995) (“*Adarand III*”).

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

20. *Id.*

21. *Id.*

22. *Croson*, 488 U.S. at 506.

23. *Adarand Constructors III*, 515 U.S. 200.

24. The federal DBE Program regulation is set forth in 49 Code of Federal Regulations Part 26 and Part 23. Part 26 addresses participation by DBEs in United States Department of Transportation Financial Assistance Programs. Part 23 deals with participation of DBEs in airport concessions.

25. See, for example, *Croson*, 488 U.S. at 492-493; *Adarand III*, 515 U.S. 200, 227; see generally *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013).

26. *W.H. Scott Construction Co., Inc., v. City of Jackson, Mississippi*, 199 F.3d 206, 215 n.9 (5th Cir. 1999).

gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program²⁹ or held that the results would be the same under strict scrutiny.³⁰

Classifications not based upon a suspect class (race, ethnicity, religion, national origin, or gender) are subject to the lesser standard of review referred to as “rational basis scrutiny”.³¹ The courts have held there are no equal protection implications under the Fourteenth Amendment of the United States Constitution for groups not subject to systemic discrimination.³² In contrast to both strict scrutiny and intermediate scrutiny, rational basis means the governmental action or statutory classification must be “rationally related” to a “legitimate” government interest.³³ Thus, preferences for persons with disabilities or veteran status may be enacted with vastly less evidence than that required for race- or gender-based measures to combat historic discrimination.³⁴

Unlike most legal challenges, the defendant bears the initial burden of producing “strong evidence” in support of its race-conscious program.³⁵ As held by the Seventh Circuit,³⁶ the plaintiff must then proffer evidence to rebut the government’s case, and bears the ultimate burden of production and persuasion that the affirmative action program is unconstitutional.³⁷ “[W]hen the proponent of an affirmative action plan produces sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”³⁸

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27. See, e.g., *Associated Utility Contractors of Maryland v. Mayor of Baltimore*, 83 F. Supp. 2d 613, 620 (D. Md. 2000) (“*Baltimore I*”); *Scott*, 199 F.3d at 206, 215, *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997) (“*Engineering Contractors II*”); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (“*Concrete Works II*”); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990, 1009-1011 (3rd Cir. 1993) (“*Philadelphia II*”); *Coral Construction Co. v. King County, Washington*, 941 F.2d 910, 930-931 (9th Cir. 1991).
 28. Cf. *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).
 29. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007), *cert. denied*, __ U.S. __, June 26, 2017 (“*Northern Contracting III*”).
 30. *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).
 31. See generally, *Coral Construction Co v. King County*, 941 F. 2d 910 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997).
 32. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
 33. *Heller v. Doe*, 509 U.S. 312, 320 (1993).
 34. The standard applicable to status based on sexual orientation or gender identity has not yet been clarified by the courts.
 35. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).
 36. See generally *Dunnett Bay Construction Company v. Borggren*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).
 37. *W.H. Scott Construction*, 199 F.3d at 219; *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), 532 U.S. 941, *cert. granted then dismissed as improvidently granted*, 534 U.S. 103 (2001) (“*Adarand VII*”).
 38. *Engineering Contractors II*, 122 F.3d at 916.

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”³⁹ To successfully rebut the government’s evidence, a plaintiff must introduce “credible, particularized evidence” that rebuts the government’s showing of a strong basis in evidence.⁴⁰ For example, in the challenge to the Minnesota and Nebraska DBE programs, “plaintiffs presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to, and participation in, federally assisted highway contracts. Therefore, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.”⁴¹ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.⁴² A plaintiff cannot rest upon general criticisms of studies or other related evidence; it must meet its burden that the government’s proof is inadequate to meet strict scrutiny, rendering the legislation or government program illegal.⁴³

To meet strict scrutiny, studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of minority- and woman-owned firms and their actual utilization compared to White male-owned businesses. More rigorous studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored. The following is a detailed discussion of the legal parameters and the requirements for conducting studies to support legally defensible programs.

B. Elements of Strict Scrutiny

In its decision in *City of Richmond v. J.A. Croson Co.*, the United States Supreme Court established the constitutional contours of permissible race-based public contracting programs. Reversing long established Equal Protection jurisprudence,⁴⁴ the Court, for the first time, extended the highest level of judicial exam-

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39. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989 (10th Cir. 2003), cert. denied, 540 U.S. 1027 (2003) (10th Cir. 2003) (“Concrete Works IV”).
40. *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233 (4th Cir. 2010); *Midwest Fence Corp. v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (“Midwest Fence I”), affirmed, 840 F.3d 932 (7th Cir. 2016) (“Midwest Fence II”).
41. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).
42. *Coral Construction*, 941 F. 2d at 921; *Engineering Contractors II*, 122 F.3d at 916.
43. *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works II*, 36 F.3d 1513, 1522-1523; *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999), aff’d per curiam, 218 F. 3d 1267 (11th Cir. 2000); see also *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

ination from measures designed to limit the rights and opportunities of minorities to legislation that inures to the benefit of these victims of historic, invidious discrimination. Strict scrutiny requires that a government entity prove both its “compelling governmental interest” in remediating identified discrimination based upon “strong evidence”⁴⁵ and that the measures adopted to remedy that discrimination are “narrowly tailored” to that evidence. However benign the government’s motive, race is always so suspect a classification that its use must pass the highest constitutional test of “strict scrutiny”. Many programs fail to meet the “compelling governmental interest” requirement, the “narrow tailoring” requirement, or both.

The Court struck down the City of Richmond’s Minority Business Enterprise Plan (“Plan”) because it failed to satisfy the strict scrutiny analysis applied to “race-based” government programs. The City’s “set-aside” Plan required prime contractors awarded City construction contracts to subcontract at least 30% of the project to Minority-Owned Business Enterprises (“MBEs”).⁴⁶ A business located anywhere in the nation was eligible to participate so long as it was at least 51% owned and controlled by minority citizens or lawfully-admitted permanent residents.

The Plan was adopted following a public hearing during which no direct evidence was presented that the City had discriminated on the basis of race in contracts or that its prime contractors had discriminated against minority subcontractors. The only evidence before the City Council was: (a) Richmond’s population was 50% Black, yet less than one percent of its prime construction contracts had been awarded to minority businesses; (b) local contractors’ associations were virtually all White; (c) the City Attorney’s opinion that the Plan was constitutional; and (d) generalized statements describing widespread racial discrimination in the local, Virginia, and national construction industries.

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

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment...[I]f the City could show that

44. U.S. Const. Amend. XIV, §1.

45. There is no precise mathematical formula to assess what rises to the level of “strong evidence”. However, statistical evidence of discrimination constitutes a primary method used to determine whether strong evidence exists to adopt a program to remediate that discrimination.

46. The City described its Plan as remedial. It was enacted to promote greater participation by minority business enterprises in public construction projects.

it had essentially become a “passive participant” in a system of racial exclusion ...[it] could take affirmative steps to dismantle such a system.⁴⁷

Strict scrutiny of race-based remedies is required to determine whether racial classifications are in fact motivated by notions of racial inferiority or blatant racial politics. This highest level of judicial review “smokes out” illegitimate uses of race by ensuring that the legislative body is pursuing an important enough goal to warrant use of a highly suspect tool.⁴⁸ It also ensures that the means chosen “fit” this compelling goal so closely that there is little or no likelihood that the motive for the classification was illegitimate racial prejudice or stereotype. The Court made clear that strict scrutiny is designed to expose racial stigma; racial classifications are said to create racial hostility if they are based on notions of racial inferiority.

Richmond’s evidence was found to be lacking in every respect.⁴⁹ The City could not rely upon the disparity between its utilization of MBE prime contractors and Richmond’s minority population because not all minority persons would be qualified to perform construction projects; general population representation is irrelevant. No data were presented about the availability of MBEs in either the relevant market area or their utilization as subcontractors on City projects.

According to Justice O’Connor, the extremely low MBE membership in local contractors’ associations could be explained by “societal” discrimination or perhaps Blacks’ lack of interest in participating as business owners in the construction industry. To be relevant, the City would have to demonstrate statistical disparities between eligible MBEs and actual membership in trade or professional groups. Further, Richmond presented no evidence concerning enforcement of its own anti-discrimination ordinance. Finally, the City could not rely upon Congress’ determination that there has been nationwide discrimination in the construction industry. Congress recognized that the scope of the problem varies from market to market, and, in any event, it was exercising its powers under Section Five of the Fourteenth Amendment. Local governments are further constrained by the Amendment’s Equal Protection Clause.

In the case at hand, the City has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in City construction projects. The City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual

47. 488 U.S. at 491-92.

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

49. The City cited past discrimination and its desire to increase minority business participation in construction projects as the factors giving rise to the Plan.

case. Under such circumstances, it is simply impossible to say that the City has demonstrated “a strong basis in evidence for its conclusion that remedial action was necessary.”⁵⁰

This analysis was applied only to Blacks. The Court emphasized that there was “absolutely no evidence” of discrimination against other minorities. “The random inclusion of racial groups that, as a practical matter, may have never suffered from discrimination in the construction industry in Richmond, suggests that perhaps the City’s purpose was not in fact to remedy past discrimination.”⁵¹

Having found that Richmond had not presented evidence in support of its compelling interest in remediating discrimination—the first prong of strict scrutiny—the Court made two observations about the narrowness of the remedy—the second prong of strict scrutiny. First, Richmond had not considered race-neutral means to increase MBE participation. Second, the 30% quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.⁵² The Court noted that the City “does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁵³

Recognizing that her opinion might be misconstrued to eliminate all race-conscious contracting efforts, Justice O’Connor closed with these admonitions:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the City could act to dismantle the closed business system by taking appropriate measures against those who discriminate based on race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion... Moreover, evidence of a pattern of individual discriminatory acts can, if supported by

50. *Croson*, 488 U.S. at 510.

51. *Id.*

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

53. *Croson*, 488 U.S. at 502.

appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.⁵⁴

While much has been written about *Croson*, it is worth stressing what evidence was, and was not, before the Court. First, Richmond presented *no* evidence regarding the availability of MBEs to perform as prime contractors or subcontractors and *no* evidence of the utilization of minority-owned subcontractors on City contracts.⁵⁵ Nor did Richmond attempt to link the remedy it imposed to any evidence specific to the program; it used the general population of the City rather than any measure of business availability.

Some commentators have taken this dearth of any particularized proof and argued that only the most particularized proof can suffice in all cases. They leap from the Court's rejection of Richmond's reliance on only the percentage of Blacks in the City's population to a requirement that only firms that bid or have the "capacity" or "willingness" to bid on a particular contract at a particular time can be considered in determining whether discrimination against Black businesses infects the local economy.⁵⁶

This argument has been rejected explicitly by some courts. In denying the plaintiff's summary judgment motion to enjoin the City of New York's Minority- and Woman-Owned Business Enterprise ("M/WBE") construction ordinance, the court stated:

[I]t is important to remember what the *Croson* plurality opinion did and did not decide. The Richmond program, which the *Croson* Court struck down, was insufficient because it was based on a comparison of the minority population in its entirety in Richmond, Virginia (50%) with the number of contracts awarded to minority businesses (0.67%). There were no statistics presented regarding the number of minority-owned contractors in the Richmond area, *Croson*, 488 U.S. at 499, and the Supreme Court was concerned with the gross generality of the statistics used in justifying the Richmond program. There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.⁵⁷

54. *Id.* at 509 (citations omitted).

55. *Id.* at 502.

56. *See, for example, Northern Contracting III*, 473 F.3d at 723.

57. *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785, *28-29 (E.D. N.Y. 1998); *see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2nd Cir. 1992) ("Croson made only broad pronouncements concerning the findings necessary to support a state's affirmative action plan"); *cf. Concrete Works II*, 36 F.3d at 1528 (City may rely on "data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion").

Further, Richmond made no attempt to narrowly tailor a goal for the procurement at issue that reflected the reality of the project. Arbitrary quotas, and the unyielding application of those quotas, did not support the stated objective of ensuring equal access to City contracting opportunities. The *Croson* Court said nothing about the constitutionality of flexible goals based upon the availability of MBEs to perform the scopes of the contract in the government's local market area. In contrast, the USDOT DBE program avoids these pitfalls. The federal DBE program "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."⁵⁸

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

C. Establishing a "Strong Basis in Evidence" for the Illinois Tollway's Business Enterprise Program

The case law on the DBE program should guide the Illinois Tollway program for state funded contracts. Whether the program is called an M/WBE program or a DBE program or any other moniker, the strict scrutiny test applies. As discussed, 49 C.F.R. Part 26 has been upheld by every court, and local programs for M/WBEs will be judged against this legal framework.⁵⁹ As previously noted, programs for veterans, persons with disabilities, preferences based on geographic location or truly race- and gender-neutral small business efforts are not subject to strict scrutiny but rather the lower level of scrutiny called "rational basis". Therefore, no evidence comparable to that in a disparity study is needed to enact such initiatives.

It is well established that disparities between an agency's utilization of M/WBEs and their availability in the relevant marketplace provide a sufficient basis for the consideration of race- or gender-conscious remedies. Proof of the disparate impacts of economic factors on M/WBEs and the disparate treatment of such firms by actors critical to their success is relevant and probative under the strict scrutiny standard. Discrimination must be shown using sound statistics and econometric models to examine the effects of systems or markets on different groups, as well as by evidence of personal experiences with discriminatory conduct, policies, or systems.⁶⁰ Specific evidence of discrimination or its absence may be direct or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs.⁶¹

58. *Western States Paving*, 407 F.3d at 994.

59. *Midwest Fence II*, 840 F.3d. at 953.

60. *Adarand VII*, 228 F.3d at 1166 ("statistical and anecdotal evidence are appropriate").

Croson's admonition that “mere societal” discrimination is not enough to meet strict scrutiny is met where the government presents evidence of discrimination in the industry targeted by the program. “If such evidence is presented, it is immaterial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry... The genesis of the identified discrimination is irrelevant.” There is no requirement to “show the existence of specific discriminatory policies and that those policies were more than a reflection of societal discrimination.”⁶²

The Tollway need not prove that it is itself guilty of discrimination to meet its burden. In upholding Denver’s M/WBE construction program, the court stated that Denver can show its compelling interest by “evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination...[by] linking its spending practices to the private discrimination.”⁶³ Denver further linked its award of public dollars to discriminatory conduct through the testimony of M/WBEs that identified general contractors who used them on City projects with M/WBE goals but refused to use them on private projects without goals.

The following are the evidentiary elements courts will examine in determining the constitutional validity of the Tollway’s race- and gender-conscious program and the steps in performing a disparity study necessary to meet those elements.

1. Define the Illinois Tollway’s Market Area

The first step is to determine the relevant geographic market area in which the Tollway operates. *Croson* states that a state or local government may only remedy discrimination within its own contracting market area. The City of Richmond was specifically faulted for including minority contractors from across the country in its program, based on national data considered by Congress.⁶⁴ The Tollway must therefore empirically establish the geographic and product dimensions of its contracting and procurement market area to ensure that the program meets strict scrutiny. This is a fact driven inquiry; it may or may not be the case that the market area is the government’s jurisdictional boundaries.⁶⁵ This study employs long established economic principles to empirically establish the Tollway’s geographic and product market area to ensure that any program based on the study satisfies strict scrutiny.

61. *Id.*

62. *Concrete Works IV*, 321 F.3d at 976.

63. *Id.* at 977.

64. *Croson*, 488 U.S. at 508.

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

A commonly accepted definition of geographic market area for disparity studies is the locations that account for at least 75% of the agency's contract and subcontract dollar payments.⁶⁶ Similarly, the accepted approach is to analyze those detailed industries that make up at least 75% of the prime contract and associated subcontract payments for the study period.⁶⁷ This produces the utilization results within the geographic market area.⁶⁸

2. Determine the Illinois Tollway's Utilization of M/WBEs

The study should next determine the Tollway's utilization of M/WBEs in its geographic market area. Generally, this analysis should be limited to formally procured contracts, since it is unlikely that it is realistic or useful to set goals on small dollar purchases. Developing the file for analysis involves the following steps:

- Develop the initial contract data files. This involves first gathering the Tollway's records of its payments to prime contractors, and if available, associated subcontractors.
- Develop the final contract data file. Whatever data are missing (often race and gender ownership, North American Industry Classification System ("NAICS") or other industry codes, work descriptions or other important information not collected by the Tollway) must be reconstructed by the consultant. Using surveys is unlikely to yield sufficient data. It is also important to research whether a firm that has an address outside the market area has a location in the geographic market area (contract records often have far flung addresses for payments). All necessary data for at least 80% of the contract dollars in the final contract data files should be collected to ensure a comprehensive file that mirrors the Tollway's contracting and procurement activities.

3. Determine the Availability of M/WBEs in Illinois Tollway's Market Area

Next, the study must estimate the availability of minorities and women in the Tollway's relevant geographic market area to participate in its contracts as prime contractors and associated subcontractors. Based on the product and geographic utilization data, the study should calculate unweighted and

66. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 ("*National Disparity Study Guidelines*").

67. *Id.* at 50-51.

68. For this Report, we found the State's market area to be the entire state of Illinois. Please see Chapter IV for additional details.

weighted M/WBE availability estimates of ready, willing, and able firms in the Tollway's market. These results will be a narrowly tailored, dollar-weighted average of all the underlying industry availability numbers; larger weights will be applied to industries with relatively more spending and lower weights applied to industries with relatively less spending. The availability figures should be sub-divided by race, ethnicity, and gender.

The availability analysis involves the following steps:

1. The development of the Merged Business Availability List. Three data sets are used to develop the Merged Business Availability List:
 - The firms in the M/WBE/BEP Master Directory. This methodology includes both certified firms and non-certified firms owned by minorities or women.⁶⁹ The Master Directory consists of all available government and private M/WBE directories, limited to firms within the Tollway's geographic and product market.
 - The firms contained in the Tollway's contract data file. This will require the elimination of any duplications because a firm might have received more than one contract for work in a given NAICS code during the study period.
 - Firms extracted from the Dun & Bradstreet MarketPlace/Hoovers database, using the relevant geographic and product market definitions.
2. The estimation of unweighted availability. The Merged Business Availability List will be the available universe of relevant firms for the study. This process will significantly improve the identification of minority-owned and woman-owned businesses in the business population. Race and sex must be assigned to any firm not already classified.⁷⁰ This will produce estimates of woman and minority business availability in the Tollway's markets for each NAICS code in the product market; for woman and minority business availability for all NAICS codes combined; and for the broad industry categories of goods, services, and construction. The detailed results should also be the basis for contract specific goal setting methodology.
3. The estimation of weighted availability. Using the weights from the utilization analysis, the unweighted availability should be adjusted for the share of the Tollway's spending in each NAICS code. The unweighted

69. See *National Disparity Study Guidelines*, Chapter III, at 33-34.

70. We note this is an improvement over the approach described in the *National Disparity Study Guidelines*, which recommended a survey to assign classifications. While it is more labor intensive to actually assign race, gender and industry code to each firm than using a mathematical formula derived from survey results, it greatly improves the accuracy of the assignments, resulting in more narrowly tailored results.

availability determination will be weighted by the share of dollars the Tollway actually spends in each NAICS code, derived from the utilization analysis. These resulting weighted availability estimates will be used in the calculation of disparity indices.

This adjustment is important for two reasons. First, disparity analyses compare utilization and availability. The utilization metrics are shares of dollars. The unweighted availability metrics are shares of firms. In order to make comparable analyses, the dollar shares are used to weight the unweighted availability. Second, any examination of the Tollway's overall usage of available firms must be conducted with an understanding of what NAICS codes received what share of agency spending. Absent this, a particular group's availability share (high or low) in an area of low spending would carry equal weight to a particular group's availability share (high or low) in an area of large spending.

This methodology for estimating availability is usually referred to as the "custom census" approach with refinements. This approach is favored for several reasons. As recognized by the courts, including the Seventh Circuit Court of Appeals and the *National Disparity Study Guidelines*,⁷¹ this methodology in general is superior to the other methods for at least four reasons.

- First, it provides an internally consistent and rigorous "apples to apples" comparison between firms in the availability numerator and those in the denominator. Other approaches often have different definitions for the firms in the numerator (*e.g.*, certified M/WBEs or firms that respond to a survey) and the denominator (*e.g.*, registered vendors or the Census Bureau's County Business Patterns data).
- Second, by examining a comprehensive group of firms, it "casts a broader net" beyond those known to the agency. As held by the federal court of appeals in finding the Illinois Department of Transportation's program to be constitutional, the "remedial nature of [DBE programs] militates in favor of a method of DBE availability calculation that casts a broader net" than merely using bidders lists or other agency or government directories.⁷² A broad methodology is also recommended by the federal DBE Program, which has been upheld by every court.⁷³ A custom census is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in

71. *National Disparity Study Guidelines*, at 57-58.

72. *Northern Contracting III*, 473 F.3 at 723.

73. *See Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program*, https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf.

the agency's market areas that have not been able to access its opportunities.

- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. Several courts have held that the results of discrimination – which impact factors affecting capacity – should not be the benchmark for a program designed to ameliorate the effects of discrimination. They have acknowledged that minority and woman firms may be smaller, newer, and otherwise less competitive than non-M/WBEs because of the very discrimination sought to be remedied by race-conscious contracting programs. Racial and gender differences in these “capacity” factors are the outcomes of discrimination and it is therefore inappropriate as a matter of economics and statistics to use them as “control” variables in a disparity study.⁷⁴
- Fourth, it has been upheld by every court that has reviewed it, including in the failed challenge to the Illinois Department of Transportation's DBE program⁷⁵ and most recently in the successful defense of the Illinois State Toll Highway's DBE program.⁷⁶

Other methodologies relying only on vendor or bidder lists may overstate or understate availability as a proportion of the Tollway's actual markets because they reflect only the results of the Tollway's own activities, not an accurate portrayal of marketplace behavior. Other methods of whittling down availability by using assumptions based on surveys with limited response rates or guesses about firms' capacities easily lead to findings that woman and minority businesses no longer face discrimination. Firms that fail to respond to a survey are called “unavailable” even if the firm is actually working on Tollway contracts.

Many plaintiffs have argued that studies must somehow control for “capacity” of M/WBEs to perform specific agency contracts. The definition of “capacity” has varied based upon the plaintiff's particular point of view, but it has generally meant firm age, firm size (full time employees), firm revenues, bonding limits and prior experience on agency projects (no argument has been made outside of the construction industry).

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

75. *Northern Contracting III*, 473 F.3d 715.

76. *Midwest Fence II*, F.3d 932; see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), cert. denied, 137 S.Ct. 2292 (2017) (CHA served as testifying experts for the Tollway).

This test has been rejected by the courts when directly addressed by the plaintiff and the agency. As recognized by the courts and the *National Disparity Study Guidelines*, these capacity factors are not race- and gender-neutral variables. Discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors. In a perfectly discriminatory system, M/WBEs would have no “capacity” because they would have been prevented from developing any “capacity”. That certainly would not mean that there was no discrimination or that the government must sit by helplessly and continue to award tax dollars within the “market failure” of discrimination and without recognition of systematic, institutional race- and gender-based barriers. It is these types of “capacity” variables where barriers to full and fair opportunities to compete will be manifested. Capacity limitations on availability would import the current effects of past discrimination into the model, because if M/WBEs are newer or smaller because of discrimination, then controlling for those variables will mask the phenomenon of discrimination that is being studied. In short, identifiable indicators of capacity are themselves impacted and reflect discrimination. The courts have agreed. Based on expert testimony, judges understand that factors such as size and experience reflect outcomes influenced by race and gender: “M/WBE construction firms are generally smaller and less experienced *because* of discrimination.”⁷⁷ Significantly, *Croson* does not “require disparity studies that measure whether construction firms are able to perform a *particular contract*.”⁷⁸

To rebut this framework, a plaintiff must proffer its own study showing that the disparities disappear when whatever variables it believes are important are held constant and that controlling for firm specialization explained the disparities.⁷⁹ “Since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. Speculative criticism about potential problems will not carry that burden.”⁸⁰ “To successfully rebut the [Illinois] Tollway's evidence of discrimination, [plaintiff] Midwest [Fence] must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *See Concrete Works IV*, 321 F.3d at 959 (citation omitted). Again, the Court finds that Midwest has failed to make this showing.”⁸¹

77. *Concrete Works IV*, 321 F.3d at 983 (emphasis in the original).

78. *Id.*

79. Conjecture and unsupported criticism of the government are not enough. The plaintiff must rebut the government's evidence and introduce “credible, particularized evidence” of its own. *See Midwest Fence II*, 840 F.3d at 942 (upholding the Illinois Tollway's program for state funded contracts modeled after Part 26 and based on CHA's expert testimony).

80. *Midwest Fence II*, 840 F.3d at 952.

There are also practical reasons to not circumscribe availability through “capacity” limitations. First, there is no agreement concerning what variables are relevant or how those variables are to be measured for the purpose of examining whether race and gender barriers impede the success of minority and woman entrepreneurs. [“Plaintiff’s’ expert] and Midwest Fence have not explained how to account for relative capacity.”⁸² For example, a newly formed firm might be the result of a merger of much older entities or have been formed by highly experienced owners; it is unclear how such variations would shed light on the issues in a disparity study. Second, since the amount of necessary capacity will vary from contract to contract, there is no way to establish universal standards that would satisfy the capacity limitation. Third, firms’ capacities are highly elastic. Businesses can add staff, rent equipment, hire subcontractors, or take other steps to be able to perform a particular scope on a particular contract. Whatever a firm’s capacity might have been at the time of the study, it may well have changed by the time the agency seeks to issue a specific future solicitation. Fourth, there are no reliable data sources for the type of information usually posited as important by those who seek to reduce availability estimates using capacity factors. While a researcher might have information about firms that are certified as M/WBEs or that are prequalified by an agency (which usually applies only to construction firms), there is no database for that information for non-certified firms, especially White male-owned firms that usually function as subcontractors. Any adjustment to the numerator (M/WBEs) must also be made to the denominator (all firms), since a researcher cannot assume that all White male-owned firms have adequate capacity but that M/WBEs do not.

Capacity variables, such as the length of time the owner has been in business, the receipts of the firms, the number of employees and other information, should be examined at the economy-wide level of business formation and earnings, discussed in Chapter V, not at the first stage of the analysis. To import these variables into the availability determination would confirm the downward bias that discrimination imposes on M/WBEs’ availability and the upward bias enjoyed by non-M/WBEs. These factors should also be explored during anecdotal data collection, discussed in Chapter VI, to develop data on how the formation and development of M/WBEs are affected by these types of factors. The ability of firms to perform a particular contract or scope of work is also relevant to contract goal setting, where the agency must use its judgment about whether to adjust the initial goal that results from the study data based on current market conditions and current firm availability.

81. *Midwest Fence I*, 2015 WL 1396376 at *22).

82. *Midwest Fence II*, 840 F.3d at 952.

4. Examine Disparities between Illinois Tollway's Utilization of M/WBEs and M/WBE Availability

A disparity study for a state or local government must analyze whether there are statistically significant disparities between the availability of M/WBEs and their utilization on agency contracts.

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise... In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.⁸³

This is known as the "disparity ratio" or "disparity index" which is a critical element of the statistical evidence. A disparity ratio measures the participation of a group in the government's contracting opportunities by dividing that group's utilization by the availability of that group and multiplying that result by 100. Courts have looked to disparity indices in determining whether strict scrutiny is satisfied.⁸⁴ An index less than 100% indicates that a given group is being utilized less than would be expected based on its availability.

The courts have held that disparity results must be analyzed to determine whether the results are "significant". There are two distinct methods to measure the significance of a result. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. This is based on the Equal Employment Opportunity Commission's "eighty percent rule" that a ratio less than 80% presents a *prima facie* case of discrimination by supporting the inference that the result may be caused by the disparate impacts of discrimination.⁸⁵ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance

83. *Croson*, 488 U.S. at 509; see *Webster*, 51 F.Supp.2d at 1363, 1375.

84. *Scott*, 199 F.3d at 218; see also *Concrete Works II*, 36 F.3d at 1526-1527; *O'Donnell Construction Co., Inc. v. State of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992); *Cone Corporation v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990).

85. 29 C.F.R. §1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."); see *Engineering Contractors II*, 122 F3d at 914.

alone.⁸⁶ A more in-depth discussion of statistical significance is provided in Appendix C.

In addition to creating the disparity ratio, correct measures of availability are necessary to determine whether discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors, known as an “economy-wide” disparity analysis.⁸⁷

The Tollway need not prove that the statistical inferences of discrimination are “correct”. In upholding Denver’s M/WBE Program, the Tenth Circuit Court of Appeals noted that strong evidence supporting Denver’s determination that remedial action was necessary need not have been based upon “irrefutable or definitive” proof of discrimination. Statistical evidence creating inferences of discriminatory motivations was sufficient and, therefore, evidence of market area discrimination was properly used to meet strict scrutiny. To rebut this type of evidence, the plaintiff must prove by a preponderance of the evidence that such proof does not support those inferences.⁸⁸

Nor must the Tollway demonstrate that the “ordinances will *change* discriminatory practices and policies” in the local market area; such a test would be “illogical” because firms could defeat the remedial efforts simply by refusing to cease discriminating.⁸⁹

The State need not prove that private firms directly engaged in any discrimination in which the government passively participates do so intentionally, with the purpose of disadvantaging minorities and women.

Denver’s only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination.... Denver was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. To impose such a burden on a municipality would be tantamount to requiring proof of discrimination and would

86. A chi-square test – examining if the utilization rate was different from the weighted availability - is used to determine the statistical significance of the disparity ratio.

87. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868 at *69 (Sept. 8, 2005) (“*Northern Contracting II*”) (IDOT’s custom census approach was supportable because “discrimination in the credit and bonding markets may artificially reduce the number of M/WBEs”).

88. *Concrete Works IV*, 321 F. 3d at 971.

89. *Id.* at 973 (emphasis in the original).

eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence.⁹⁰

Similarly, statistical evidence by its nature cannot identify the individuals responsible for the discrimination; there is no need to do so to meet strict scrutiny, as opposed to an individual or class action lawsuit.⁹¹

5. Analyze Economy-Wide Evidence of Race- and Gender-Based Disparities in the Illinois Tollway's Market

The courts have repeatedly held that analysis of disparities in the rates at which M/WBEs in the government's markets form businesses compared to similar non-M/WBEs, their earnings from such businesses, and their access to capital markets are highly relevant to the determination of whether the market functions properly for all firms regardless of the race or gender of their ownership. These analyses contributed to the successful defense of the Illinois Tollway's DBE program⁹². As similarly explained by the Tenth Circuit, this type of evidence

demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.... The government's evidence is particularly striking in the area of the

90. *Id.* at 971.

91. *Id.* at 973.

92. *Midwest Fence I*, 2015 WL 1396376 at *21 ("Colette Holt's updated census analysis controlled for variables such as education, age, and occupation and still found lower earnings and rates of business formation among women and minorities as compared to white men.").

race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.⁹³

Business discrimination studies and lending formation studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. “Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it similarly demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”⁹⁴ Despite the contentions of plaintiffs that possibly dozens of factors might influence the ability of any individual to succeed in business, the courts have rejected such impossible tests and held that business formation studies are not flawed because they cannot control for subjective descriptions such as “quality of education”, “culture” and “religion”.⁹⁵

For example, in unanimously upholding the federal DBE Program for federally assisted transportation-related contracts, the courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.⁹⁶ The Eighth Circuit Court of Appeals took a “hard look” at the evidence Congress considered, and concluded that the legislature had

spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, [the plaintiffs] presented evidence that the data were susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.⁹⁷

93. *Adarand VII*, 228 F.3d at 1147, 1168-69.

94. *Id.*

95. *Concrete Works IV*, 321 F.3d at 980.

96. *Id.*; *Western States*, 407 F.3d at 993; *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2004 U.S. Dist. LEXIS 3226 at *64 (N.D. Ill., Mar. 3, 2004) (“*Northern Contracting I*”).

6. Evaluate Anecdotal Evidence of Race- and Gender-Based Barriers to Equal Opportunities in the Illinois Tollway's Market

A study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities because it is relevant to the question of whether observed statistical disparities are due to discrimination and not to some other non-discriminatory cause or causes. As observed by the Supreme Court, anecdotal evidence can be persuasive because it “brought the cold [statistics] convincingly to life.”⁹⁸ Testimony about discrimination practiced by prime contractors, bonding companies, suppliers, and lenders has been found relevant regarding barriers both to minority firms’ business formation and to their success on governmental projects.⁹⁹ While anecdotal evidence is insufficient standing alone, “[p]ersonal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a [government’s] institutional practices that exacerbate discriminatory market conditions are [sic] often particularly probative.”¹⁰⁰ “[W]e do not set out a categorical rule that every case must rise or fall entirely on the sufficiency of the numbers. To the contrary, anecdotal evidence might make the pivotal difference in some cases; indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”¹⁰¹

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making as opposed to judicial proceedings. “[Plaintiff] offered no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not— and indeed cannot— be verified because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.”¹⁰² Likewise, the Tenth Circuit held that “Denver was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.”¹⁰³

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- 97. *Sherbrooke*, 345 F.3d. at 970; *see also*, *Adarand VII*, 228 F.3d at 1175 (Plaintiff has not met its burden “of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market.”).
 - 98. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).
 - 99. *Adarand VII*, 228 F.3d at 1168-1172.
 - 100. *Concrete Works II*, 36 F.3d at 1520,1530.
 - 101. *Engineering Contractors II*, 122 F.3d at 926.
 - 102. *Rowe*, 615 F.3d at 249.
 - 103. *Concrete Works IV*, 321 F.3d at 989.

D. Narrowly Tailoring a Minority- and Woman-Owned Business Enterprise Program for the Illinois Tollway

Even if the Tollway has a strong basis in evidence to believe that race-based measures are needed to remedy identified discrimination, the program must still be narrowly tailored to that evidence. In striking down the City of Chicago's earlier M/WBE construction program, the court held that "remedies must be more akin to a laser beam than a baseball bat."¹⁰⁴ In contrast, as discussed above, programs that closely mirror those of the federal DBE Program¹⁰⁵ have been upheld using that framework.¹⁰⁶ The courts have repeatedly examined the following factors in determining whether race-based remedies are narrowly tailored to achieve their purpose:

- The necessity of relief;¹⁰⁷
- The efficacy of race- and gender-neutral remedies at overcoming identified discrimination;¹⁰⁸
- The relationship of numerical benchmarks for government spending to the availability of minority- and woman-owned firms and to subcontracting goal setting procedures;¹⁰⁹
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;¹¹⁰
- The relationship of numerical goals to the relevant market;¹¹¹
- The impact of the relief on third parties;¹¹² and
- The over inclusiveness of racial classifications.¹¹³

104. *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 742 (N.D. Ill. 2003).

105. Although numerous regulatory pronouncements have been issued since the federal DBE program was revamped in 1999, the 1999 rule remains in effect.

106. *See, e.g., Midwest Fence II*, 840 F.3d at 953 (upholding the Illinois Tollway's program for state funded contracts modeled after Part 26 and based on CHA's expert testimony).

107. *Croson* at 507; *Adarand III* at 237-238.

108. *Paradise* at 171.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Croson* at 506.

113. *United States v. Paradise*, 480 U.S. 149, 171 (1987); *see also Sherbrooke*, 345 F.3d at 971-972.

1. Consider Race- and Gender-Neutral Remedies

Race- and gender-neutral approaches are necessary components of a defensible and effective M/WBE program,¹¹⁴ and the failure to seriously consider such remedies has proven fatal to several programs.¹¹⁵ Difficulty in accessing procurement opportunities, restrictive bid specifications, excessive experience requirements, and overly burdensome insurance and/or bonding requirements, for example, might be addressed by the State without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units that facilitate small business participation; providing technical support; and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.¹¹⁶ Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.¹¹⁷

The requirement that the agency must meet the maximum feasible portion of the goal through race-neutral measures, as well as estimate that portion of the goal that it predicts will be met through such measures, has been central to the holdings that the DBE program rule meets narrow tailoring.¹¹⁸ The highly disfavored remedy of race-based decision making should be used only as a last resort.

However, strict scrutiny does not require that every race-neutral approach must be implemented and then proven ineffective before race-conscious remedies may be utilized.¹¹⁹ While an entity must give good faith consideration to race-neutral alternatives, “strict scrutiny does not require exhaustion of every possible such alternative... however irrational, costly, unreasonable, and unlikely to succeed such alternative might be... [S]ome degree of practicality is

114. *Croson*, 488 U.S. at 507 (Richmond considered no alternatives to race-based quota); *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) (“*Drabik II*”); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 609 (3rd Cir. 1996) (“*Philadelphia III*”) (City’s failure to consider race-neutral alternatives was particularly telling); *Webster*, 51 F.Supp.2d at 1380 (for over 20 years County never seriously considered race-neutral remedies); cf. *Aiken*, 37 F.3d at 1164 (failure to consider race-neutral method of promotions suggested a political rather than a remedial purpose).

115. See, e.g., *Florida A.G.C. Council, Inc. v. State of Florida*, Case No.: 4:03-CV-59-SPM at 10 (N. Dist. Fla. 2004) (“There is absolutely no evidence in the record to suggest that the Defendants contemplated race-neutral means to accomplish the objectives” of the statute.); *Engineering Contractors II*, 122 F.3d at 928.

116. See 49 C.F.R. §26.51; *Midwest Fence I*, 2015 WL 1396376 at *22 (“the Illinois Tollway has implemented at least four race-neutral programs to increase DBE participation, including: a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. The Tollway’s race-neutral measures are consistent with those suggested under the Federal Regulations”).

117. *Croson*, 488 U.S. at 503 n.3; *Webster*, 51 F.Supp.2d at 1380.

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

119. *Gutter*, 529 U.S. at 339.

subsumed in the exhaustion requirement.”¹²⁰ Actual results matter, too. “Like [the Illinois Department of Transportation], the [Illinois] Tollway uses race- and gender-neutral measures.... Those measures have not produced substantial DBE participation, however, so the Tollway also sets DBE participation goals.”¹²¹

2. Set Targeted M/WBE Goals

Numerical goals or benchmarks for M/WBE participation must be substantially related to their availability in the relevant market.¹²² For example, the DBE program rule requires that the overall goal must be based upon demonstrable evidence of the number of DBEs ready, willing, and able to participate on the recipient’s federally assisted contracts.¹²³ “Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*.”¹²⁴

It is settled case law that goals for a particular solicitation must reflect the particulars of the contract, not reiterate annual aggregate targets; goals must be contract specific. In holding the City of Chicago’s former construction program to be insufficiently narrowly tailored, the court found that the MBE and WBE goals were “formulistic” percentages not related to the availability of firms.¹²⁵ Contract goals must be based upon availability of M/WBEs to perform the anticipated scopes of the contract, location, progress towards meeting annual goals, and other factors.¹²⁶ Not only is transparent, detailed contract goal setting legally mandated,¹²⁷ but this approach also reduces the need to conduct good faith efforts reviews, as well as the temptation to create “front” companies and sham participation to meet unreasonable contract goals. While this is more labor intensive than defaulting to the annual, overall goals, narrow tailoring requires contract goal setting.

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

121. *Midwest Fence II*, 840 F. 3d at 938.

122. *Webster*, 51 F.Supp.2d at 1379, 1381 (statistically insignificant disparities are insufficient to support an unexplained goal of 35% M/WBE participation in County contracts); *see also Baltimore I*, 83 F.Supp.2d 613, 621.

123. 49 C.F.R. §26.45 (b).

124. *Sherbrooke*, 345 F.3d. at 972.

125. *BAGC v. Chicago*, 298 F. Supp.2d at 740.

126. *Midwest Fence I*, 2015 WL 1396376 at *23.

127. *See also Coral Construction*, 941 F.2d at 924.

3. Ensure Flexibility of Goals and Requirements

It is imperative that remedies not operate as fixed quotas.¹²⁸ An M/WBE program must provide for contract awards to firms who fail to meet the contract goals but make good faith efforts to do so. In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the USDOT's DBE program,¹²⁹ a feature that has been central to the holding that the DBE program meets the narrow tailoring requirement. If the standards for evaluating whether a bidder who fails to meet the contract goal has made good faith efforts to so

seems vague, that is likely because it was meant to be flexible.... A more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. Midwest Fence contends this creates a de facto system of quotas because contractors believe they must meet the DBE goal in their bids or lose the contract. But Appendix A to the [DBE program] regulations cautions against this very approach.... Flexibility and the availability of waivers affect whether a program is narrowly tailored. The regulations caution against quotas; provide examples of good faith efforts prime contractors can make and states can consider; and instruct a bidder to use "good business judgment" to decide whether a price difference between a DBE and a non-DBE subcontractor is reasonable or excessive in a given case. For purposes of contract awards, this is enough to "give fair notice of conduct that is forbidden or required," [citation omitted].¹³⁰

Chicago's program failed narrow tailoring by imposing a "rigid numerical quota" on prime bidders' utilization of MBEs and WBEs.¹³¹ By contrast, the constitutionally sound Illinois Tollway's program provides for detailed waiver provisions, including rights of appeal of adverse determinations that the bidder made a good faith effort to meet a contract goal.¹³²

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

129. *Croson*, 488 U.S. at 508; see also *Adarand VII*, 228 F.3d at 1181.

130. *Midwest Fence II*, 840 F.3d at 948.

131. *BAGC v. Chicago*, 298 F. Supp.2d at 740 ("Waivers are rarely or never granted... The City program is a rigid numerical quota...formulistic percentages cannot survive strict scrutiny.").

132. *Midwest Fence I*, 2015 WL 1396376 at *23.

4. Review Program Eligibility Over-Inclusiveness and Under-Inclusiveness

The over- or under-inclusiveness of those persons to be included in the Tollway's program is an additional consideration and addresses whether the remedies truly target the evil identified. Over-inclusiveness addresses the question whether a remedial program grants preferences or confers benefits to groups without examining whether each group is actually disadvantaged.

The groups to include must be based upon evidence demonstrating disparities caused by discrimination.¹³³ The "random inclusion" of ethnic or racial groups that may never have experienced discrimination in the entity's market area may indicate impermissible "racial politics".¹³⁴ In striking down Cook County, Illinois' construction program, the Seventh Circuit remarked that a "state or local government that has discriminated just against Blacks may not by way of remedy discriminate in favor of Blacks and Asian-Americans and women."¹³⁵ However, at least one court has held some quantum of evidence of discrimination for each group is sufficient; *Croson* does not require that each group included in the ordinance suffer equally from discrimination.¹³⁶ Therefore, remedies should be limited to those firms owned by the relevant minority groups, as established by the evidence, that have suffered actual harm in the market area.¹³⁷

The over-inclusiveness concern is mitigated by the requirement that the firm's owner(s) must be disadvantaged.¹³⁸ The federal DBE Program's rebuttable presumptions of social and economic disadvantage, including the requirement that the disadvantaged owner's personal net worth not exceed a certain ceiling and that the firm meet the Small Business Administration's size definitions for its industry, have been central to the courts' holdings that it is narrowly tailored.¹³⁹ "[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively

133. *Philadelphia II*, 6 F.3d 990, 1007-1008 (strict scrutiny requires data for each minority group; data was insufficient to include Hispanics, Asians or Native Americans).

134. *Webster*, 51 F.Supp.2d at 1380-1381.

135. *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001).

136. *Concrete Works IV*, 321 F.3d at 971 (Denver introduced evidence of bias against each group; that is sufficient); cf. *Midwest Fence II*, 840 F.3d at 945 ("Midwest has not argued that any of the groups in the table [in the expert report] were not in fact disadvantaged at all.").

137. *Rowe*, 615 F.3d at 233, 254 ("[T]he statute contemplates participation goals only for those groups shown to have suffered discrimination. As such, North Carolina's statute differs from measures that have failed narrow tailoring for over-inclusiveness.").

138. In the DBE program, preferences are limited to small businesses and owners whose personal net worth is not over the prescribed threshold. Additionally, a qualifying small business owned by a White male can become a program beneficiary based upon criteria set forth in Part 26 for an individual showing of social and economic disadvantage. See generally, *Northern Contracting I*; Part 26, Appendix E: *Individual Determinations of Social and Economic Disadvantage*.

[socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.”¹⁴⁰ In contrast, Chicago’s program was held to fail strict scrutiny because “[t]he ‘graduation’ revenue amount is very high, \$27,500,000, and very few have graduated. There is no net worth threshold. A third generation Japanese American from a wealthy family, and with a graduate degree from MIT, qualifies (and an Iraqi immigrant does not).”¹⁴¹

5. Evaluate the Burden on Third Parties

Failure to make “neutral” changes to contracting and procurement policies and procedures that disadvantage M/WBEs and other small businesses may result in a finding that the program unduly burdens non-M/WBEs.¹⁴² The trial court in the City of Chicago case noted that “there was little testimony about the effectiveness of race-neutral programs.”¹⁴³ However, “innocent” parties can be made to share some of the burden of the remedy for eradicating racial discrimination.¹⁴⁴

The Court reiterates that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors. The Tollway's method of goal setting is identical to that prescribed by the Federal Regulations, which this Court has already found to be supported by “strong policy reasons” [citation omitted].... Here, where the Tollway Defendants have provided persuasive evidence of discrimination in the Illinois road construction industry, the Court finds the Tollway Program's burden on non-DBE subcontractors to be permissible.¹⁴⁵

Burdens must be proven and cannot constitute mere speculation by a plaintiff.¹⁴⁶ “Implementation of the race-conscious contracting goals for which [the

139. *Sherbrooke*, 345 F.3d at 973; see also *Gutter*, 539 U.S. at 341; *Adarand VII*, 228 F.3d at 1183-1184 (personal net worth limit is element of narrow tailoring); cf. *Associated General Contractors of Connecticut v. City of New Haven*, 791 F.Supp. 941, 948 (D. Conn. 1992), *vacated on other grounds*, 41 F.3d 62 (2nd Cir. 1992) (definition of “disadvantage” was vague and unrelated to goal).

140. *Sherbrooke*, 345 F.3d. at 973.

141. *BAGC v. Chicago*, 298 F. Supp.2d at 739-740.

142. See *Engineering Contractors I*, 943 F.Supp. 1546, 1581-1582 (County chose not to change its procurement system).

143. *BAGC v. Chicago*, 298 F. Supp.2d at 742.

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

145. *Midwest Fence I*, 2015 WL 1396376 at *22.

federal authorizing legislation] provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although the result places a very real burden on non-DBE firms, this fact alone does not invalidate [the statute]. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities.”¹⁴⁷

Narrow tailoring does permit certified firms acting as prime contractors to count their self-performance towards meeting contract goals if the study finds discriminatory barriers to prime contract opportunities. There is no requirement that a program be limited only to the subcontracting portions of contracts. Part 26 provides this remedy for discrimination against DBEs seeking prime contractor work,¹⁴⁸ and it does not limit the application of the program to only subcontracts.¹⁴⁹ The trial court in upholding the Illinois DOT’s DBE program explicitly recognized that barriers to subcontracting opportunities also affect the ability of DBEs to compete for prime work on a fair basis.

This requirement that goals be applied to the value of the entire contract, not merely the subcontracted portion(s), is not altered by the fact that prime contracts are, by law, awarded to the lowest bidder. While it is true that prime contracts are awarded in a race- and gender-neutral manner, the Regulations nevertheless mandate application of goals based on the value of the entire contract. Strong policy reasons support this approach. Although laws mandating award of prime contracts to the lowest bidder remove concerns regarding direct discrimination at the level of prime contracts, the indirect effects of discrimination may linger. The ability of DBEs to compete successfully for prime contracts may be indirectly affected by discrimination in the subcontracting market, or in the bonding and financing markets. Such discrimination is particularly burdensome in the construction industry, a highly competitive industry with tight profit margins, considerable hazards, and strict bonding and insurance requirements.¹⁵⁰

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

147. *Western States Paving*, 407 F.3d at 995.

148. 49 C.F.R. §26.53(g) (“In determining whether a DBE bidder/offeror for a prime contract has met the contractor goal, count the work the DBE has committed to perform with its own forces as well as the work that it has committed to be performed by DBE subcontractors and suppliers.”).

149. 49 C.F.R. §26.45(a)(1).

150. *Northern Contracting II*, 2005 U.S. Dist. LEXIS 19868 at 74.

6. Examine the Duration and Review of the Program

Race-based programs must have durational limits. A race-based remedy must “not last longer than the discriminatory effects it is designed to eliminate.”¹⁵¹ The unlimited duration and lack of review were factors in the court’s holding that the earlier iteration of the City of Chicago’s M/WBE construction program was no longer narrowly tailored; Chicago’s program was based on 14-year-old information which, while it supported the program adopted in 1990, no longer was sufficient standing alone to justify the City’s efforts in 2004.^{152,153} How old is too old is not definitively answered¹⁵⁴; however, governments would be wise to analyze data at least once every five or six years.¹⁵⁵

In contrast, the federal DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.^{156,157} Similarly, “two facts [were] particularly compelling in establishing that [North Carolina’s M/WBE program] was narrowly tailored: the statute’s provisions (1) setting a specific expiration date and (2) requiring a new disparity study every five years.”¹⁵⁸

E. Cases from the Seventh Circuit Court of Appeals

Although discussed above as part of the elements of studies upon which successful race- and gender-conscious programs have been defended, it is instructive to review the three cases from the Seventh Circuit Court of Appeals, which governs Illinois, to illustrate almost all of these principles.

151. *Adarand III*, 515 U.S. at 238.

152. *BAGC v. Chicago*, 298 F.Supp.2d at 739.

153. The City’s program was revised to comply with the court’s decision in 2004 and subsequently reauthorized based on new data in 2009 and 2015.

154. See, e.g., *Associated General Contractors of Ohio, Inc. v. Drabik*, 50 F.Supp.2d 741, 747, 750 (S.D. Ohio 1999) (“*Drabik I*”) (“A program of race-based benefits cannot be supported by evidence of discrimination which is now over twenty years old.... The state conceded that it had no additional evidence of discrimination against minority contractors, and admitted that during the nearly two decades the Act has been in effect, it has made no effort to determine whether there is a continuing need for a race-based remedy.”); *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied sub nom. Brunet v. Tucker*, 510 U.S. 1164 (1994) (fourteen-year-old evidence of discrimination was “too remote to support a compelling governmental interest.”).

155. Chicago’s program was amended based on new evidence in 2009 and 2015.

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

157. The Federal DBE Program was reauthorized in the Infrastructure and Investment and Jobs Act, Public Law No: 117-58 earlier this year.

158. *Rowe*, 615 F.3d at 253.

1. ***Builders Association of Greater Chicago v. City of Chicago***

Plaintiff brought suit in 1996 to challenge the constitutionality of the City of Chicago's construction M/WBE Program. In defending the action, the City relied upon the types and quality of evidence discussed above in establishing its strong basis in evidence for its M/WBE program designed to remedy discrimination against minority- and woman-owned construction firms.¹⁵⁹ However, the program as implemented in 2003 when the case was tried, had not been reviewed since its inception in 1990. The court therefore found it was no longer sufficiently narrowly tailored to meet strict constitutional scrutiny. The court stayed the final order enjoining the implementation of the Program for six months, to permit the City to review the ruling and adopt a new program.¹⁶⁰

The opinion first reviews the historical proof of discrimination against minorities, particularly Blacks, in the Chicago construction industry. While not legally mandated, Chicago was a *de facto* segregated city and "City government was implicated in that history." After the election of Harold Washington as the first Black mayor in 1983, several reports focused on the exclusion of minorities and women from City procurement opportunities as well as pervasive employment discrimination by City departments. Mayor Washington imposed an executive order mandating that at least 25% of City contracts be awarded to minority-owned businesses and five percent to woman-owned businesses.

In response to *Crosen*, Chicago commissioned a Blue-Ribbon Panel in 1990 to recommend an effective program that would survive a constitutional challenge. Based upon the Panel's Report, and 18 days of hearings with over 40 witnesses and 170 exhibits, Chicago adopted a new program that retained the 25% MBE and five percent WBE goals; and provided that larger construction contracts could have higher goals.

The court held that the playing field for minorities and women in the Chicago area construction industry in 2003 was still not level. The City presented a great amount of statistical evidence. Despite the plaintiff's attacks about over-aggregation and disaggregation of data and which firms were included in the analyses, "a reasonably clear picture of the Chicago construction industry emerged... While the size of the disparities was disputed, it is evident that minority firms, even after adjustment for size, earn less and work less, and have less sales compared to other businesses". That there was perhaps over-

159. *BAGC v. Chicago*, 298 F. Supp.2d 725.

160. A similar suit was filed against Cook County's Program, which was declared unconstitutional in 2000. *Builders Association of Greater Chicago v. County of Cook*, 123 F.Supp.2d 1087 (N.D. Ill. 2000); *aff'd*, 256 F.3d 642 (7th Cir. 2001). In contrast to the City of Chicago, Cook County presented very little statistical evidence, and none directed towards establishing M/WBE availability, utilization, economy-wide evidence of disparities, or other proof beyond anecdotal testimony. It also provided no evidence related to narrow tailoring.

utilization of M/WBEs on City projects was not sufficient to abandon remedial efforts, as that result is “skewed by the program itself.”

Further, while it is somewhat unclear whether disparities for Asians and Hispanics result from discrimination or the language and cultural barriers common to immigrants, there were two areas “where societal explanations do not suffice”. The first is the market failure of prime contractors to solicit M/WBEs for non-goals work. Chicago’s evidence was consistent with that presented of the effects of the discontinuance or absence of race-conscious programs throughout the country and in Illinois. Not only did the plaintiff fail to present credible alternative explanations for this universal phenomenon but also this result “follows as a matter of economics... [P]rime contractors, without any discriminatory intent or bias, are still likely to seek out the subcontractors with whom they have had a long and successful relationship... [T]he vestiges of past discrimination linger on to skew the marketplace and adversely impact M/WBEs disproportionately as more recent entrants to the industry... [T]he City has a compelling interest in preventing its tax dollars from perpetuating a market so flawed by past discrimination that it restricts existing M/WBEs from unfettered competition in that market.”¹⁶¹

The judge also relied upon the City’s evidence of discrimination against minorities in the market for commercial loans. Even the plaintiff’s experts were forced to concede that, at least as to Blacks, credit availability appeared to be a problem. Plaintiff’s expert also identified discrimination against White females in one data set.

The City provided a witness who spoke of market failures resulting in the inability of minority and woman owners to meet the three imperatives of construction: management, money, and markets. Market failure, in particular, resulted from prime contractors’ failure to solicit minority and woman business owners for non-goals work. Fourteen minority and woman construction firm owners testified to the race- and gender-based discrimination and barriers they encountered to full and fair opportunities to compete for City prime and subcontracts in construction. The overriding theme was that these firms were not solicited or were rarely solicited for non-goals works by prime contractors that bid city jobs, even though the M/WBEs expressed interest in performing private work.

After finding that Chicago met the test that it present “strong evidence” of its compelling interest in taking remedial action, the court held that the program was no longer narrowly tailored to address these market distortions and barriers because:

161. *BAGC v. Chicago*, 298 F. Supp.2d at 738.

- There was no meaningful individualized review of M/WBEs' eligibility;
- There was no sunset date for the ordinance or any means to determine a date;
- The graduation threshold of \$27.5M was very high and few firms had graduated;
- There was no personal net worth limit;
- The percentages operated as quotas unrelated to the number of available firms;
- Waivers were rarely granted;
- No efforts were made to impact private sector utilization of M/WBEs; and
- Race-neutral measures had not been promoted, such as linked deposit programs, quick pay, contract downsizing, restricting prime contractors' self-performance, reducing bonds and insurance requirements, local bid preferences for subcontractors and technical assistance.

2. *Northern Contracting, Inc. v. Illinois Department of Transportation*

In this challenge to the constitutionality of the DBE program, the Seventh Circuit Court of Appeals affirmed the district court's trial verdict that the Illinois Department of Transportation's application of Part 26 was narrowly tailored.¹⁶² Like every other circuit that has considered the issue, the court held that IDOT had a compelling interest in remedying discrimination in the market area for federally funded highway contracts, and its DBE Plan was narrowly tailored to that interest and in conformance with the regulations.

To determine whether IDOT met its constitutional and regulatory burdens, the court reviewed the evidence of discrimination against minority and woman construction firms in the Illinois area. IDOT had commissioned an Availability Study to meet Part 26 requirements. The IDOT Study included a custom census of the availability of DBEs in IDOT's market area similar to that employed in this Report, weighted by the location of IDOT's contractors and the types of goods and services IDOT procures. The Study determined that DBEs comprised 22.77% of IDOT's available firms.¹⁶³ It next examined the possible impact of discrimination on the formation of firms. As required by "step 2" of Part 26,

162. *Northern Contracting III*, 473 F.3d 715. Ms. Holt authored IDOT's DBE goal submission and testified as IDOT's expert witnesses at the trial.

163. This baseline figure of DBE availability is the "Step 1" estimate USDOT grant recipients must make pursuant to 49 C.F.R. §26.45(c).

IDOT considered whether to adjust the step 1 base figure to account for the “continuing effects of past discrimination” (often called the “but for” discrimination factor).¹⁶⁴ The Availability Study analyzed Census Bureau data to determine whether and to what extent there are disparities between the rates at which DBEs form businesses relative to similarly situated non-minority men, and the relative earnings of those businesses. Controlling for numerous variables such as the owner’s age, education, and the like, the Study found that in a race- and gender-neutral market area the availability of DBEs would be approximately 20.8% higher, for an estimate of DBE availability “but for” discrimination of 27.51%.

In addition to the IDOT Study, the court also relied upon:

- An Availability Study conducted for Metra, the Chicago-area commuter rail agency;
- Expert reports relied upon in *BAGC v. Chicago*;
- Expert reports and anecdotal testimony presented to the Chicago City Council in support of the City’s revised 2004 M/WBE Program ordinance;
- Anecdotal evidence gathered at IDOT’s public hearings on the DBE program;
- Data on DBE involvement in construction projects in markets without DBE goals;¹⁶⁵ and
- IDOT’s “zero goals” experiment. This was designed to test the results of “race-neutral” contracting policies, that is, the utilization of DBEs on contracts without goals. IDOT issued some solicitations for which there was significant DBE availability to perform the scopes of work without a DBE goal. In contrast to contracts with goals, DBEs received approximately 1.5% of the total value of these “zero goals” contracts.

Based upon this record, the Court of Appeals agreed with the trial court’s judgment that the Program was narrowly tailored. IDOT’s plan was based upon sufficient proof of discrimination such that race-neutral measures alone would be inadequate to assure that DBEs operate on a “level playing field” for government contracts.

The stark disparity in DBE participation rates on goals and non-goals contracts, when combined with the statistical and

164. 49 C.F.R. §26.45(d)(3).

165. *Northern Contracting III*, 473 F.3d at 719 (“Also of note, IDOT examined the system utilized by the Illinois State Toll Highway Authority, which does not receive federal funding; though the Tollway has a DBE goal of 15%, this goal is completely voluntary -- the average DBE usage rate in 2002 and 2003 was 1.6%. On the basis of all of this data, IDOT adopted 22.77% as its Fiscal Year 2005 DBE goal.”).

anecdotal evidence of discrimination in the relevant marketplaces, indicates that IDOT's 2005 DBE goal represents a "plausible lower-bound estimate" of DBE participation in the absence of discrimination.... Plaintiff presented no persuasive evidence contravening the conclusions of IDOT's studies, or explaining the disparate usage of DBEs on goals and non-goals contracts.... IDOT's proffered evidence of discrimination against DBEs was not limited to alleged discrimination by prime contractors in the award of subcontracts. IDOT also presented evidence that discrimination in the bonding, insurance, and financing markets erected barriers to DBE formation and prosperity. Such discrimination inhibits the ability of DBEs to bid on prime contracts, thus allowing the discrimination to indirectly seep into the award of prime contracts, which are otherwise awarded on a race- and gender-neutral basis. This indirect discrimination is sufficient to establish a compelling governmental interest in a DBE program.... Having established the existence of such discrimination, a governmental entity has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.¹⁶⁶

3. *Midwest Fence, Corp. v. U.S. Department of Justice, Illinois Department of Transportation and the Illinois Tollway*

Most recently and saliently for the City of Chicago's local M/WBE construction program, the challenge to Part 26, IDOT's implementation of those regulations and its DBE program for state funded contracts, and to the Illinois Tollway's¹⁶⁷ separate DBE program was rejected.¹⁶⁸

Plaintiff Midwest Fence is a White male-owned fencing and guardrail specialty contractor owned and controlled by White males that typically bids on projects as a subcontractor. From 2006-2010, Midwest generated average gross sales of approximately \$18M per year. It alleged that the DBE programs failed to meet the requirement that they be based on strong evidence of discrimination, and that the remedies were neither narrowly tailored on their face nor as applied. In sum, plaintiff's argument was that the agencies lacked proof of discrimination, and it bore an undue burden under the programs as a specialty

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

167. The Tollway is authorized to construct, operate, regulate, and maintain Illinois' system of toll highways. The Tollway does not receive any federal funding.

168. *Midwest Fence I*, 84 F. Supp. 3d 705.

trade firm that directly competes with DBEs for prime contracting and subcontracting opportunities.

The district court granted summary judgment in favor of all defendants on all claims. It found that the USDOT DBE Program serves a compelling government interest in remedying a history of discrimination in highway construction contracting. The court observed that Midwest Fence's challenge to the Tollway's program¹⁶⁹ mirrored the challenge to the IDOT's program and held that the Tollway, like IDOT, established a strong basis in evidence for its remedial program, finding that both programs imposed minimal burdens on non-DBEs, employed numerous race-neutral measures, and ensured significant and ongoing flexibility and adaptability to local conditions.¹⁷⁰

The Seventh Circuit Court of Appeals affirmed the district court's grant of summary judgment. It reiterated its decision in *Northern Contracting III* that the USDOT DBE Program is facially constitutional. "We agree with the district court and with the Eighth, Ninth, and Tenth Circuits that the federal DBE program is narrowly tailored on its face, so it survives strict scrutiny."¹⁷¹

The bases upon which the Tollway's program were held to be constitutional are especially instructive for the City of Chicago. Before adopting the Program, the Tollway set aspirational goals on a number of small contracts. These attempts failed: in 2004, the Tollway did not award a single prime contract or subcontract to a DBE. Additionally, in adopting its program, the Tollway considered anecdotal evidence provided in *Northern Contracting* consisting of the testimony of several DBE owners regarding barriers they faced.¹⁷²

The Tollway's DBE program substantially mirrors that of Part 26 and was based on studies similar to those relied upon by IDOT that employed a methodology similar to this Report.

Further, its

method of goal setting is identical to that prescribed by the Federal Regulations, which this Court has already found to be supported by "strong policy reasons". [citation omitted] Although the Tollway is not beholden to the Federal Regulations, those policy reasons are no different here... [W]here the Tollway Defendants have provided persuasive

169. The Tollway adopted its own DBE program in 2005. Although the Tollway does not receive federal funds, it opted to mostly mirror the provisions of Part 26.

170. *Midwest Fence Corp. v. U.S. et al*, 840 F. 3d 932 (7th Cir. 2016) ("*Midwest Fence I*"), *cert. denied*, 2017 WL 497345 (June 26, 2017).

171. *Midwest Fence II*, 840 F3d at 945.

172. *Northern Contracting II*, 2005 WL 2230195 at *13-14.

evidence of discrimination in the Illinois road construction industry, the Court finds the Tollway Program's burden on non-DBE subcontractors to be permissible... The Tollway's race-neutral measures are consistent with those suggested under the Federal Regulations. *See*, 49 U.S.C. §26.51. The Court finds that the availability of these programs, which mirror IDOT's, demonstrates 'serious, good faith consideration of workable race-neutral alternatives.' [citations omitted] In terms of flexibility, the Tollway Program, like the Federal Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so... Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the Federal Regulations, the Court finds the Tollway Program sufficiently flexible. Midwest's final challenge to the Tollway Program is that its goal-setting process is "secretive and impossible to scrutinize." [reference omitted] However, the Tollway has plainly laid out the two goal-setting procedures it has employed since the program's enactment... The Tollway Defendants have provided a strong basis in evidence for their DBE Program. Midwest, by contrast, has not come forward with any concrete, affirmative evidence to shake this foundation.¹⁷³

173. *Midwest Fence I*, 2015 WL 1396376 at *22-23.

III. THE ILLINOIS TOLLWAY'S BUSINESS ENTERPRISE PROGRAM

A. Program History and Objectives

The Business Enterprise for Minorities, Women, and Persons with Disabilities Act ("Act") was adopted by the State of Illinois in 1989 to foster continuing economic development of minority-owned and woman-owned businesses. The Act applies to all state agencies and state universities, including the Illinois Tollway. The state has also adopted Program provisions under the Act to promote and encourage the development of businesses owned by persons with disabilities.

The Business Enterprise Program ("BEP") seeks to promote fair and equitable contracting opportunities for M/WBEs. This program applies to goods and services procured by the Illinois Tollway that are subject to the Illinois Procurement Code, under the Joint Committee on Administrative Rules.

The State's program was amended in 2016, 2018 and 2021. Our firm conducted a Disparity Study in 2015 that supported the inference that barriers based on race and gender continued to impede opportunities on state projects for each racial and ethnic minority group, for White women, for minorities as a whole and for M/WBEs as a whole.

B. Program Administration

The State of Illinois' Commission on Equity and Inclusion ("CEI") is the primary agency in charge of setting the program's overall policies, procedures and regulations to ensure that each state agency, including the Tollway, is utilizing minority, women and persons with disabilities in its procurement process.¹⁷⁴ CEI's BEP program authority includes, but is not limited to, the following:

- Ensuring that BEP Goals are established on contracts worth more than \$100,000.

174. Effective January 1, 2022, CEI became responsible for administration of the BEP Program and the Business Enterprise Council, when the jurisdiction over the functions of the program were transferred from Central Management Services ("CMS") to CEI. Prior to 2022, the program was administered by CMS.

- Conducting conflict of interest reviews on bids and offers from responsive bidders, offerors, vendors, or contractors with an annual value of more than \$50,000.
- Reviewing contracts for purposes of equity and inclusion, if deemed necessary.
- Reviewing proposals, bids, or contracts and issuing a recommendation to void a contract or reject a proposal or bid based on any violation of the Illinois Procurement Code governing equity and inclusion.

The Business Enterprise Program Council¹⁷⁵ assists with implementing, monitoring and enforcing the goals of the BEP program. The Council is responsible for the following:

- Reviewing compliance plans submitted by the Tollway.
- Reviewing BEP certification application appeals.
- Setting BEP Council Meeting Agendas.
- Maintaining a list of all businesses certified as businesses with 51% or greater ownership by minorities, females, or persons with disabilities.

The Tollway is required to file an annual compliance plan with the Council that states its goals for contracting with BEP firms and how it will reach those goals.

Within the Tollway, the BEP program's policies and procedures are executed by two departments.¹⁷⁶ The routine administration of the program is managed by the Contract Compliance Team in the Department of Procurement. The Department of Diversity and Strategic Development ("Diversity Department") assists with implementing initiatives that facilitate BEP participation in the program.

The Tollway's Board of Directors has established the Diversity & Inclusion Committee to focus on diversity issues and policies, create access to sustainable jobs and foster increased opportunities for firms of all sizes and types.

C. Program Eligibility

The Tollway is not a certifying agency. To participate as a BEP vendor, firms must be certified by CEI. Certifications are processed through CEI's Business Enterprise Program Certification Division and must meet the following requirements:

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175. The Business Enterprise Program Council was established by 30 ILCS 575, Business Enterprise for Minorities, Women, and Persons with Disabilities Act.
176. This structure has been in place since the end of 2019, when the program's contract compliance function was moved under the responsibilities of the Department of Procurement.

- At least 51% of the applicant's ownership must be owned by a minority, woman, or person with a disability.
- At least 51% of the applicant's control must be by one or more minority groups, women, or persons with a disability.
- The owner must be a citizen of the United States or a legal permanent resident alien.
- The applicant must have annual gross sales of less than \$150M based on federal income tax returns of the business.

The Program has four certification processes:

1. The full application process: Vendors must submit a notarized affidavit signed by an officer of the firm, along with the most recent company financial statements, a U.S. Corporate or LLC partnership income tax return, U.S. individual federal income tax returns and other documentation validating ownership information and gross sales. The full application process generally takes 60 days after the date the completed application and supporting documentation are submitted. The full BEP certification is valid for seven years. To maintain certification, vendors must submit an annual No Change Affidavit.
2. The BE Enrolled Business Enterprise Certification Program ("BE BEP"): This offers automatic certification to businesses certified with the City of Chicago and/or Cook County. The BE BEP certification is valid for the duration and for the commodity codes of the certification held with the City of Chicago and/or Cook County.
3. The FastTrack Certification: This allows vendors who are certified by the Chicago Minority Supplier Development, Mid-States Minority Supplier Development Council or the Women's Business Development Center to apply by submitting proof of certification from the partner and a notarized BEP application affidavit. Turnaround time to process these applications is seven business days. FastTrack Certification is valid for one year.
4. The Transportation Recognition Certification: this is a scaled-down version of the Full Certification process, with condensed documentation requirements. Vendors are required to complete an online application as well as provide a notarized BEP application, a current business license and current tax return and proof of certification from either the Illinois Department of Transportation, the Chicago Transit Authority, METRA or Pace Bus. The Recognition Certification application processing time is approximately 15 to 30 business days. The Transportation Recognition Certification is valid for one year.

D. Race- and Gender-Neutral Measures

1. Small Business Set-Aside Program

The Small Business Set-Aside Program provides for bidding only by small firms on designated contracts without consideration of the firm's minority or gender status. To qualify, retail or service businesses must have revenues of less than \$8M, wholesale companies must have less than \$13M and manufacturing companies must have fewer than 250 employees. The program includes 66 small business set-aside categories with over 600 product and service categories at any dollar amount.

- Procurements less than small purchase threshold (currently \$100,000) – most products or services qualify.
- Any other procurement the Chief Procurement Office deems appropriate to set aside.

Firms are listed in the small business database on the Illinois Procurement Gateway.

2. Technical Assistance Programs

The Department of Commerce and Economic Opportunity has established Procurement Technical Assistance Centers throughout Illinois to provide assistance and training to small businesses who are interested in contracting with the state. Small Business Development Centers are also available to help entrepreneurs start and sustain small businesses.

3. Information Access and Dissemination

The Tollway's Buying Plan for Goods and Services provides potential vendors a list of upcoming services, equipment and materials the Tollway expects to purchase. The detailed list includes the initial term of each contract, the tentative timeframe for when the solicitation will be issued, and an estimated contract value range to provide prospective vendors with information they need to prepare to bid on Tollway contracts. It describes what equipment and materials will be purchased, listing items such as electrical generators, uniforms, winter roadway abrasives and vehicle paint. The buying plan also details services that will be provided by vendors, including technical assistance for small businesses and legal services.

E. BEP Policies and Procedures

1. Business Enterprise Program Goals

As of January 2022, the state's annual, aggregated aspirational goal is to spend at least 30% of its total non-construction and non-professional services dollars with firms certified through BEP. This overall goal is allocated as follows: MBEs 16%; WBEs 10%; and businesses owned by persons with disabilities 4%.

2. Contract Goals

Contract goals are based on the availability of BEP certified vendors and the scope of work for the contract. The overall contract goal is the cumulative amount of the availability of certified BEP firms in each percentage weighted scope of work. The Tollway's Compliance Department performs the initial goal setting using the BEP Project Goal Setting Form. The final goal is then determined by the CEI BEP Compliance Officer.

Goals are not set on procurements that do not offer subcontracting opportunities or where there is insufficient BEP availability to ensure adequate competition. Exemptions of entire classes of contracts and individual contract exemptions must be made in writing by the Tollway to the BEP Council. Requests must include documented justification for the exemption.

3. Counting BEP Participation Towards Contract Goals

Only the value of payments made for services performed and/or actual supplies/goods/equipment provided by BEP certified vendors is counted towards the contract goal. This includes fees or commissions charged by second-tier BEP firms for providing a *bona fide* service and 100% of expenditures for materials and supplies required under the contract and obtained from a BEP certified vendor manufacturer, regular dealer, or supplier, as long as it is customary. For joint ventures, only the portion of the total dollar value of the specific work performed by the BEP certified joint venture vendor on the contract is counted.

To be credited towards a contract goal, the BEP firm must perform a Commercially Useful Function ("CUF"), as defined in 49 C.F.R. §26.55(c). A CUF is performed when a firm is responsible for the execution of a distinct element of the work of the contract and carries out its responsibilities by actually performing, managing, and supervising the work involved, or by fulfilling its responsibilities in a joint venture.

4. Sheltered Market

The Sheltered Market Program is administered by CEI. Under this program, certain Tollway contracts may be selected and specifically set aside for bidding only by BEP firms through competitive solicitations.

F. Pre-Award Bidding Procedures

1. Submission of BEP Utilization Plans

All Tollway vendors must be registered with the State's BidBuy procurement system.¹⁷⁷ For a contract with BEP goals, the vendor must submit, at bid time, a completed Utilization Plan, indicating how it will meet the goal or documenting its Good Faith Efforts ("GFE") to do so. The Utilization Plan must include a completed Participation Agreement ("Letter of Intent") documenting either the vendor's commitment to utilizing BEP firms or demonstrating GFE when requesting a goal waiver or reduction. The Commitment Statement must be signed by the bidder and each BEP confirming availability and the intent to perform a CUF. Failure to include a completed Utilization Plan will render the bid or offer nonresponsive.

A BEP bidder meeting the goal through self-performance is also required to submit a Utilization Plan. When the bidder is a joint venture, each joint venture partner must provide an attestation to the Utilization Plan.

Approved Utilization Plans and Participation Agreements become part of the contract upon award.

2. Good Faith Efforts to Meet Contract Goals

A bidder unable to meet the contract goal must demonstrate it made GFE to do so. A Good Faith Efforts Contact Log and Checklist must be submitted with the bid and the bidder must provide supporting documentation outlining its GFE to achieve the goal.

The BEP Council or its delegate is responsible for considering bids that do not meet the contract goal. The Council considers numerous factors set by CEI policy that include the quality, quantity, and intensity of the vendor's efforts, as well as the performance of other bidders in meeting the contract goal on contracts of a similar nature.

177. <https://www.bidbuy.illinois.gov/bsa/>

3. Cure Period

A “cure” period of up to 10 days from the date of notification of contract award is allowed for an otherwise successful bidder to demonstrate its GFE to meet the contract goal(s). The “deficiency” in the bid or proposal may only be cured by contracting with additional BEP subcontractors who are certified at the time of bid submission. Submission of a blank utilization plan renders a bid or offer non-responsive and is not curable. The Tollway’s Procurement Officer must notify CEI of all bids or offers that fail to include a utilization plan or that include a utilization plan with deficiencies.

It is important to note that vendors are given only one chance to cure their deficiencies.

Only a deficient Utilization Plan submitted at the time of bid may be cured. Once a determination has been made by CEI, the identified deficiencies are then sent to Tollway Compliance to draft a letter listing the deficiencies. The vendor will have 10 days to cure the deficiencies and return the revised Utilization Plan. Compliance forwards the revised Utilization Plan to CEI for final review and determination of responsiveness.

G. Contract Performance Compliance

The Tollway monitors vendor compliance with its Utilization Plan and the terms of the contract during performance. The Tollway uses the B2Gnow® Diversity Contract Compliance Reporting System software to track real time payments to prime vendors and track and analyze prime payments to subcontractors. The software also monitors compliance with certification requirements and tracks certification applications from submission to completion.

Changes to commitments in the Utilization Plan, including BEP substitutions after contract award, must be approved in writing by the Tollway. All requests for changes must also be reported to the BEP Council or its delegate.

The Tollway’s Contract Compliance Team is responsible for approving or denying any requests, except for GFEs, according to CEI policy. The request must detail the reasons for the change(s) and be submitted using the vendor’s letterhead. Any unauthorized changes are considered a breach of contract and can result in a declaration of default, termination of the contract, and/or imposition of remedies and sanctions provided for in the contract or by law.

Where the vendor has established the basis for the substitution to the Tollway’s satisfaction, it must follow the GFE procedures to meet the contract goal by substituting another BEP subcontractor. If the contract goal cannot be reached and GFE have been made, the vendor may substitute a non-BEP firm.

The prime vendor must also obtain the Tollway's approval to hire a vendor for any scope of work that was not previously disclosed. The vendor must make GFE to ensure that BEP firms have a fair opportunity to bid on the new scope of work. A new subcontract for the substituted BEP firm and an amended Utilization Plan must be executed and submitted for approved substitutions, addition of a subcontractor or any other changes.

H. Sanctions for Non-Compliance

Sanctions may be imposed on the prime vendor or BEP subcontractor for not complying with the Utilization Plan. A vendor is considered out of compliance if it fails to provide requested information or provides false or misleading information or statements concerning compliance, the certification status of BEP firms, GFE or any other material fact.

Upon determination of non-compliance, a report is filed with the Secretary of CEI. If the Secretary determines that the vendor did not fulfill the contract goals or did not make sufficient GFE to do so, the vendor may be subject to remedies or sanctions for breach of contract, including withholding payment, termination of the contract, disqualification of the contractor from doing business with the state for a period of not more than one year, cancellation of any contract entered into by the vendor or any other remedies provided for in the contract, at law or in equity.

I. Outreach and Training

1. Mentor-Protégé Program

CEI offers a mentor-protégé program to assist BEP firms to develop capacity and to enhance their core capabilities through partnering with larger, more experienced firms. The mentor must utilize the protégé for at least ten percent of the total contract amount. The protégé must be certified and perform a CUF under the contract. Interested mentors and proteges fill out a brief questionnaire on the CEI website expressing interest in participating in the program. CEI staff review the request and contact the interested firm.

2. Online Training

The Tollway conducts virtual workshops and training sessions specifically designed to assist vendors with BEP program requirements. These webinars

are available on the Tollway's website¹⁷⁸ to view at any time. Workshops offered include:

- Goods and Services Special Provisions Compliance
- Good Faith Efforts Training
- Eight Approved Reasons for a Prime to Substitute BEP Vendors Working in Goods and Services Contracts
- BEP Policies & Procedures Procurement Department
- How to Navigate the BidBuy procurement system
- How to do business with the Tollway

3. CEI Outreach and Support

The Tollway's program is also supported by CEI's broader effort to promote minority, woman and persons with disabilities contracting on state procurements. CEI partners with local assist agencies that conduct virtual and in-person events to encourage participation in Tollway goods and services contracts and to provide technical support to BEP firms.

J. Staff Training

The Diversity Department and Contract Compliance staff regularly attend the American Contract Compliance Association's annual National Training Institute, where they receive extensive training on national best practices for D/M/WBE programs. Staff also attend the annual B2Gnow® User Training Conference and participate in B2Gnow® online training.

K. Experiences with the Tollway's Business Enterprise Program

To explore the impacts of race- and gender-neutral contracting policies and procedures and the implementation of the Tollway's BEP program, we interviewed 62 individuals about their experiences and solicited their suggestions for changes. We also collected information and written comments from 106 BEP and non-BEP businesses about their experiences with the Tollway's program through an electronic survey. In addition, we also received written comments throughout the study period.

178. <https://www.illinoistollway.com/diversitywebinarseries>

The following are summaries of the topics discussed during the group interviews. Quotations are indented and have been edited for readability. They are representative of the views expressed during seven sessions by participants.

1. Business Owner and Stakeholder Interviews

a. Access to information and decisionmakers

Several firm owners reported it was sometimes difficult to access information about upcoming Tollway opportunities to participate on Tollway goods and services contracts.

I have been involved with the BEP program but I've never got a chance to bid on anything or connect with anyone to see, even to just get in the game as far as dealing with the Illinois tollway. I was at a meeting a few months ago and I can't remember who I spoke with, but they reached out once. I responded, did not hear anything else from them. I just need a point person or something that can guide me through the program to help me get in the game.

My biggest challenge is really basic, is finding out about opportunities. I feel like I get emails quite a bit about construction projects and things like that, but it's not relevant to my services.

BEP firms that had been listed on Utilization Plans requested an avenue to get information on the status of the project.

Sometimes you get these contracts and you don't get any orders.... There doesn't seem to be a resource to figure out why.... [I don't know] who you would call at the tollway to say, "We've had this contract for a year and a half and we've never gotten any orders," or "Is there some place you can look up and see whether they're actually giving orders?" So, more visibility.

There's really no enforcement place for us to go.

b. Obtaining work with the Tollway

Contract goals were seen as critical to many firms' ability to obtain work from the Tollway and other governments.

[Prime vendors say] you're only here because I have to have you here.

The BEP program has helped some firms to participate on state contracts.

The experience has been mostly positive. I think there's a little bit, if you're new to the process, it can get a little bit confusing with BEP, and IPG, and all these acronyms that kind of have overlap. And so trying to navigate those waters sometimes can be a little bit frustrating. But you just have to stay with it and go through it.

Others had not been successful in using the program.

[The large prime vendors] go to the same players every time and that's a huge barrier to entry. They're going to go with who the typical people were that have performed like work in the past, which in my opinion is a bit unfair because the whole point is to try to evenly distribute the work and allow everyone to have a fair shake.

My feeling towards the BEP program, as with management consulting, is it's really not helpful because most of the firms that I would probably be matched up with like a [name], they have no ability to carve out work for us on certain contracts.... We appreciate the small business set aside a lot more than the BEP program.

c. Supportive services to BEPs and small firms

Many M/WBEs supported various supportive services programs.

I'm very interested in the joint ventures, the mentor protege, and those programs that will allow me to get a foot in the door.

How then do I venture forward to some of the bigger opportunities?

Mentor-protégé programs were reported to be especially valuable.

We have always done sub work for the Tollway, but just recently received a prime [contract] through a joint venture. So, we decided to try it that way and that process really worked for us.... We have a lot of teaming partners that we work with throughout the area, especially at IDOT. And so, we took a really good teaming partner that we have

had lots of experience with working for IDOT and then proposed that to the Tollway.

We had done First Mentor Protege, which was an amazing opportunity for someone who has been a sub on a few projects to really rise to become a prime and with having some support system like on call support from a larger consultant who was a sub consultant. So, it was kind of a reverse instead of the protege being under a big firm, it was the actual smaller firm having a larger firm supporting them. So, it was a wonderful concept and we were fortunate enough to become prime that way.

Firms that had not had the opportunity to participate were eager to do so.

Mentorship. I have never been offered one in 36 years. No one has ever said, "Hey, we have a mentorship program. Here's what we think we can do for you to grow you and to grow your business." And that would be wonderful.

d. Meeting BEP Contract Goals

Most non-certified firms that submit as prime vendors reported that they meet the contract goals but it was often a challenge to do so on goods and services contracts because of limited subcontractable scopes.

We've always met the goals, but it's getting tougher.

The Tollway should focus on creating a prime, independent relationship with these firms as opposed to this prime contract subcontract model.

2. Electronic Survey Written Comments

Written comments from the electronic survey have been categorized and are presented below. Comments are indented and have been edited for readability.

a. Impact of the BEP Program

Many minority and woman respondents supported the program. It was viewed as essential for obtaining Tollway contracts.

Amazing help in receiving a contract.

BEP program helps identify contracting opportunities.

[The program has helped my business by providing] good contracts.

It has increased our recent and upcoming work for the Tollway.

We do not believe that we would be awarded work if there were not "goals".

The BEP program has enabled me to work with vendors/businesses that most likely wouldn't have given me the time of day. The certification has provided a foot in the door, which is all I needed to show my company's ability and worth. This has made a very positive impact on the overall health and viability of my company.

We have had long-term contracts with as a sub-contractor to the Prime since 2014.

It has caused our business to grow exponentially.

Ability to reach buyers.

Put us at a table with other experienced vendors. We were able to get tips and not feel so intimidated.

I have gotten customers that I never contacted prior, they found me because my company is listed as a [certified firm].

I get noticed by big companies with BEP requirements.

I was eligible as a BEP subcontractor to assist the Prime contractor achieve the project's goals.

One BEP firm complimented the Tollway's administration of the program.

They are doing a good job.

For some, the program's benefits were inconsistent.

I would like to see real opportunity. I keep hearing the need for minority vendors in the form of goods and services but I see very little opportunity.

The only time there was a small business set aside that I was interested in, the budget was out of whack, there were too many requirements, and they got only one bidder. Ended up rebidding to majority contractors.

Some years yes [the program has been beneficial] and other years no.

We have had jobs in the past. Many of them are now over.

Tollway has consistently for years, created barriers and/or not effectively addressed barriers for African Americans in prime or subcontracting opportunities.

We are thankful for all that you and others do on our behalf, however until you stop looking at contract value that does not tell the true story and start looking at profits, you know that which we need to grow, we will continue to these same issues.

The Tollway business brings foundational revenue which is beneficial but is not in our main core area of business.

If all the government agencies would write in their contract with the so called CMAR's that we, the W/MBEs are to be paid a minimum 10% overhead and 15% profit. It's not enough for us to be on these projects, we have to make a profit, that's the only way to grow, get a decent line of credit and bonding.

b. BEP Certification Process and Standards

Some firms found the certification process to be burdensome.

The certification process is not streamlined.

Make certification easier.

Several BEP firms requested reciprocity with other certifying entities to make the process less cumbersome.

Too cumbersome, why is there not reciprocity with the DBE program? If certified as a DBE, that should automatically certify a firm for the BEP program.

Reciprocity with the IL UCP.

I'm not included in the Tollway's BEP; I assumed my DBE status would help in any work considerations with the Tollway.

One respondent felt that White woman-owned firms were "fronts" for White men.

Non-MBE/WBEs posing as WBEs [is an issue I have encountered].

c. Access to Tollway Goods and Services Contracts

Some respondents suggested “unbundling” projects into smaller contracts to open up more prime opportunities and allow smaller firms to take on more work.

Contract sizes are too large.

More opportunity as a smaller company to work on projects.

As a small business with 2 employees, there’s not many programs to support us. The scope of the contracts are out of our reach.

Higher BEP goals were suggested by several respondents.

Government making more note of the professional services that it can award M/WBE business. It needs to move forward and establish bold mandates to utilize M/WBE entities and award a higher percentage, minimum of 35% to truly help these businesses scale up.

I’d like to see a higher minority percentage across contracts such as a minimum of 35% for either MBE or WBE across all state contracts awarded.

Setaside contracts for BEPs and small firms was another recommendation.

There should be more set-asides for BEP vendors.

We are largely faceless. A DBE set aside which is meaningful like 20% and enforced.

I think the small business set asides have helped more than the BEP.

Offer actual smaller non-competitive opportunities to build past performance and develop supplier rating. As the rating gets higher offer higher contracts.

Several M/WBEs felt the same firms are repeatedly used.

As a WBE, DBE the big Engineering and Planning firms have their favorite go-to firms and it is hard to break in as a small business.

I believe race and gender can cause barriers for my firm in the industry. Being a newer firm, many non-certified firms have been using the same [certified] firms repeatedly. Those [certified] firms are established and have been given the chance to prove themselves over the years. As such, they will repeatedly use them since they don't want to "fix something that isn't broken." This leaves little opportunity for a newer firm to succeed because they are never given the opportunity to prove themselves when the same [certified] firms are being used. Several of those [certified] firms are close to graduating but will stay under the limits to remain [certified].

Several M/WBEs believed that the number of contracts procured under the program has decreased over time.

The practice of including M/WBEs is not taken into consideration when procuring. Not sure if creating a new unit has helped and removing BEP department in CMS. Time will tell, but with new unit at [the] State, I've seen % removed of contracts.

I've noticed the Tollway has decreased the amount of procurements that require BEP participation compared to 10 years ago.

d. Tollway BEP Program Compliance

Many M/WBEs requested more oversight to ensure prime contractors comply with goal requirements.

In our experience, the Prime can report, year after year, that they are not meeting goals with no consequences.

Enforcement of the rules and regulations.

More stringent adherence to diversity goals on projects.

Compliance enforcement when primes fail to pay subs in a timely manner and address barriers in the shelter[ed] market program for blacks.

Create consequences for non-compliance.

Improve the systems and procedures around gov't contracting for minority firms. Track that firms awarded gov't contracts are following through on their commitments.

Monitor the compliance of the BEP goals. I have participated as a subcontractor on a project and was not utilized as much as the contractor stated even though there were services, I could have performed to achieve the BEP goal.

Stop corruption. Companies are cheating the system.

The BEP program is a good start. There needs to be better contract oversight so that BEP is better enforced with the primes.

[The program] is toothless and [the Tollway] will not enforce.

As a subcontractor the Prime has not held to their end of the contractual agreement, when protests were issued through the proper channels within IL government, the Prime retaliated against us.

Primes sub-contracting us but never actually using our company, just using us to get the bid is a HUGE problem.

The DOT and other Public Agencies request all sorts of documentation from [certified firms] but don't support us when it comes to working for the Prime Contractors. This should change. Primes bring us on, then change the scope of work and then tell us that we aren't needed anymore and the State Agencies don't crack down on these firms.

e. Contracting policies and requirements

One BEP respondent suggested adjusting liability insurance requirements for professional services firms to appropriately reflect their business' risk.

I am a professional services firm and do not do construction work so I don't have the same workers comp liability risk. Yet I'm held to the same insurance standards as a construction firm. My biggest risk is falling off my chair or a paper cut.

Another BEP firm questioned whether small BEP firms should be required to complete the Commitment to Diversity Form when submitting as a prime.

The fact that BEP firms are required to fill out the Commitment to Diversity Form to bid as a prime or on a sheltered market opportunity is very difficult. The

Commitment to Diversity Form is written for large firms/ primes to show how they are assisting BEP firms, and since most BEP firms are very small, it is almost pointless for them to be required to fill out that form.

Several M/WBEs suggested more technical services would help them to be more successful in submitting bids and RFP responses.

Continue with webinars regarding financial programs & navigation of Tollway/IDOT websites.

Assistance programs helped me obtain certifications.

There's no direct training on how to win these contracts.

Clearer, more straightforward tutorials on how to win contracts. Usually, smaller companies like us work during the day where these trainings are done and even if we join, it's not that easy to absorb all that information. If a tutorial and help center can be developed, it would really help.

Better explanation of how to work with state's RFP system.

The BidBuy system used by the Tollway is difficult to use and it comes with limited support. Combining difficult processes and systems adds barriers to small businesses wanting to work with government.

Learning how to bid on contracts.

f. Access to Information and Networks

Some M/WBEs reported receiving late notifications or no notifications about upcoming contracting opportunities.

Many times, it seems the information comes out very late with not enough time to respond.

Often been left off distribution lists for [American Council of Engineering Companies]/IDOT events as well as Tollway networking events. Working on making sure we are on all lists but I don't have confidence that we are.

Improved communication would be helpful.

Improving the communication platform for potential vendors and making it more intuitive to interact with would be helpful.

My business would be able to grow with more opportunities for contracts and better planning. For example, the Tollway provides a lookahead but does not follow the lookahead at all. This makes it difficult when planning for types of projects and scheduling of projects. If the Tollway could provide a set date for bulletins to be released and selection dates, that would help. Although likely not possible, if specific months when work begins can be stated in the bulletin items, as well as sticking to that schedule, that would also help small firms with staffing and planning.

Many M/WBEs requested more networking opportunities with prime contractors.

More connection events with Prime Contractors, more connection with key buyers at the Tollway.

Network with primes.

Help with networking and holding the prime accountable for following-up with us small businesses. A lot of the events for networking end-up being a waste of time. Mentoring on how to respond to specific RFP.

Set up more match making events to ensure opportunities are in the room.

Perhaps other opportunities to connect with primes and subs in a structured networking event or similar setting to know how I can best position myself to get new work in the future.

I would like to get more involved and get some invites to what is going on in the industry.

We are a small firm and it is difficult to find some networking opportunities for firms such as ours.

One suggestion was to hold more virtual events.

Dates and times are bad when they are scheduled. Need more virtual.

Another was more targeted outreach to firms based on their industry.

I am a sign language interpreting service and I get requests for services that are totally unrelated to my field.

More outreach; perhaps targeted to specific firms doing specific work.

Better way to see what projects are out there for marketing, advertising and communications professionals. It is all lumped under communication equipment and services.

g. Experiences with supportive services initiatives

Those who had participated in support services generally found them helpful.

I have participated in the Tollway DBE support services programs. The Tollway provides technical assistance to help with any business and engineering information needs.

Overall, [I found participation in supportive services] pretty good and insightful.

Positive experience [participating in supportive services].

The accounting consultants have been great so far.

They helped me set up my website; it was very helpful.

Some requested more information and assistance.

Marketing assistance [would help my business].

Mainly with information about certain programs.

Some administrative support [would be helpful].

Just to understand options and opportunities as a BEP provider.

Assistance in obtaining working capital was a frequent request.

Access to capital, being awarded a bid.

Better access to cash and capital. I need to upgrade my facility and need a higher skilled administrative team. I need the cash to pay an appropriate wage to employees with greater skill set as many do not wish to relocate without coverage of the expense and potential candidates fitting into this role are at higher compensation levels.

Capital will help my business grow tremendously.

Help with capital.

h. Experiences with mentor-protégé programs and teaming arrangements

Most M/WBEs that had participated in mentor-protégé programs and teaming arrangements found them to be helpful.

Have been part of successful groups pairing with larger firms.

We have had an excellent experience working with like-minded businesses who have mentored us and/or entered into joint ventures with our organization. The level of collaboration and cross-functional support has positively impacted the growth of our business.

We have partnered with other BEP firms to make our bid stronger.

One firm preferred teaming arrangements rather than joint ventures or mentor protégé relationships.

We prefer Teaming Arrangements.

Several did not find their participation in mentor-protégé or joint venture relationships fruitful.

I have been a mentee of major organizations but that was more educational and did not provide direct contracting opportunities.

Signed up for IDOT Mentor protege program, but wasn't successful in obtaining a mentor. Joint ventured with firms seeking Government contracts, but wasn't successful in winning bids.

L. Conclusion

Overall, the BEP program assisted certified firms to obtain work as prime vendors and subcontractors. Although challenging, prime contractors were generally able to comply with program requirements. The program was strongly supported by participants and was viewed as important to the growth and development of M/WBEs. However, there are some issues to address, including overcoming difficulties in accessing accurate information and decision-makers; increasing program oversight to ensure prime contractors comply with program requirements; offering more technical support to assist with the competitive bidding process; creating more targeted outreach and facilitating relationships between sub and prime contractors; and increasing access capital.

IV. CONTRACT DATA ANALYSIS FOR THE ILLINOIS TOLLWAY'S BUSINESS ENTERPRISE PROGRAM

A. Contract Data Overview

We analyzed data from the Illinois Tollway's ("Tollway") contracts for non-construction related goods and services for fiscal years 2015 through 2019. To conduct the analysis, we constructed all the fields necessary where they were missing in the Tollway's contract records (*e.g.*, industry type; zip codes; six-digit North American Industry Classification System ("NAICS") codes of prime contractors and subcontractors; and Business Enterprise Program ("BEP") firm¹⁷⁹ information, including payments, race, gender; etc.). Tables 4-1 and 4-2 provide data on the resulting Final Contract Data File ("FCDF") for the Tollway's contracts.

Table 4-1: Final Contract Data File
Number of Contracts

Contract Type	Total Contracts	Share of Total Contracts
Prime Contracts	214	75.1%
Subcontractor	71	24.9%
TOTAL	285	100.0%

Source: CHA analysis of Illinois Tollway data

179. The State of Illinois has enacted the Business Enterprise Act to ensure non-discrimination in state contracting, 30 ILCS 575, Business Enterprise for Minorities, Women, and Persons with Disabilities Act. The Act applies to the Tollway's goods and services contracts outside the construction industry. We use the term BEP firm interchangeably with minority- and woman-owned business enterprises ("M/WBEs").

Table 4-2: Final Contract Data File
Net Dollar Value of Contracts

Business Type	Total Contract Dollars	Share of Total Contract Dollars
Prime Contracts	\$454,768,507	91.0%
Subcontractor	\$44,854,096	9.0%
TOTAL	\$499,622,603	100.0%

Source: CHA analysis of Illinois Tollway data

The following sections present our analysis, which consisted of five steps:

1. The determination of the geographic and product markets for the analysis.
2. The estimation of the utilization of BEP firms by the Tollway.
3. The calculation of the unweighted and weighted availability of BEP firms in the Tollway's marketplace.
4. The examination of concentration of contract dollars among BEP and non-BEP firms.
5. The presentation of the BEP firm disparity analysis.

B. The Geographic and Product Market for Illinois Tollway Contracts

As discussed in Chapter II, the federal courts¹⁸⁰ require that a local government narrowly tailor its race- and gender-conscious program elements to its geographic market area. This element of the analysis must be empirically established.¹⁸¹ The accepted approach is to analyze those detailed industries, as defined by six-digit NAICS codes,¹⁸² that make up at least 75% of the prime contract and subcontract payments for the study period.¹⁸³ The determination of the Tollway's geographic and product market required three steps:

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180. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (Richmond was specifically faulted for including minority contractors from across the country in its program based on the national evidence that supported the USDOT DBE program); see 49 C.F.R. §26.45(c); <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise> ("D. Explain How You Determined Your Local Market Area.... your local market area is the area in which the substantial majority of the contractors and subcontractors with which you do business are located and the area in which you spend the substantial majority of your contracting dollars.").
 181. *Concrete Works of Colorado, Inc. v. the Tollway and the Tollway of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (to confine data to strict geographic boundaries would ignore "economic reality").
 182. www.census.gov/eos/www/naics.
 183. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 ("*National Disparity Study Guidelines*").

1. Develop the FCDF to determine the product market. Table 4-3 presents these results.
2. Identify the geographic market.
3. Determine the product market constrained by the geographic parameters. Table 4-4 presents these results.

1. **Final Contract Data File for Illinois Tollway Highway Authority Contracts**

The FCDF, which establishes the Tollway's product market, consisted of 63 NAICS codes, with a total contract dollar value of \$499,622,603. Table 4-3 presents each NAICS code with its share of the total contract dollar value. The NAICS codes are presented in the order of the code with the largest share to the code with the smallest share.

Table 4-3: Industry Percentage Distribution of Illinois Tollway Contracts by Dollars

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	28.8%	28.8%
541511	Custom Computer Programming Services	22.2%	50.9%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	6.7%	57.6%
518210	Data Processing, Hosting, and Related Services	4.7%	62.3%
541512	Computer Systems Design Services	4.6%	67.0%
238210	Electrical Contractors and Other Wiring Installation Contractors	4.0%	70.9%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	3.8%	74.8%
221122	Electric Power Distribution	3.6%	78.3%
488490	Other Support Activities for Road Transportation	3.0%	81.3%
561320	Temporary Help Services	2.5%	83.9%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	2.1%	85.9%
541612	Human Resources Consulting Services	1.9%	87.8%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
424690	Other Chemical and Allied Products Merchant Wholesalers	1.7%	89.5%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.4%	90.9%
541611	Administrative Management and General Management Consulting Services	1.3%	92.2%
238290	Other Building Equipment Contractors	1.2%	93.4%
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers	0.8%	94.2%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	0.6%	94.8%
561612	Security Guards and Patrol Services	0.6%	95.4%
423840	Industrial Supplies Merchant Wholesalers	0.6%	95.9%
424950	Paint, Varnish, and Supplies Merchant Wholesalers	0.5%	96.5%
523150	Investment Banking and Securities Intermediation	0.5%	96.9%
424320	Men's and Boys' Clothing and Furnishings Merchant Wholesalers	0.3%	97.2%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	0.3%	97.5%
541110	Offices of Lawyers	0.3%	97.8%
811111	General Automotive Repair	0.3%	98.0%
541330	Engineering Services	0.2%	98.2%
323111	Commercial Printing (except Screen and Books)	0.2%	98.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.1%	98.5%
237310	Highway, Street, and Bridge Construction	0.1%	98.7%
333318	Other Commercial and Service Industry Machinery Manufacturing	0.1%	98.8%
238990	All Other Specialty Trade Contractors	0.1%	98.9%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.1%	99.0%
424120	Stationery and Office Supplies Merchant Wholesalers	0.1%	99.1%
541211	Offices of Certified Public Accountants	0.1%	99.2%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
236220	Commercial and Institutional Building Construction	0.1%	99.3%
423830	Industrial Machinery and Equipment Merchant Wholesalers	0.1%	99.4%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.1%	99.4%
541990	All Other Professional, Scientific, and Technical Services	0.1%	99.5%
562119	Other Waste Collection	0.05%	99.5%
424130	Industrial and Personal Service Paper Merchant Wholesalers	0.05%	99.6%
423860	Transportation Equipment and Supplies (except Motor Vehicle) Merchant Wholesalers	0.04%	99.6%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.04%	99.7%
624190	Other Individual and Family Services	0.04%	99.7%
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	0.03%	99.7%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.03%	99.8%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	0.03%	99.8%
238910	Site Preparation Contractors	0.03%	99.8%
423710	Hardware Merchant Wholesalers	0.02%	99.8%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.02%	99.9%
561421	Telephone Answering Services	0.02%	99.9%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.02%	99.9%
562998	All Other Miscellaneous Waste Management Services	0.02%	99.9%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.02%	99.9%
488410	Motor Vehicle Towing	0.01%	100.0%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
621999	All Other Miscellaneous Ambulatory Health Care Services	0.01%	100.0%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	0.01%	100.0%
423420	Office Equipment Merchant Wholesalers	0.01%	100.0%
561439	Other Business Service Centers (including Copy Shops)	0.01%	100.0%
441228	Motorcycle, ATV, and All Other Motor Vehicle Dealers	0.01%	100.0%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.003%	100.0%
238350	Finish Carpentry Contractors	0.002%	100.0%
562920	Materials Recovery Facilities	0.001%	100.0%
TOTAL		100.0%	

Source: CHA analysis of Illinois Tollway data

2. Geographic Market for Illinois Tollway Contracts

To determine the geographic market area, we applied the standard of identifying the firm locations that account for close to 75% of contract and subcontract dollar payments in the FCDF.¹⁸⁴ Firm location was determined by zip code and aggregated into counties as the geographic unit. Six counties in Illinois – Cook, Dupage, Kane, Lake, McHenry, and Will – captured 82.7% of the FCDF. Therefore, we used these six counties as the geographic market.

C. Utilization of BEP Firms in the Illinois Tollway's Geographic and Product Market

Having determined the Tollway's geographic market area, the next step was to determine the dollar value of its utilization of BEP firms¹⁸⁵ as measured by net payments to prime firms and subcontractors and disaggregated by race and gen-

184. *National Disparity Study Guidelines*, at p. 29.

185. For our analysis, the term "BEP" includes firms that are certified by government agencies and minority- and woman-owned firms that are not certified. The inclusion of all minority- and female-owned businesses in the pool casts the broad net approved by the courts and that supports the remedial nature of these programs. See *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007) (The "remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net.").

der. There were 56 NAICS codes after constraining the FCDF by the geographic market; the dollar value of the contracts in these codes was \$413,197,552.

Table 4-4 presents these data. We note that the contract dollar shares in Table 4-4 are equivalent to the weight of spending in each NAICS code. These data were used to calculate weighted availability¹⁸⁶ from unweighted availability, as discussed below.

Table 4-4: NAICS Code Distribution of Contract Dollars in the Illinois Tollway's Constrained Product Market

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	\$143,746,896	34.8%
541511	Custom Computer Programming Services	\$92,490,848	22.4%
541512	Computer Systems Design Services	\$23,225,172	5.6%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$18,535,192	4.5%
221122	Electric Power Distribution	\$17,858,924	4.3%
518210	Data Processing, Hosting, and Related Services	\$17,001,018	4.1%
488490	Other Support Activities for Road Transportation	\$14,908,027	3.6%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	\$12,795,830	3.1%
561320	Temporary Help Services	\$12,629,686	3.1%
541612	Human Resources Consulting Services	\$9,143,814	2.2%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	\$8,264,129	2.0%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$6,854,324	1.7%
238290	Other Building Equipment Contractors	\$5,812,387	1.4%
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers	\$4,021,219	1.0%

186. See "Tips for Goal Setting in the Disadvantaged Business Enterprise Program" ("F. Wherever Possible, Use Weighting. Weighting can help ensure that your Step One Base Figure is as accurate as possible. While weighting is not required by the rule, it will make your goal calculation more accurate. For instance, if 90% of your contract dollars will be spent on heavy construction and 10% on trucking, you should weight your calculation of the relative availability of firms by the same percentages.") (emphasis in the original), <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541611	Administrative Management and General Management Consulting Services	\$3,178,030	0.8%
423840	Industrial Supplies Merchant Wholesalers	\$2,784,688	0.7%
424950	Paint, Varnish, and Supplies Merchant Wholesalers	\$2,618,523	0.6%
523150	Investment Banking and Securities Intermediation	\$2,113,901	0.5%
424320	Men's and Boys' Clothing and Furnishings Merchant Wholesalers	\$1,533,767	0.4%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	\$1,421,172	0.3%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	\$1,359,196	0.3%
541110	Offices of Lawyers	\$1,314,502	0.3%
811111	General Automotive Repair	\$1,311,879	0.3%
541330	Engineering Services	\$941,215	0.2%
323111	Commercial Printing (except Screen and Books)	\$910,943	0.2%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$703,012	0.2%
237310	Highway, Street, and Bridge Construction	\$514,200	0.1%
238990	All Other Specialty Trade Contractors	\$466,949	0.1%
424120	Stationery and Office Supplies Merchant Wholesalers	\$465,085	0.1%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	\$436,779	0.1%
541211	Offices of Certified Public Accountants	\$429,325	0.1%
423830	Industrial Machinery and Equipment Merchant Wholesalers	\$389,937	0.1%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	\$357,985	0.1%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	\$313,158	0.1%
541990	All Other Professional, Scientific, and Technical Services	\$262,940	0.1%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
562119	Other Waste Collection	\$244,655	0.1%
424130	Industrial and Personal Service Paper Merchant Wholesalers	\$239,625	0.1%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	\$194,664	0.05%
624190	Other Individual and Family Services	\$177,382	0.04%
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	\$150,503	0.04%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	\$145,380	0.04%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	\$137,910	0.03%
423710	Hardware Merchant Wholesalers	\$124,362	0.03%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	\$114,012	0.03%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	\$88,712	0.02%
562998	All Other Miscellaneous Waste Management Services	\$87,566	0.02%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	\$82,209	0.02%
488410	Motor Vehicle Towing	\$74,421	0.02%
621999	All Other Miscellaneous Ambulatory Health Care Services	\$63,544	0.02%
238910	Site Preparation Contractors	\$39,485	0.01%
423420	Office Equipment Merchant Wholesalers	\$31,496	0.01%
561439	Other Business Service Centers (including Copy Shops)	\$30,625	0.01%
441228	Motorcycle, ATV, and All Other Motor Vehicle Dealers	\$27,420	0.01%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	\$13,540	0.003%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
238350	Finish Carpentry Contractors	\$9,376	0.002%
562920	Materials Recovery Facilities	\$6,012	0.001%
TOTAL		\$413,197,552	100.0%

Source: CHA analysis of Illinois Tollway data

Tables 4-5 and 4-6 present data on the Tollway's BEP firm utilization, measured in contract dollars and percentage of contract dollars.

Table 4-5: Distribution of Illinois Tollway Contract Dollars by Race and Gender
(total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
221122	\$0	\$0	\$0	\$0	\$0	\$0	\$17,858,924	\$17,858,924
237310	\$0	\$0	\$1,426	\$0	\$91,613	\$93,039	\$421,161	\$514,200
238210	\$0	\$547,974	\$14,341,819	\$0	\$1,478,159	\$16,367,952	\$2,167,240	\$18,535,191
238220	\$0	\$0	\$0	\$0	\$6,627,712	\$6,627,712	\$226,612	\$6,854,324
238290	\$0	\$0	\$0	\$0	\$0	\$0	\$5,812,387	\$5,812,387
238350	\$0	\$0	\$0	\$0	\$0	\$0	\$9,376	\$9,376
238910	\$0	\$0	\$39,485	\$0	\$0	\$39,485	\$0	\$39,485
238990	\$0	\$0	\$0	\$0	\$425,207	\$425,207	\$41,742	\$466,949
323111	\$0	\$0	\$0	\$0	\$0	\$0	\$910,943	\$910,943
423310	\$0	\$0	\$0	\$0	\$44,910	\$44,910	\$93,000	\$137,910
423320	\$0	\$0	\$0	\$0	\$114,012	\$114,012	\$0	\$114,012
423420	\$0	\$0	\$0	\$0	\$0	\$0	\$31,496	\$31,496

NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
423430	\$0	\$0	\$0	\$0	\$0	\$0	\$12,795,830	\$12,795,830
423450	\$0	\$0	\$0	\$0	\$13,540	\$13,540	\$0	\$13,540
423510	\$0	\$107,316	\$173,511	\$0	\$58,930	\$339,758	\$97,021	\$436,779
423610	\$0	\$0	\$0	\$0	\$1,399,146	\$1,399,146	\$22,026	\$1,421,172
423690	\$0	\$0	\$0	\$0	\$0	\$0	\$8,264,129	\$8,264,129
423710	\$0	\$0	\$0	\$0	\$0	\$0	\$124,362	\$124,362
423720	\$0	\$0	\$0	\$0	\$0	\$0	\$313,158	\$313,158
423730	\$0	\$0	\$0	\$0	\$4,021,219	\$4,021,219	\$0	\$4,021,219
423810	\$0	\$0	\$0	\$0	\$0	\$0	\$88,712	\$88,712
423820	\$0	\$0	\$0	\$0	\$0	\$0	\$1,359,196	\$1,359,196
423830	\$0	\$0	\$0	\$0	\$295,641	\$295,641	\$94,296	\$389,937
423840	\$0	\$114,012	\$0	\$0	\$81,235	\$195,247	\$2,589,441	\$2,784,688
423850	\$0	\$0	\$0	\$0	\$194,664	\$194,664	\$0	\$194,664
423990	\$0	\$0	\$0	\$0	\$82,209	\$82,209	\$0	\$82,209
424120	\$0	\$0	\$0	\$0	\$0	\$0	\$465,085	\$465,085
424130	\$0	\$0	\$0	\$0	\$239,625	\$239,625	\$0	\$239,625
424320	\$0	\$0	\$0	\$0	\$119,951	\$119,951	\$1,413,815	\$1,533,766
424720	\$0	\$0	\$0	\$0	\$0	\$0	\$357,985	\$357,985
424950	\$0	\$0	\$0	\$0	\$0	\$0	\$2,618,523	\$2,618,523
441228	\$0	\$0	\$0	\$0	\$0	\$0	\$27,420	\$27,420
484220	\$39,634	\$611,069	\$0	\$0	\$52,309	\$703,012	\$0	\$703,012
488410	\$0	\$0	\$0	\$0	\$0	\$0	\$74,421	\$74,421
488490	\$0	\$0	\$0	\$0	\$0	\$0	\$14,908,027	\$14,908,027

NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
518210	\$1,537,950	\$3,927,039	\$0	\$0	\$248,604	\$5,713,593	\$11,287,425	\$17,001,018
522320	\$0	\$0	\$0	\$0	\$20,678,292	\$20,678,292	\$123,068,607	\$143,746,899
523150	\$470,243	\$436,202	\$0	\$0	\$0	\$906,445	\$1,207,456	\$2,113,901
532490	\$0	\$0	\$0	\$0	\$0	\$0	\$150,503	\$150,503
541110	\$245,500	\$235,520	\$0	\$0	\$120,000	\$601,020	\$713,482	\$1,314,502
541211	\$0	\$0	\$0	\$0	\$0	\$0	\$429,325	\$429,325
541330	\$0	\$0	\$0	\$0	\$941,215	\$941,215	\$0	\$941,215
541511	\$45,023	\$8,887	\$26,211,646	\$0	\$36,812,738	\$63,078,293	\$29,412,554	\$92,490,847
541512	\$0	\$0	\$23,027,868	\$0	\$0	\$23,027,868	\$197,305	\$23,225,173
541611	\$1,555,699	\$0	\$758,914	\$0	\$126,766	\$2,441,379	\$736,651	\$3,178,030
541612	\$0	\$0	\$0	\$0	\$9,143,814	\$9,143,814	\$0	\$9,143,814
541990	\$0	\$42,820	\$0	\$0	\$0	\$42,820	\$220,120	\$262,940
561320	\$0	\$1,333,713	\$4,370,797	\$0	\$5,982,230	\$11,686,740	\$942,946	\$12,629,686
561439	\$30,625	\$0	\$0	\$0	\$0	\$30,625	\$0	\$30,625
562119	\$0	\$0	\$0	\$0	\$131,332	\$131,332	\$113,324	\$244,655
562920	\$0	\$0	\$0	\$0	\$0	\$0	\$6,012	\$6,012
562998	\$0	\$0	\$0	\$0	\$0	\$0	\$87,566	\$87,566
621999	\$0	\$0	\$0	\$0	\$0	\$0	\$63,544	\$63,544
624190	\$0	\$0	\$0	\$0	\$0	\$0	\$177,382	\$177,382
811111	\$0	\$0	\$0	\$0	\$0	\$0	\$1,311,879	\$1,311,879
811310	\$0	\$0	\$0	\$0	\$0	\$0	\$145,380	\$145,380
Total	\$3,924,674	\$7,364,552	\$68,925,466	\$0	\$89,525,073	\$169,739,765	\$243,457,789	\$413,197,552

Source: CHA analysis of Illinois Tollway data

**Table 4-6: Percentage Distribution of Illinois Tollway Contract Dollars by Race
and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
221122	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
237310	0.0%	0.0%	0.3%	0.0%	17.8%	18.1%	81.9%	100.0%
238210	0.0%	3.0%	77.4%	0.0%	8.0%	88.3%	11.7%	100.0%
238220	0.0%	0.0%	0.0%	0.0%	96.7%	96.7%	3.3%	100.0%
238290	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238350	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238910	0.0%	0.0%	100.0%	0.0%	0.0%	100.0%	0.0%	100.0%
238990	0.0%	0.0%	0.0%	0.0%	91.1%	91.1%	8.9%	100.0%
323111	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423310	0.0%	0.0%	0.0%	0.0%	32.6%	32.6%	67.4%	100.0%
423320	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423420	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423430	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423450	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423510	0.0%	24.6%	39.7%	0.0%	13.5%	77.8%	22.2%	100.0%
423610	0.0%	0.0%	0.0%	0.0%	98.5%	98.5%	1.5%	100.0%
423690	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423710	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423720	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423730	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423810	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423820	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423830	0.0%	0.0%	0.0%	0.0%	75.8%	75.8%	24.2%	100.0%
423840	0.0%	4.1%	0.0%	0.0%	2.9%	7.0%	93.0%	100.0%
423850	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423990	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
424120	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424130	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%

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NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
424320	0.0%	0.0%	0.0%	0.0%	7.8%	7.8%	92.2%	100.0%
424720	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424950	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
441228	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
484220	5.6%	86.9%	0.0%	0.0%	7.4%	100.0%	0.0%	100.0%
488410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
488490	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
518210	9.0%	23.1%	0.0%	0.0%	1.5%	33.6%	66.4%	100.0%
522320	0.0%	0.0%	0.0%	0.0%	14.4%	14.4%	85.6%	100.0%
523150	22.2%	20.6%	0.0%	0.0%	0.0%	42.9%	57.1%	100.0%
532490	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541110	18.7%	17.9%	0.0%	0.0%	9.1%	45.7%	54.3%	100.0%
541211	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541330	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
541511	0.0%	0.0%	28.3%	0.0%	39.8%	68.2%	31.8%	100.0%
541512	0.0%	0.0%	99.2%	0.0%	0.0%	99.2%	0.8%	100.0%
541611	49.0%	0.0%	23.9%	0.0%	4.0%	76.8%	23.2%	100.0%
541612	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
541990	0.0%	16.3%	0.0%	0.0%	0.0%	16.3%	83.7%	100.0%
561320	0.0%	10.6%	34.6%	0.0%	47.4%	92.5%	7.5%	100.0%
561439	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
562119	0.0%	0.0%	0.0%	0.0%	53.7%	53.7%	46.3%	100.0%
562920	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
562998	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
621999	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
624190	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811111	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.9%	1.8%	16.7%	0.0%	21.7%	41.1%	58.9%	100.0%

Source: CHA analysis of Illinois Tollway data

D. The Availability of BEP Firms for Illinois Tollway Contracts in its Geographic and Product Markets

1. The Methodological Framework

Estimates of the availability of BEP firms in the Tollway's geographic and product market are a critical component of the Tollway's compliance with its constitutional obligation to determine whether it has a strong basis in evidence to support the use of race- and gender-conscious measures. The courts require that the availability estimates reflect the number of "ready, willing and able" firms that can perform on specific types of work involved in the recipient's prime contracts and associated subcontracts; general population is legally irrelevant.¹⁸⁷

We applied the "custom census" approach, with refinements, to estimate availability. The courts and the National Model Disparity Study Guidelines¹⁸⁸ have recognized this methodology as superior to the other methods for at least four reasons:

- First, it provides an internally consistent and rigorous "apples to apples" comparison between firms in the availability numerator and those in the denominator. Other approaches often have different definitions for the firms in the numerator (*e.g.*, certified or firms that respond to a survey) and the denominator (*e.g.*, registered vendors or the Census Bureau's County Business Patterns data).
- Second, by examining a comprehensive group of firms, it "casts a broader net" beyond those known to the agency. As recognized by the courts, this comports with the remedial nature of contracting affirmative action programs by seeking to bring in businesses that have historically been excluded. Our methodology is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders' lists, because it seeks out firms in the Tollway's market area that have not been able to access the agency's opportunities.
- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. Several courts have held that the results of

187. 49 C.F.R. §25.45(c).

188. *National Disparity Study Guidelines*, pp.57-58. This was also the approach used in the successful defense of the Illinois Department of Transportation's Disadvantaged Business Enterprise Program in the *Northern Contracting* case, discussed in Chapter II.

discrimination – which impact factors affecting capacity – should not be the benchmark for a program designed to ameliorate the effects of discrimination. They have acknowledged that minority and woman firms may be smaller, newer, and otherwise less competitive than non-BEP firms because of the very discrimination sought to be remedied by race-conscious contracting programs. Racial and gender differences in these “capacity” factors are the outcomes of discrimination and it is therefore inappropriate as a matter of economics and statistics to use them as “control” variables in a disparity study.

- Fourth, it has been upheld by every court that has reviewed it, including¹⁸⁹ most recently in the successful defense of the Illinois Tollway’s Disadvantaged Business Enterprise (“DBE”) program, for which we served as testifying experts.¹⁹⁰

Using this framework, CHA utilized three databases to estimate availability:

1. The Final Contract Data File
2. The Master M/W/BEP/DBE Directory compiled by CHA
3. Dun & Bradstreet/Hoovers Database

First, we eliminated any duplicate entries in the geographically constrained FCDF. Some firms received multiple contracts for work performed in the same NAICS codes. Without this elimination of duplicate listings, the availability database would be artificially large. This list of unique firms comprised the first component of the Study’s availability determination.

To develop the Master Directory, we utilized the State of Illinois’ Business Enterprise Program Directory; the Illinois Unified Certification Program Directory; the City of Chicago’s Minority- and Woman-Owned Business Enterprise Directory; Cook County, Illinois’ Minority- and Woman-Owned Business Enterprise Directory; and the Tollway Contract Data File. We limited the firms we used in our analysis to those operating within the Tollway’s geographic and product market.

We next developed a custom database from Hoovers, a Dun & Bradstreet company, for minority- and woman-owned firms and non-BEP firms. Hoovers maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including location and detailed industry codes, and is the broadest publicly available data source for firm information. We purchased the informa-

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

190. *Midwest Fence, Corp. v. U.S. Department of Transportation et al.*, 840 F.3d 932 (2016); see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), cert. denied, 137 S.Ct. 2292 (2017).

tion from Hoovers for the firms in the NAICS codes located in the Tollway's market area to form our custom Dun & Bradstreet/Hoovers Database. In the initial download, the data from Hoovers simply identified a firm as being minority owned.¹⁹¹ However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). We obtained this additional information from Hoovers by special request.

The Hoovers database is the most comprehensive list of minority-owned and woman-owned businesses available. It is developed from the efforts of a national firm whose business is collecting business information. Hoovers builds its database from over 250 sources, including information from government sources and various associations, and its own efforts. Hoovers conducts an audit of the preliminary database prior to the public release of the data. That audit must result in a minimum of 94% accuracy. Once published, Hoovers has an established protocol to regularly refresh its data. This protocol involves updating any third-party lists that were used and contacting a selection of firms via Hoover's own call centers.

We merged these three databases to form an accurate estimate of firms available to work on the Tollway's contracts.

2. The Availability Data and Results

Tables 4-7 through 4-9 present data on:

- The unweighted availability percentages by race and gender and by NAICS codes for the Tollway's product market;
- The weights used to adjust the unweighted numbers;¹⁹² and
- The final estimates of the weighted averages of the individual six-digit level NAICS availability estimates in the Tollway's market area.

We "weighted" the availability data for two reasons. First, the weighted availability represents the share of total possible contractors for each demographic group, weighted by the distribution of contract dollars across the NAICS codes in which the Tollway spends its dollars.

Second, weighting also reflects the importance of the availability of a demographic group in a particular NAICS code, that is, how important that NAICS code is to the Tollway's contracting patterns.¹⁹³ For example, in a hypothetical

191. The variable is labeled: "Is Minority Owned" and values for the variable can be either "1" (for yes) or blank.

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

193. <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

NAICS Code 123456, the total available firms are 100 and 60 of these firms are BEP firms; hence, BEP availability would be 60%. However, if the Tollway spends only one percent of its contract dollars in this NAICS code, then this high availability would be offset by the low level of spending in that NAICS code. In contrast, if the Tollway spent 25% of its contract dollars in NAICS Code 123456, then the same availability would carry a greater weight. For an extended explanation of how unweighted and weighted availability are calculated, please see Appendix D.

To calculate the weighted availability for each NAICS code, we first determined the unweighted availability for each demographic group in each NAICS code, presented in Table 4-7. In the previous example, the unweighted availability for BEP firms in NAICS Code 123456 is 60%. We then multiplied the unweighted availability by the share of the Tollway spending in that NAICS code, presented in Table 4-8. This share is the *weight*. Using the previous example, where the Tollway spending in NAICS Code 123456 was one percent, the component of BEP weighted availability for NAICS Code 123456 would be 0.006: 60% multiplied by one percent. We say “the component of BEP firm weighted availability for NAICS Code 123456” because this process is repeated for each NAICS code and then the components are summed to generate an overall weighted availability estimate. The results of this calculation are presented in Table 4-9.

Table 4-7: Unweighted BEP Firms Availability for Illinois Tollway Contracts

NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
221122	1.7%	0.0%	0.0%	0.0%	3.3%	5.0%	95.0%	100.0%
237310	8.4%	13.4%	4.0%	0.3%	9.8%	36.0%	64.0%	100.0%
238210	2.9%	2.5%	0.7%	0.1%	7.0%	13.1%	86.9%	100.0%
238220	1.6%	1.3%	0.4%	0.0%	3.6%	6.9%	93.1%	100.0%
238290	10.9%	8.7%	3.3%	0.0%	10.4%	33.3%	66.7%	100.0%
238350	12.9%	7.6%	2.1%	0.0%	5.8%	28.3%	71.7%	100.0%
238910	6.9%	11.7%	2.0%	0.1%	11.6%	32.3%	67.7%	100.0%
238990	1.5%	1.7%	0.5%	0.1%	2.9%	6.7%	93.3%	100.0%
323111	0.9%	0.6%	0.6%	0.0%	7.9%	10.0%	90.0%	100.0%
423310	0.8%	0.4%	0.6%	0.0%	3.7%	5.4%	94.6%	100.0%
423320	0.8%	2.5%	2.0%	0.0%	5.1%	10.5%	89.5%	100.0%
423420	0.8%	1.3%	1.3%	0.0%	5.9%	9.3%	90.7%	100.0%
423430	2.3%	0.8%	2.3%	0.0%	6.6%	11.9%	88.1%	100.0%

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NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
423450	4.1%	1.2%	2.7%	0.0%	8.0%	15.9%	84.1%	100.0%
423510	1.1%	0.8%	0.7%	0.0%	5.5%	8.0%	92.0%	100.0%
423610	3.4%	2.5%	1.4%	0.0%	9.8%	17.1%	82.9%	100.0%
423690	1.0%	0.7%	1.5%	0.0%	5.9%	9.2%	90.8%	100.0%
423710	2.4%	0.6%	2.1%	0.0%	8.1%	13.3%	86.7%	100.0%
423720	2.2%	1.1%	0.0%	0.0%	7.4%	10.7%	89.3%	100.0%
423730	3.0%	2.0%	1.0%	0.0%	5.0%	11.1%	88.9%	100.0%
423810	0.0%	2.2%	0.0%	0.0%	4.8%	7.0%	93.0%	100.0%
423820	0.0%	3.0%	0.0%	0.0%	9.1%	12.1%	87.9%	100.0%
423830	0.5%	0.4%	0.4%	0.0%	4.7%	6.0%	94.0%	100.0%
423840	1.7%	1.8%	0.8%	0.0%	5.8%	10.0%	90.0%	100.0%
423850	3.0%	2.5%	0.8%	0.0%	10.5%	16.8%	83.2%	100.0%
423990	0.7%	0.5%	0.2%	0.0%	3.2%	4.7%	95.3%	100.0%
424120	5.2%	1.4%	2.6%	0.0%	11.0%	20.3%	79.7%	100.0%
424130	3.2%	1.8%	0.7%	0.0%	12.3%	17.9%	82.1%	100.0%
424320	60.0%	0.0%	0.0%	0.0%	30.0%	90.0%	10.0%	100.0%
424720	1.0%	1.5%	2.8%	0.0%	6.8%	12.0%	88.0%	100.0%
424950	1.0%	2.0%	2.9%	0.0%	9.8%	15.7%	84.3%	100.0%
441228	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
484220	9.9%	47.7%	3.3%	0.0%	12.1%	72.9%	27.1%	100.0%
488410	0.6%	0.1%	0.0%	0.0%	2.1%	2.9%	97.1%	100.0%
488490	4.1%	4.1%	0.0%	0.0%	5.6%	13.9%	86.1%	100.0%
518210	3.9%	1.1%	2.4%	0.0%	5.7%	13.1%	86.9%	100.0%
522320	0.4%	0.1%	0.2%	0.0%	3.1%	3.9%	96.1%	100.0%
523150	0.7%	0.5%	0.1%	0.0%	0.7%	2.1%	97.9%	100.0%
532490	0.2%	0.1%	0.0%	0.0%	1.6%	1.9%	98.1%	100.0%
541110	0.5%	0.2%	0.1%	0.0%	4.6%	5.4%	94.6%	100.0%
541211	1.6%	0.5%	0.4%	0.0%	5.6%	8.1%	91.9%	100.0%
541330	3.9%	3.2%	6.1%	0.2%	5.5%	18.9%	81.1%	100.0%
541511	1.8%	0.6%	3.5%	0.0%	4.0%	10.1%	89.9%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
541512	3.8%	1.6%	4.7%	0.0%	6.2%	16.3%	83.7%	100.0%
541611	4.2%	1.2%	1.0%	0.0%	7.4%	13.9%	86.1%	100.0%
541612	7.5%	2.3%	0.9%	0.0%	15.5%	26.3%	73.7%	100.0%
541990	1.4%	0.5%	0.6%	0.0%	6.4%	8.9%	91.1%	100.0%
561320	5.1%	2.7%	2.5%	0.0%	10.5%	20.9%	79.1%	100.0%
561439	8.7%	0.0%	4.3%	0.0%	13.0%	26.1%	73.9%	100.0%
562119	3.2%	3.2%	0.0%	0.0%	6.8%	13.2%	86.8%	100.0%
562920	0.3%	0.2%	0.2%	0.0%	2.2%	2.8%	97.2%	100.0%
562998	12.3%	7.0%	1.8%	0.0%	15.8%	36.8%	63.2%	100.0%
621999	0.7%	0.1%	0.3%	0.0%	2.4%	3.5%	96.5%	100.0%
624190	0.1%	0.0%	0.0%	0.0%	0.1%	0.3%	99.7%	100.0%
811111	0.2%	0.1%	0.0%	0.0%	1.4%	1.8%	98.2%	100.0%
811310	0.6%	1.1%	0.3%	0.0%	4.0%	6.0%	94.0%	100.0%
Total	1.9%	1.5%	1.1%	0.0%	4.6%	9.2%	90.8%	100.0%

Source: CHA analysis of Illinois Tollway data; Hoovers; CHA Master Directory

These unweighted estimates should be used by the Tollway as the starting point for setting narrowly tailored BEP contract goals.

Table 4-8: Distribution of the Illinois Tollway's Spending by NAICS Code (the Weights)

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
221122	Electric Power Distribution	4.3%
237310	Highway, Street, and Bridge Construction	0.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	4.5%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.7%
238290	Other Building Equipment Contractors	1.4%
238350	Finish Carpentry Contractors	0.002%
238910	Site Preparation Contractors	0.01%
238990	All Other Specialty Trade Contractors	0.1%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
323111	Commercial Printing (except Screen and Books)	0.2%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	0.03%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.03%
423420	Office Equipment Merchant Wholesalers	0.01%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	3.1%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.003%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.1%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	0.3%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	2.0%
423710	Hardware Merchant Wholesalers	0.03%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.1%
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers	1.0%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.02%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	0.3%
423830	Industrial Machinery and Equipment Merchant Wholesalers	0.1%
423840	Industrial Supplies Merchant Wholesalers	0.7%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.05%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.02%
424120	Stationery and Office Supplies Merchant Wholesalers	0.1%
424130	Industrial and Personal Service Paper Merchant Wholesalers	0.1%
424320	Men's and Boys' Clothing and Furnishings Merchant Wholesalers	0.4%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	0.1%
424950	Paint, Varnish, and Supplies Merchant Wholesalers	0.6%
441228	Motorcycle, ATV, and All Other Motor Vehicle Dealers	0.01%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.2%
488410	Motor Vehicle Towing	0.02%
488490	Other Support Activities for Road Transportation	3.6%
518210	Data Processing, Hosting, and Related Services	4.1%
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	34.8%
523150	Investment Banking and Securities Intermediation	0.5%
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	0.04%
541110	Offices of Lawyers	0.3%
541211	Offices of Certified Public Accountants	0.1%
541330	Engineering Services	0.2%
541511	Custom Computer Programming Services	22.4%
541512	Computer Systems Design Services	5.6%
541611	Administrative Management and General Management Consulting Services	0.8%
541612	Human Resources Consulting Services	2.2%
541990	All Other Professional, Scientific, and Technical Services	0.1%
561320	Temporary Help Services	3.1%
561439	Other Business Service Centers (including Copy Shops)	0.01%
562119	Other Waste Collection	0.1%
562920	Materials Recovery Facilities	0.001%
562998	All Other Miscellaneous Waste Management Services	0.02%
621999	All Other Miscellaneous Ambulatory Health Care Services	0.02%
624190	Other Individual and Family Services	0.04%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
811111	General Automotive Repair	0.3%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.04%
TOTAL		100.0%

Source: CHA analysis of Illinois Tollway data

Table 4-9 presents the weighted availability results for each of the racial and gender categories. The aggregated availability of BEP firms, weighted by the Tollway's spending in its geographic and industry markets, is 9.9%.

Table 4-9: Aggregated Weighted Availability for the Tollway Contracts

Black	Hispanic	Asian	Native American	White Women	BEP	Non-BEP	Total
2.3%	1.1%	1.6%	0.0%	5.0%	9.9%	90.1%	100.0%

Source: CHA analysis of Illinois Tollway data; Hoovers; CHA Master Directory

3. Analysis of the Concentration of Contract Dollars among Firms

In addition to examining the level of BEP and non-BEP contract dollar utilization, another important dimension to a disparity analysis is an examination of any asymmetries between the NAICS codes where the agency spends large shares of its funds and the NAICS codes that provide BEP firms' and non-BEP firms' largest shares of their earnings. This analysis is important for two reasons. First, to the extent the NAICS codes where the agency spends the largest shares of its funds align with the codes that provide the largest shares of non-BEP firm earnings AND these NAICS codes are different from the codes that provide large shares of BEP firms earnings, this indicates that BEP firms do not enjoy the same position in the agency's marketplace as non-BEP firms. Second, if an asymmetry exists between agency spending and BEP firms' earnings, then the high utilization of M/WBEs as a group will mask unequal opportunities at a more granular level. Consequently, a race- or gender-based remedial program may still be supportable. This section presents data to examine this issue.

Prior to presenting these data, it is important to emphasize four important findings: 1) the three NAICS codes that provide the most contract dollars to each minority/ethnic group or White women captured a larger share of the overall Tollway spending received by the group than the share of overall Tollway spending captured by the top three NAICS codes for Tollway's overall spend¹⁹⁴; 2) two of the three NAICS codes – Custom Computer Programming

Services and Computer Systems Design Services for Asians; Custom Computer Programming Services and Financial Transactions Processing, Reserve, and Clearinghouse Activities for White women — were among the top three codes for the Tollway’s overall spend and among the top three codes that provided the most contract dollars to BEP firms; 3) none of the three leading NAICS codes for the Tollway’s overall spend were among the top three NAICS codes that provided the most contract dollars to Blacks and Hispanics; and 4) when examining the leading NAICS codes for BEP firms, their share of the overall earnings exceeded the share of non-BEP firms’ overall earnings.

With respect to the first finding, Table 4-10 presents data on the share of Tollway’s contract dollars received by the top three NAICS codes for each demographic group. These shares were derived from the data presented in Tables 4-5 and 4-6. The three NAICS codes where the Tollway spent most of its contract dollars captured 62.8% of all Tollway spending. For each group, the corresponding figure for the share of spending captured by the top three codes ranged between 92.2% (Asian) and 74.4% (White Woman).

Table 4-10: Comparison of the Share of Tollway Spending Captured by the Top Three NAICS Codes for Each Demographic Group

Demographic Group	Share of All Tollway Spending in the Top Three NAICS Codes for Each Group
All	62.8%
Black	90.8%
Hispanic	79.7%
Asian	92.2%
Native American	0.0%
White Woman	74.4%
Non-BEP	70.0%

Source: CHA analysis of Illinois Tollway data

With respect to the second and third findings, Table 4-11 provides more detail on the data presented in Table 4-10. Table 4-11 lists the top three codes for each group and their corresponding share of the group’s total spending. Two of the three NAICS codes with the largest amount of Tollway spending – Custom Computer Programming Services and Computer Systems Design Services – were among the top three codes in which Asian-owned firms were utilized.

194. The following discussion will disregard Native American firms as no Native American firms received any contracts from the Tollway.

The Tollway spent 22.4% and 5.6% in these codes, respectively; the corresponding figures were 38.0% and 33.4%.

The NAICS codes representing Financial Transactions Processing, Reserve, and Clearinghouse Activities and Custom Computer Programming Services were among the top two codes for the Tollway's overall spend and for its utilization of White woman-owned firms: the Tollway spent 34.8% and 22.4% respectively in these codes; the corresponding figures for its utilization of White woman-owned firms were 2.1% and 41.1%.

None of the three leading NAICS codes for the Tollway's overall spend were among the top three NAICS codes that provided the most contract dollars to Blacks and Hispanics.

Table 4-11: The Top Three Tollway Spending NAICS Codes for Each Demographic Group

NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
All			
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	34.8%	62.8%
541511	Custom Computer Programming Services	22.4%	
541512	Computer Systems Design Services	5.6%	
Black			
541611	Administrative Management and General Management Consulting Services	39.6%	90.8%
518210	Data Processing, Hosting, and Related Services	39.2%	
523150	Investment Banking and Securities Intermediation	12.0%	
Hispanic			
518210	Data Processing, Hosting, and Related Services	53.3%	79.7%
561320	Temporary Help Services	18.1%	
484220	Specialized Freight (except Used Goods) Trucking, Local	8.3%	
Asian			
541511	Custom Computer Programming Services	38.0%	92.2%
541512	Computer Systems Design Services	33.4%	
238210	Electrical Contractors and Other Wiring Installation Contractors	20.8%	

NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
Native American			
----	----	----	----
----	----	----	
----	----	----	
White Woman			
541511	Custom Computer Programming Services	41.1%	74.4%
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	23.1%	
541612	Human Resources Consulting Services	10.2%	
Non-BEP Firm			
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	50.6%	70.0%
541511	Custom Computer Programming Services	12.1%	
221122	Electric Power Distribution	7.3%	

Source: CHA analysis of Illinois Tollway data

Tables 4-12 through 4-15 present data on the fourth finding: how Tollway spending varies across groups. These results illustrate the different levels of concentration of contract dollars among BEP firms compared to non-BEP firms. For each demographic group, we re-state the three NAICS codes where the group received the largest share of Tollway's spending (first presented in Table 4-11). Then, we present the weight for each code derived from the Tollway's overall spending. Finally, we present the share of all group contract dollars and compare that share to the corresponding share received by non-BEP firms.

Table 4-12 presents the three NAICS codes where Black firms received the largest share of their contract dollars. While these codes captured 90.8% of all Black contract dollars, the corresponding figure for non-BEP firms was 5.4%.

Table 4-12: Three NAICS Codes where Black Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total Black Dollars	Share of Total Non-BEP Dollars
541611	Administrative Management and General Management Consulting Services	0.8%	39.6%	0.3%
518210	Data Processing, Hosting, and Related Services	4.1%	39.2%	4.6%
523150	Investment Banking and Securities Intermediation	0.5%	12.0%	0.5%
Total 3-code Share of Total Group Dollars			90.8%	5.4%

Source: CHA analysis of Illinois Tollway data

Table 4-13 presents the three NAICS codes where Hispanic firms received the largest share of their contract dollars. While these codes comprised 79.7% of all Hispanic contract dollars, the corresponding figure for non-BEP firms was 5.0%.

Table 4-13: Three NAICS Codes where Hispanic Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total Hispanic Dollars	Share of Total Non-BEP Dollars
518210	Data Processing, Hosting, and Related Services	4.1%	53.3%	4.6%
561320	Temporary Help Services	3.1%	18.1%	0.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.2%	8.3%	0.0%
Total 3-code Share of Total Group Dollars			79.7%	5.0%

Source: CHA analysis of Illinois Tollway data

Table 4-15 presents the three NAICS codes where Asian firms received the largest share of their contract dollars. While these codes captured 92.2% of all Asian contract dollars, the corresponding figure for non-BEP firms was 13.1%.

Table 4-14: Three NAICS Codes where Asian Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total Asian Dollars	Share of Total Non-BEP Dollars
541511	Custom Computer Programming Services	22.4%	38.0%	12.1%
541512	Computer Systems Design Services	5.6%	33.4%	0.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	4.5%	20.8%	0.9%
Total 3-code Share of Total Group Dollars			92.2%	13.1%

Source: CHA analysis of Illinois Tollway data

Table 4-15 presents the three NAICS codes where White woman firms received the largest share of their contract dollars. These codes comprise 74.4% of all White woman contract dollars; the corresponding figure for non-BEP firms was 62.6%.

Table 4-15: Three NAICS Codes where White Woman Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total White Woman Dollars	Share of Total Non-BEP Dollars
541511	Custom Computer Programming Services	22.4%	41.1%	12.1%
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	34.8%	23.1%	50.6%
541612	Human Resources Consulting Services	2.2%	10.2%	0.0%
Total 3-code Share of Total Group Dollars			74.4%	62.6%

Source: CHA analysis of Illinois Tollway data

The data presented in Tables 4-10 through 4-16 support the inference that regardless of any statistical disparities between contract utilization and weighted availability, the experiences of BEP firms with respect to participation in Tollway procurements were significantly different than the experiences of non-BEP firms. There is minimal overlap between the three NAICS codes that were central to the Tollway's spending and the three most important NAICS codes for the different racial and ethnic groups and White women. In addition, when examining the three most important NAICS codes for BEP firms, we found that for each group, the BEP firms share of all group earnings

exceeded the non-BEP firms share of all group earnings; for Blacks, Hispanics, and Asians, the differences were very large.

E. Disparity Analysis of BEP firms for Illinois Tollway Contracts

As required by strict constitutional scrutiny, we next calculated disparity ratios for each demographic group, comparing the group's total utilization compared to its total weighted availability.

A *disparity ratio* is the relationship between the utilization and weighted availability (as determined in the section above). Mathematically, this is represented by:

$$DR = U/WA$$

Where DR is the disparity ratio; U is utilization rate; and WA is the weighted availability.

The courts have held that disparity results must be analyzed to determine whether the results are "significant". There are two distinct methods to measure a result's significance. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.¹⁹⁵ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the

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

smaller the probability that it resulted from random chance alone.¹⁹⁶ A more in-depth discussion of statistical significance is provided in Appendix C.

Substantive and Statistical Significance

- ‡ Connotes these values are substantively significant. Courts have ruled the disparity ratio less or equal to 80 percent represent disparities that are substantively significant. (See Footnote 195 for more information.)
- * Connotes these values are statistically significant at the 0.05 level. (See Appendix C for more information.)
- ** Connotes these values are statistically significant at the 0.01 level. (See Appendix C for more information.)
- *** Connotes these values are statistically significant at the 0.001 level. (See Appendix C for more information.)

Table 4-16 presents the disparity ratios for each demographic group. The disparity ratio for Blacks, Native Americans, and BEP firms is substantively significant. All of the disparity ratios are statistically significant at the 0.001 level.

Table 4-16: Disparity Ratios by Demographic Group

	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP
Disparity Ratio	39.8%‡***	163.4%***	1051.0%***	0.0%‡***	435.9%***	413.2%***	65.4%‡***

Source: CHA analysis of Illinois Tollway data

‡ Indicates substantive significance

*** Statistically significant at the 0.001 level

To better understand the disparity ratios for Hispanics, Asians, and White Women, we examined more closely the three NAICS codes where the Tollway spent 62.8% of its contract dollars. These three codes were selected because the share of Tollway spending in these codes ranged from 34.8% to 5.6%. The remaining 53 NAICS codes accounted for just 37.2% of all Tollway spending. For each NAICS code, we compared a demographic group’s utilization on Tollway contract dollars to its unweighted availability. Table 4-17 presents this comparative data.

For Hispanics, in each of the three NAICS codes, the data indicate that, Hispanic utilization did not exceed Hispanic unweighted availability. For Asians, utilization exceeds unweighted availability in two NAICS codes. For White women, utilization exceeds their unweighted availability in two NAICS codes.

196. A chi-square test – examining if the utilization rate was different from the weighted availability - was used to determine the statistical significance of the disparity ratio.

Table 4-17: Comparing Utilization and Unweighted Availability in the Three NAICS Codes Where the Tollway Spends 62.8% of Its Funds

	Black	Hispanic	Asian	Native American	White Woman	BEP	Non-BEP	Total
NAICS Code: 522320; Weight: 34.8%								
Utilization	0.0%	0.0%	0.0%	0.0%	14.4%	14.4%	85.1%	100.0%
Unweighted Availability	0.4%	0.1%	0.3%	0.0%	3.1%	3.9%	96.1%	100.0%
NAICS Code: 541511; Weight: 22.4%								
Utilization	0.05%	0.01%	28.3%	0.0%	39.8%	68.2%	31.8%	100.0%
Unweighted Availability	1.84%	0.65%	3.49%	0.04%	4.04%	10.06%	89.94%	100.0%
NAICS Code: 541510; Weight: 5.6%								
Utilization	0.00%	0.00%	99.15%	0.0%	0.0%	99.15%	0.85%	100.0%
Unweighted Availability	3.8%	1.6%	4.7%	0.0%	6.2%	16.3%	83.7%	100.0%

Source: CHA analysis of Illinois Tollway data

Looking further at these three codes, we found that 71.4% of all Asian contract dollars and 64.2% of all White woman contract dollars were concentrated in the codes. These figures were higher than the level of contract dollars spending by the Tollway overall (62.8%). These data points might explain the unusually high disparity ratios for Asians and White women.

F. Conclusion

This Chapter examines the Tollway's utilization of BEP firms compared to non-BEP firms; provides estimates of the availability of BEP firms and non-BEP firms to perform the types of goods and services utilized by the Tollway in its geographic market area; tests for whether there are significant disparities in the results of utilization compared to availability; and analyzes the NAICS code concentration of BEP firms compared to non-BEP firms on Tollway contracts.

These results support the conclusion that while overall, BEP firms have received fair opportunities to contract with Tollway, their work has been highly concentrated in a few codes. Race- and gender-conscious measures may still be supportable to ensure that minority and woman firms have equal opportunities to compete for all types of Tollway contracts.

V. ANALYSIS OF DISPARITIES IN THE ILLINOIS TOLLWAY'S MARKETPLACE

A. Introduction

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

Racial discrimination pervades every aspect of a society in which it is found. It is found above all in attitudes of both races, but also in social relations, in intermarriage, in residential location, and frequently in legal barriers. It is also found in levels of economic accomplishment; this is income, wages, prices paid, and credit extended.¹⁹⁷

This Chapter explores the data and literature relevant to how discrimination in the state of Illinois economy affects the ability of minorities and women to fairly and fully engage in the Illinois Tollway's goods and services contract opportunities. Because the Tollway's Business Enterprise Program covers the goods, services and information technology industries, we limit our discussion to those three industries. First, we analyze the rates at which Minority- and Woman-Owned Business Enterprises ("M/WBEs") in the Illinois economy form firms and their earnings from those firms. Then, we analyze state-wide data to see if M/WBE firms' share of all firms is greater than or less than their share of all sales and receipts and their share of all annual payroll. Next, we summarize the literature on barriers to equal access to commercial credit. Finally, we summarize the literature on barriers to equal access to human capital. All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in discrimination without some type of affirmative intervention.

A key element to determine the need for the Tollway to intervene in its market through contract goals is an analysis of disparities independent of the Tollway's intervention through its contracting affirmative action program.

The courts have repeatedly held that analysis of disparities in the rate of M/WBE formation in the government's markets as compared to similar non-M/WBEs, dis-

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

parities in M/WBE earnings, and barriers to access to capital markets are highly relevant to a determination of whether market outcomes are affected by race or gender ownership status.¹⁹⁸ Similar analyses supported the successful legal defense of the Illinois Tollway's Disadvantaged Business Enterprise ("DBE") program from constitutional challenge in 2016.¹⁹⁹

Similarly, the Tenth Circuit Court of Appeals also upheld the U.S. Department of Transportation's DBE program, and in doing so, stated that this type of evidence

demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs... The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.²⁰⁰

Business discrimination studies and lending studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. In unanimously upholding the USDOT DBE Program, federal courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business

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

199. *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 840 F.3d 942 (7th Cir. 2016) (upholding the Illinois Tollway's program for state funded contracts modeled after Part 26 and based on CHA's expert testimony, including about disparities in the overall Illinois construction industry); *see also Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 2015 WL 1396376 at * 21 (N.D. Ill.) ("Colette Holt [& Associates'] updated census analysis controlled for variables such as education, age, and occupation and still found lower earnings and rates of business formation among women and minorities as compared to White men."); *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) (holding that City of Chicago's M/WBE program for local construction contracts satisfied "compelling interest" standards using this framework).

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

owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.²⁰¹ As recognized by the Seventh Circuit Court of Appeals, “[e]vidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public Goods contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”²⁰²

This type of court-approved analysis is especially important for an agency such as the Tollway, which has been implementing a program for many years. the Tollway’s remedial market interventions through the use of race- and gender-based contract goals may ameliorate the disparate impacts of marketplace discrimination in the Tollway’s own contracting activities. Put another way, the program’s success in moving towards parity for minority and woman firms may be “masking” the effects of discrimination that, but for the contract goals, would mirror the disparities in M/WBE utilization in the overall economy.

To explore the question of whether firms owned by non-Whites and White women face disparate treatment in the Tollway’s marketplace outside of agency contracts, we examined two data sets. The first data set was the U.S. Bureau of the Census’ *American Community Survey* (“ACS”), which provided data to analyze disparities using individual entrepreneurs as the basic unit of analysis.²⁰³ With the ACS, we will address four basic questions:

1. What are the business formation rates for the different demographic groups? We ask this question to establish a basic baseline of business formation outcomes in the private sector.
2. What is the probability of a group forming a business once the analysis considers education, age, industry, and occupation? We want to explore the issue of demographic business formation difference once we statistically tease out possible non-demographic explanations for these differences.
3. Do business earnings vary by demographic group once the analysis considers education, age, industry, and occupation? This question explores the issue of demographic differences in the central business outcome (earnings) once we statistically tease out possible non-demographic explanations for these differences.
4. Do wages vary by demographic group once the analysis considers education, age, industry, and occupation? This question is similar to the third in examining wages instead of business earnings. It is important because

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

202. *Id.*

203. Data from 2017-2021 American Community Survey are the most recent for a five-year period.

economic research indicates that wage levels can impact the future business formation behavior of individual.

We used the state of Illinois (as we did in the previous chapter) as the geographic unit of analysis. We found disparities in wages, business earnings and business formation rates for minorities and women in all industry sectors in the Tollway's marketplace.²⁰⁴

The second data set was the U.S. Bureau's Annual Business Survey ("ABS"). The ABS supersedes the more well-known Survey of Business Owners ("SBO"). The SBO was last conducted in 2012 and historically had been reported every five years. In contrast, the ABS was first conducted in 2017 and it is the Census Bureau's goal to release results annually. This study utilizes the 2018 ABS which contains 2017 data.²⁰⁵ With the ABS data, six key variables are used in this analysis:

1. The number of all firms
2. The sales and receipts of all firms
3. The number of firms with employees (employer firms)
4. The sales and receipts of all employer firms
5. The number of paid employees
6. The annual payroll of employer firms

CHA examined these data in two ways: First, we calculated the minority- and woman-owned business share of each variable. Second, we calculated three disparity ratios for each grouping of minority- and woman-owned businesses and for the grouping of firms that are not non-White- or White woman-owned:

1. Ratio of sales and receipts share for all firms over the share of total number of all firms
2. Ratio of sales and receipts share for employer firms over the share of total number of employer firms
3. Ratio of annual payroll share over the share of total number of employer firms

204. Possible disparities in wages is important to explore because of the relationship between wages and business formation. Research by Alicia Robb and others indicate non-White firms rely on their own financing to start businesses compared to White firms who rely more heavily on financing provided by financial institutions. To the extent non-Whites face discrimination in the labor market, they would have reduced capacity to self-finance their entrepreneurial efforts and, hence, impact business formation. *See, for example*, Robb's "Access to Capital among Young Firms, Minority-owned Firms, Woman-owned Firms, and High-tech Firms" (2013), [https://www.sba.gov/sites/default/files/files/rs403tot\(2\).pdf](https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf).

205. While there are more recent surveys, much of the data needed for this analysis were not present. CHA reached out to the Census Bureau via e-mail and its response (dated November 11, 2022) was that the 2018 ABS sampled approximately 850,000 firms, which allowed a more complete set of data to be released. In the ABS conducted in 2019-2022, the sample was reduced to 300,000 firms; consequently, the detailed statistics presented in the 2018 ABS could not be reproduced. The 2023 ABS will return to the 2018 sample size of 850,000.

We explored the data to see if an M/WBE's share of sales/receipts and payroll approximates its share of firms. For example, Black firms might represent 10% of all firms but the sales for Black firms might capture just 2% of the sales of all firms. The ratio of Black share of sales over Black share of firms would be .2% (2% divided by 10%), indicating that the sales levels for Black firms in the industry is less than one would expect given the number of Black firms in the industry. As this ratio approaches one, we interpret that as a sign of approaching parity.

Results of the analysis of the ABS data indicate that non-Whites and White women's share of all employer firms is greater than their share of sales, payrolls, and employees. This supports the conclusion that barriers to business success disproportionately affect non-Whites and White women.

B. Disparate Treatment in the Illinois Tollway's Marketplace: Evidence from the Census Bureau's 2017 - 2021 American Community Survey

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

The *American Community Survey Public Use Microdata Sample* ("PUMS") is useful in addressing these issues. The ACS is an annual survey of one percent of the population and the PUMS provides detailed information at the individual level. In order to obtain robust results from our analysis, we used the file that combines the most recent data available for years 2016 through 2020.²⁰⁶ With this rich data

206. Initially, the Census Bureau contacted approximately 3.5M households. For the analysis reported in this Chapter, we examined over 290,000 observations. For more information about the ACS PUMS, see <https://www.census.gov/programs-surveys/acs/>.

set, our analysis can establish with greater certainty any causal links between race, gender and economic outcomes.

The Census Bureau classifies Whites, Blacks, Native Americans, and Asians as racial groupings. CHA developed a fifth grouping, “Other”, to capture individuals who are not a member of the above four racial categories. In addition, Hispanics are an ethnic category whose members could be of any race, *e.g.*, Hispanics could be White or Black. In order to avoid double counting – *i.e.*, an individual could be counted once as Hispanic and once as White – CHA developed non-Hispanic subset racial categories: non-Hispanic Whites; non-Hispanic Blacks; non-Hispanic Native Americans; non-Hispanic Asians; and non-Hispanic Others. When those five groups are added to the Hispanic group, the entire population is counted and there is no double-counting. When Whites are disaggregated into White men and White women, those groupings are non-Hispanic White men and non-Hispanic White women. For ease of exposition, the groups in this report are referred to as Black, Native American, Asian, Other, White women, and White men, while the actual content is the non-Hispanic subset of these racial groups.

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

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

With respect to the first result of regression analysis, we examined how variations in the race, gender, and industry of individuals impact the wages and other economic outcomes received by individuals. The technique allows us to determine the effect of changes in one variable, assuming that the other determining variables are the same. That is, we compare individuals of different races, but of the same

gender and in the same industry; or we compare individuals of different genders, but of the same race and the same industry; or we compare individuals in different industries, but of the same race and gender. We determine the impact of changes in one variable (*e.g.*, race, gender or industry) on another variable (wages), “controlling for” the movement of any other independent variables.

With respect to the second result of regression analysis, we determine the statistical significance of the relationship between the dependent variable and independent variable. For example, the relationship between gender and wages might exist (*e.g.*, holding all other factors constant, women earn less than men), but we find that it is not statistically different from zero. In this case, we are not confident that there is not any relationship between the two variables. If the relationship is not statistically different from zero, then a variation in the independent variable has no impact on the dependent variable. The regression analysis allows us to say with varying degrees of statistical confidence that a relationship is different from zero. If the estimated relationship is statistically significant at the 0.05 level, that indicates that we are 95% confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.01 level, that indicates that we are 99% confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.001 level, that indicates that we are 99.9% confident that the relationship is different from zero.²⁰⁷

In the following presentation of results, each sub-section first reports data on the share of a demographic group that forms a business (business formation rates); the probabilities that a demographic group will form a business relative to White men (business formation probabilities); the differences in wages received by a demographic group relative to White men (wage differentials); and the differences in business earnings received by a demographic group relative to White men (business earnings differentials). Because the ACS contained limited observations for certain groups in particular industries, we were unable to provide reliable estimates for business outcomes for these groups. However, there were always sufficient observations in the sample of wage earners in each group in each industry to permit us to develop reliable estimates. We developed these results using data from the U.S. Bureau of the Census’ ACS for the state of Illinois. The state of Illinois was also determined to be the geographic market in Chapter IV. Since the scope of the Tollway program covers goods, services and informational technology, we analyzed those three sectors.

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

1. The Goods Industry in the State of Illinois

One method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. Table 5-1 presents these results. As stated above, the business formation rate represents the share of a population that forms businesses. When developing industry-specific rates, we examine the population that works in that particular industry and identify what share of that sub-population form businesses. For example, Table 5-1 indicates that 5.3% of Blacks in the Goods industry form businesses; this is less than the 6.2% business formation rate for White men. There were low numbers of Hispanic, Native American and Other firms in the ACS sample; consequently, reliable estimates of firm outcomes could not be made for these groups. In Table 5-1, this is indicated by the symbol “-----”.²⁰⁸ Overall, this table indicates that White men have higher business formation rates compared to Blacks, Asians, and White women. Table 5-2 utilizes probit regression analysis to examine the probability of forming a business after controlling for important factors beyond race and gender.²⁰⁹ This table indicates that Blacks, Hispanics and White women are less likely to form businesses compared to similarly situated White men. The reduced probabilities of business formation ranged from 2.4% to 1.3%. The coefficients were not statistically significant.

Another way to measure equity is to examine how the wage and salary incomes and business earnings of particular demographic groups compare to White men. Multiple regression statistical techniques allowed us to examine the impact of race and gender on economic outcomes while controlling for other factors, such as education and age.²¹⁰ Tables 5-3 and 5-4 present these data on wage and salary incomes and business earnings respectively. Table 5-3 indicates that all M/WBE groups earn less than White men with the range of coefficients from -43.0% to 19.2%. All of these coefficients except for that for Native Americans were statistically significant at the 0.001 or 0.01 level. Table 5-4 indicates that none of coefficients was statistically significant.

With respect to the interpretation of the level of statistical significance of a result, as indicated in the latter part of the previous section, we explored whether the result of the regression analysis is statistically different from zero; if the finding is statistically significant, we also indicate the level of statistical confidence at which the result is accurate. Table 5-3 indicates that Blacks in the Goods industry earn wages 38.0% less than White men wage earners in the industry, once we control for age, education, and occupation. The statistical significance of this result is at the 0.001 level, which means we are 99.9%

208. This symbol was used through the chapter when there were insufficient observations to establish reliable estimates.

209. Appendix B provides a “Further Explanation of Probit Regression Analysis.”

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

statistically confident the result is true. If a result is non-zero but the result is not statistically significant, then we cannot rule out zero being the true result. Note: this does not mean the result is wrong, only that there is not a statistically significant level of confidence in the result.

**Table 5-1: Business Formation Rates
Goods, 2017 - 2021**

Demographic Group	Business Formation Rates
Black	5.3%
Hispanic	-----
Native American	-----
Asian/Pacific Islander	4.2%
Other	-----
White Women	2.4%
M/WBE	3.9%
White Male	6.2%

Source: CHA calculations from the American Community Survey

**Table 5-2: Business Formation Probability Differentials for Selected Groups
Relative to White Men, Goods, 2017 - 2021**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-1.6%
Hispanic	-----
Native American	-----
Asian/Pacific Islander	1.3%
Other	-----
White Women	-2.4%

Source: CHA calculations from the American Community Survey

**Table 5-3: Wage Differentials for Selected Groups Relative to White Men
Goods, 2017 - 2021**

Demographic Group	Wages Relative to White Men (% Change)
Black	-38.0%***
Hispanic	-19.3%***
Native American	-19.2%
Asian/Pacific Islander	-43.0%***
Other	-37.4%**
White Women	-32.9%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

**Table 5-4: Business Earnings Differentials for Selected Groups Relative to White Men
Goods, 2017 - 2021**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-115.0% ^a
Hispanic	-----
Native American	-----
Asian/Pacific Islander	-217.0%
Other	-----
White Women	-109.0%

a. The proper way to interpret a coefficient that is less than negative 100% (e.g., the value of the coefficient Native Americans Women in Table 5-3), is the percentage amount non-M/WBEs earn that is more than the group in question. In this case, White Men receive business earnings 115.0% more than Blacks in Goods industry.

Source: CHA calculations from the American Community Survey

2. The Services Industry in the State of Illinois

Tables 5-5 through 5-8 present the analysis of data in the Services industries. Table 5-5 indicates that all M/WBE groups formed businesses at a lower rate than White men. M/WBE business formation rates ranged from 5.0% (Others)

to 2.3% (Blacks) while White men had a business formation rate of 9.0%. Examining the business formation probabilities (Table 5-6) – once again controlling for age education and gender – Blacks, Hispanics, Asians and White women were less likely to form businesses compared to White men and these results were statistically significant. Table 5-7 present data on wage differentials: all coefficients for the wages for M/WBEs were statistically significant at the 0.001 or 0.01 level and they ranged from -50.6% to -14.6%. Business earnings – presented in Table 5-8 – indicate that only the coefficients for Blacks and White women were negative and statistically significant.

**Table 5-5: Business Formation Rates
Services, 2017 - 2021**

Demographic Group	Business Formation Rates
Black	2.3%
Hispanic	2.6%
Native American	-----
Asian/Pacific Islander	4.8%
Other	5.0%
White Women	4.8%
M/WBE	3.7%
White Male	9.0%

Source: CHA calculations from the American Community Survey

**Table 5-6: Business Formation Probability Differentials for Selected Groups
Relative to White Men, Services, 2017 - 2021**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-4.9%***
Hispanic	-3.3%***
Native American	-----
Asian/Pacific Islander	-2.0%**
Other	-0.6%
White Women	-2.4%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

**Table 5-7: Wage Differentials for Selected Groups Relative to White Men
Services, 2017 - 2021**

Demographic Group	Wages Relative to White Men (% Change)
Black	-39.8%***
Hispanic	-14.6%***
Native American	-50.6%**
Asian/Pacific Islander	-26.1%***
Other	-36.2%***
White Women	-31.4%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

**Table 5-8: Business Earnings Differentials for Selected Groups Relative to White Men
Services, 2017 - 2021**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-74.8%***
Hispanic	-27.2%
Native American	-----
Asian/Pacific Islander	-19.0%
Other	157.0%
White Women	-34.2%**

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

3. The Information Technology Industry in the State of Illinois

Tables 5-9 through 5-12 present the analysis of data in the information technology industry. Where there are sufficient observations to draw statistical inferences, M/WBEs formed businesses in this industry at a lower rate than White men (see Table 5-9). Their business formation rates ranged from 5.3% to 3.8%; for White men, the business formation rate was 6.7%. Table 5-10 shows that White women were 3.3% less likely to form businesses compared to White men and this result was statistically significant at the 0.05 level. The coefficients for the wages for Blacks, Hispanics, Asians and White women (pre-

sented in Table 5-11) were statistically significant at the 0.001 level and they ranged from -37.8% to -11.0%. Table 5-12 indicates that none of the coefficients were statistically significant.

**Table 5-9: Business Formation Rates
Information Technology, 2017 - 2021**

Demographic Group	Business Formation Rates
Black	5.3%
Hispanic	-----
Native American	-----
Asian/Pacific Islander	4.1%
Other	-----
White Women	2.6%
M/WBE	3.8%
White Male	6.7%

Source: CHA calculations from the American Community Survey

**Table 5-10: Business Formation Probability Differentials for Selected Groups
Relative to White Men, Information Technology, 2017 - 2021**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-0.2%
Hispanic	-----
Native American	-----
Asian/Pacific Islander	-2.7%
Other	-----
White Women	-3.3%*

Source: CHA calculations from the American Community Survey

* Indicates statistical significance at the 0.05 level

**Table 5-11: Wage Differentials for Selected Groups Relative to White Men
Information Technology, 2017 - 2021**

Demographic Group	Wages Relative to White Men (% Change)
Black	-37.8%***
Hispanic	-26.3%***
Native American	1.0%
Asian/Pacific Islander	-11.0%***
Other	-21.1%
White Women	-13.9%***

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

**Table 5-12: Business Earnings Differentials for Selected Groups Relative to White Men
Information Technology, 2017 - 2021**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-111.0%
Hispanic	-----
Native American	-----
Asian/Pacific Islander	43.6%
Other	-----
White Women	49.9%

Source: CHA calculations from the American Community Survey

Overall, the data presented in the above Tables indicate that non-Whites and White women form businesses less than White men and their wage and business earnings are less than those of White men. These analyses support the conclusion that barriers to business success do affect non-Whites and White women.

C. Disparate Treatment in the Illinois Tollway's Marketplace: Evidence from the Census Bureau's 2017 Annual Business Survey

We further examined whether non-Whites and White women have disparate outcomes when they are active in the state of Illinois – the geographic market for the Tollway. This question is operationalized by exploring if the share of business receipts, number of firms, and payroll for firms owned by non-Whites and White women is greater than, less than, or equal to the share of all firms owned by non-Whites and White women.

To answer this question, we examined the U.S. Bureau's Annual Business Survey ("ABS"). The ABS surveyed about 850,000 employer firms and collected data on a variety of variables documenting ownership characteristics including race, ethnicity, and gender. It also collected data on the firms' business activity with variables marking the firms' number of employees, payroll size, sales and industry.²¹¹ For this analysis, we examined firms in the state of Illinois. The state was the geographic unit of analysis because the ABS does not present data at the sub-state level.

With these data, we grouped the firms into the following ownership categories:^{212,213}

- Hispanics
- Non-Hispanic Blacks
- Non-Hispanic Native Americans
- Non-Hispanic Asians
- Non-Hispanic White women
- Non-Hispanic White men
- Firms equally owned by non-Whites and Whites
- Firms equally owned by men and women
- Firms that were either publicly-owned or where the ownership could not be classified

211. For more information on the Annual Business Survey see <https://www.census.gov/programs-surveys/abs/about.html>.

212. Race and gender labels reflect the categories used by the Census Bureau.

213. For expository purposes, the adjective "non-Hispanic" will not be used in this Chapter; the reader should assume that any racial group referenced does not include members of that group who identify ethnically as Hispanic.

For purposes of this analysis, the first four groups were aggregated to form a non-White category. Since our interest is the treatment of non-White-owned firms and White woman-owned firms, the last four groups were aggregated to form one category. To ensure this aggregated group is described accurately, we label this group “not non-White/non-White women”. While this label is cumbersome, it is important to be clear this group includes firms whose ownership extends beyond White men, such as firms that are not classifiable or that are publicly traded and thus have no racial ownership. In addition to the ownership demographic data, the Survey also gathers information on the sales, number of paid employees, and payroll for each reporting firm.

The ABS data – a sample of all businesses, not the entire universe of all businesses – required some adjustments. In particular, we had to define the sectors at the two-digit North American Industry Classification System (“NAICS”) code level, and therefore our sector definitions do not exactly correspond to the definitions used to analyze the state’s contract data in Chapter IV, where we are able to determine sectors at the six-digit NAICS code level. At a more detailed level, the number of firms sampled in particular demographic and sector cells may be so small that the Census Bureau does not report the information, either to avoid disclosing data on businesses that can be identified or because the small sample size generates unreliable estimates of the universe. We therefore report two-digit data.

We analyzed the ABS data on the Goods and Services (information technology is included in Services) industries. Table 5-13 presents information on which NAICS codes were used to define each sector.²¹⁴

Table 5-13: Two-Digit NAICS Code Definition of Sector

ABS Sector Label	Two-Digit NAICS Codes
Goods	31,42, 44
Other Services	48, 52, 53, 56, 61, 62, 71, 72, 81

The balance of this Chapter reports the findings of the ABS analysis.

1. Goods Industry

Table 5-14 presents data on the percentage share that each group has of the total of each of the following four business outcomes:

- 1. The number of firms with employees (employer firms)

214. The two-digit NAICS code level did not allow us to define and analyze an information technology industry as we did with the ACS data.

2. The sales and receipts of all employer firms
3. The number of paid employees
4. The annual payroll of employer firms

Panel A of Table 5-14 presents data for the four basic non-White racial groups:

1. Black
2. Hispanic
3. Asian
4. Native American

Panel B of Table 5-14 presents data for the following types of firm ownership:

- Non-White
- White women
- Not non-White/non-White women²¹⁵

Categories in the second panel are mutually exclusive. Hence, firms that are non-White and equally owned by men and women are classified as non-White and firms that are equally owned by non-Whites and Whites and equally owned by men and women are classified as equally owned by non-Whites and Whites.

Since the central issue is the possible disparate treatment of non-White firms and White woman firms, we calculate three disparity ratios each for Black, Hispanic, Asian, Native American, non-White, and White woman firm respectively (a total of 18 ratios), presented in Table 5-15:

- Ratio of sales and receipts share for all employer firms over the share of total number of all employer firms.
- Ratio of sales and receipts share for employer firms over the share of total number of employer firms.
- Ratio of annual payroll share over the share of total number of employer firms.

For example, the disparity ratio of sales and receipts share for all firms over the share of total number of all employer firms for Black firms is 21.5% (as shown in Table 5-15). This is derived by taking the Black share of sales and receipts for all employer firms (0.2%) and dividing it by the Black share of total number of all employer firms (0.8%) that are presented in Table 5-14.²¹⁶ If Black-owned

215. Again, while a cumbersome nomenclature, it is important to remain clear that this category includes firms other than those identified as owned by White men.

firms earned a share of sales equal to their share of total firms, the disparity index would have been 100%. An index less than 100% indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission's "80% rule" that a ratio less than 80% presents a *prima facie* case of discrimination.²¹⁷ All of the 18 disparity ratios for non-White firms and White woman firms (presented in Table 5-15) are below this threshold.²¹⁸

**Table 5-14: Demographic Distribution of Sales and Payroll Data – Aggregated Groups
Goods, 2017**

	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms				
Black	0.8%	0.2%	0.2%	0.2%
Hispanic	2.7%	0.5%	0.8%	0.7%
Asian	10.7%	1.3%	2.1%	1.4%
Native American	0.0%	0.0%	0.0%	0.0%
Panel B: Distribution of All Firms				
Non-White	14.2%	2.0%	3.1%	2.3%
White Women	13.7%	2.5%	4.6%	4.2%
Not Non-White/Not White Women	72.1%	95.5%	92.3%	93.5%
All Firms	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from American Business Survey

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216. Please note that while the numbers presented in Table 5-14 are rounded to the first decimal place, the calculations resulting in the numbers presented in Table 5-15 are based on the actual (non-rounded) figures. Therefore, the Black ratio presented in Table 5-11 of 21.5% is not the same figure as that which would be derived when you divided 0.2 by 0.8 (the numbers presented in Table 5-14).
217. 29 C.F.R. §1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").
218. Because the data in the subsequent tables are presented for descriptive purposes, significance tests on these results are not conducted.

**Table 5-15: Disparity Ratios – Aggregated Groups
Goods, 2017**

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
Panel A: Disparity Ratios for Non-White Firms			
Black	21.5%	23.4%	18.4%
Hispanic	18.7%	30.7%	25.5%
Asian	12.1%	19.8%	13.3%
Native American	74.6%	46.1%	48.7%
Panel B: Disparity Ratios for All Firms			
Non-White	14.0%	22.1%	15.9%
White Women	18.1%	33.4%	30.9%
Not Non-White/Not White Women	132.5%	128.0%	129.7%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from American Business Survey

2. Other Services Industry

Tables 5-16 and 5-17 present the same analysis for the Other Services industry. Of the 18 disparity ratios for non-White firms and White woman firms presented in Table 5-17, 16 fall under the 80% threshold.

**Table 5-16: Demographic Distribution of Sales and Payroll Data – Aggregated Groups
Other Services, 2017**

	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms				
Black	1.9%	0.4%	1.0%	0.6%
Hispanic	7.1%	1.0%	1.8%	1.0%
Asian	9.2%	2.0%	3.6%	2.1%
Native American	0.0%	0.0%	0.0%	0.0%
Panel B: Distribution of All Firms				
Non-White	18.3%	3.5%	6.5%	3.8%

	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
White Women	17.1%	3.9%	7.2%	4.7%
Not Non-White/Not White Women	64.6%	92.6%	86.3%	91.5%
All Firms	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from American Business Survey

Table 5-17: Disparity Ratios – Aggregated Groups
Other Services, 2017

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
Panel A: Disparity Ratios for Non-White Firms			
Black	24.0%	55.0%	33.2%
Hispanic	13.5%	25.7%	14.6%
Asian	22.1%	39.1%	23.1%
Native American	82.2%	300.1%	123.0%
Panel B: Disparity Ratios for All Firms			
Non-White	19.0%	35.7%	20.9%
White Women	22.9%	41.9%	27.6%
Not Non-White/Not White Women	143.3%	133.5%	141.5%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from American Business Survey

3. Conclusion

Overall, the analysis of the ABS data presented in the above tables indicate that the non-White share and White woman share of all employer firms is greater than their share of sales, payrolls, and employees. This supports the conclusion that barriers to business success disproportionately affect non-Whites and White women.

D. Evidence of Disparities in Access to Business Capital

Capital is the lifeblood of any business. Participants in the anecdotal data collection universally agreed to this fundamental fact. The interviews with business owners conducted as part of this Study confirmed that small firms, especially minority- and woman-owned firms, had difficulties obtaining needed working capital to perform on state contracts and subcontracts, as well as expand the capacities of their firms. As demonstrated by the analyses of Census Bureau data, above, discrimination may even prevent firms from forming in the first place.

There are extensive federal agency reports and much scholarly work on the relationship between personal wealth and successful entrepreneurship. There is a general consensus that disparities in personal wealth translate into disparities in business creation and ownership.²¹⁹ The most recent research highlights the magnitude of the COVID-19 pandemic's disproportionate impact on minority-owned firms.

1. Federal Reserve Board Small Business Credit Surveys²²⁰

The Development Office of the 12 Reserve Banks of the Federal Reserve System has conducted Small Business Credit Surveys ("SBCS") to develop data on small business performance and financing needs, decisions, and outcomes.

a. 2022 Report on Firms Owned by People of Color

This Report constitutes a follow-up to the *Small Business Credit Survey 2021 Report on Firms Owned by People of Color*,²²¹ which found that businesses owned by people of color often face more financial and operational challenges than their White counterparts and were frequently less successful at obtaining the funding necessary to weather the effects of the global COVID-19 pandemic. It finds that these disparities continue to persist. The Report contains results for employer firms with 1 to 499 employees other than the owners by four race/ethnicity categories: Asian or Pacific Islanders; Black or African American; Hispanic or Latino; and White.²²²

219. See, e.g., Evans, David S. and Jovanovic, Boyan, "An Estimated Model of Entrepreneurial Choice under Liquidity Constraints," *Journal of Political Economy*, Vol. 97, No. 4, 1989, pp. 808-827; David S. Evans and Linda S. Leighton, "Some empirical aspects of entrepreneurship," *The American Economic Review*, Vol. 79, No. 3, 1989, pp. 519-535.

220. This survey offers baseline data on the financing and credit positions of small firms before the onset of the pandemic. See [fedsmallbusiness.org](https://www.fedsmallbusiness.org).

221. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color>.

222. Findings for Native American-owned firms were omitted from the report because sample sizes were too small to make precise estimates for most measures.

The Report found that while revenues and employment improved for some businesses, most firms, particularly those owned by people of color, had not yet recovered from the effects of the pandemic. Firms owned by people of color were more likely than White-owned firms to report declines in revenue and employment in the prior twelve months. Both Asian- and Black-owned firms were more than twice as likely as White-owned firms to be in poor financial condition at the time of the survey. Asian-owned firms were more likely than other firms to report weak sales as a financial challenge, while Black-owned firms were more likely than others to say that credit availability was a concern.

The Report also found that firms owned by people of color were more likely to seek pandemic-related financial assistance than White-owned firms. Firms were less likely to apply for the Paycheck Protection Program (“PPP”) in 2021 than in 2020; however, when they did apply, firms owned by people of color were less likely than White-owned firms to report receiving the full amount of funding for which they applied in the prior twelve months.²²³

While firms owned by people of color were more likely to apply for traditional financing than White-owned firms (excluding pandemic-related assistance programs in the prior twelve months), they were less likely to receive the funding sought. Compared to White-owned businesses, firms owned by people of color sought smaller amounts of financing. Among low-credit-risk applicants, firms owned by people of color were less likely than White-owned firms to receive all the financing they sought.

Applicant firms were more likely to seek loans, lines of credit, and cash advances at large or small banks than at nonbank lenders. However, firms owned by people of color were less likely than White-owned firms to be approved for financing. Regardless of the type of lender they applied to, firms owned by people of color were less likely than White-owned firms to be approved for the full amount of funding sought. Firms owned by people of color were half as likely as White-owned firms to be fully approved for a loan or line of credit at a small bank and almost a third as likely to be fully approved at a nonbank finance company.

b. 2022 Small Business Credit Survey

The 2022 Small Business Credit Survey (“2022 Survey”)²²⁴ gathered insights about the COVID-19 pandemic’s continuing impact on small busi-

223. The Report finds that in 2021, firms continued to rely on pandemic-related financial assistance, including the PPP, Economic Injury Disaster Loans (“EIDL”) and other federal, state, and local funding programs. EIDL and PPP loans were the most common.

224. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2022-sbcs-employer-firms-report>.

nesses, including workforce challenges, business performance, and credit conditions. The 2022 Survey yielded 10,914 responses from a nationwide convenience sample of small business firms with 1-499 full- or part-time employees across all 50 states and the District of Columbia. The 2022 Survey was fielded during September through November of 2021 and was the second survey conducted during the global pandemic.

The 2022 Survey found that the pandemic continues to significantly impact firms, with 77% reporting negative effects. While pandemic-related financial assistance programs, including the PPP, were widely used in 2020 and 2021, the 2022 Survey found a decline in their use in the 12 months prior to the Survey. Personal funds and cash reserves remain an important source of financial stability for small businesses, while financing approval rates continue to decline relative to pre-pandemic levels. Although two-thirds of employer firms received pandemic-related financial assistance in the prior 12 months, firms were less likely to seek financial assistance than they were earlier in the pandemic. Approval rates on loans, lines of credit and cash advance applications declined for the second consecutive year. Other key findings include:

- More than half of firms were in fair or poor financial condition at the time of the Survey, and nearly all firms faced at least one operational or financial challenge in the prior 12 months.
- Firms owned by people of color, smaller firms, and leisure and hospitality firms were most likely to be in fair or poor financial condition.

Application rates for traditional financing were lower in 2021 than in prior years, and those who applied were less likely to receive the financing they sought. Firms owned by people of color, firms with fewer employees, and leisure and hospitality firms were least likely to receive the full amount of financing sought.

c. 2021 Report on Firms Owned by People of Color

i. Overview

The *2021 Report on Firms Owned by People of Color*²²⁵ compiles results from the 2020 SBCS. The SBCS provides data on small business performance, financing needs, and decisions and borrowing outcomes.^{226,227} The Report provides results by four race/ethnicity cate-

225. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color>.

226. The SBCS is an annual survey of firms with fewer than 500 employees.

gories: White, Black or African American, Hispanic or Latino, and Asian or Pacific Islander. For select key statistics, it also includes results for 4,531 non-employer firms, which are firms with no employees on payroll other than the owner(s) of the business.

Patterns of geographic concentration emerged among small business ownership by race and ethnicity. This was important given the progressive geographic spread of the novel coronavirus throughout 2020 and variations in state government responses to limit its spread. The Report found that 40% of Asian-owned small employer firms are in the Pacific census division, and another 28% are in the Middle Atlantic. Early and aggressive efforts by the impacted states may have affected the revenue performance of Asian-owned firms in the aggregate given their geographic concentration. Black-owned and Hispanic-owned small employer firms are more concentrated in the South Atlantic region, which includes states with a mix of pandemic responses. For example, while Florida lifted COVID-19 restrictions relatively quickly, the South Atlantic, including North Carolina, maintained more strict guidelines.

The Report found that firms owned by people of color continue to face structural barriers in acquiring the capital, business acumen, and market access needed for growth. At the time of the 2020 SBCS – six months after the onset of the global pandemic – the U.S. economy had undergone a significant contraction of economic activity. As a result, firms owned by people of color reported more significant negative effects on business revenue, employment, and operations. These firms anticipated revenue, employment, and operational challenges to persist into 2021 and beyond. Specific findings are, as follows:

ii. Performance and Challenges

Overall, firms owned by people of color were more likely than White-owned firms to report that they reduced their operations in response to the pandemic. Asian-owned firms were more likely than others to have temporarily closed and to have experienced declines in revenues and employment in the 12 months prior to the survey. In terms of sales and the supply chain, 93% of Asian-owned firms and 86% of Black-owned firms reported sales declines as a result of the pandemic. Relative to financial challenges for the prior 12 months, firms owned by people of color were more likely than White-owned firms to report financial challenges, including paying operating expenses, paying rent, making payments on debt, and credit availability. Black-owned business owners were most likely to have used personal funds in response to

227. The 2020 SBCS was fielded in September and October 2020 and yielded 9,693 responses from small employer firms in all 50 states and the District of Columbia.

their firms' financial challenges. Nearly half of Black-owned firms reported concerns about personal credit scores or the loss of personal assets. By contrast, one in five White-owned firms reported no impact on the owners' personal finances. Asian-owned firms were approximately twice as likely as White-owned firms to report that their firms were in poor financial condition.

iii. Emergency Funding

The *Report* finds that PPP loans were the most common form of emergency assistance funding that firms sought during the period. Black-owned and Hispanic-owned firms were less likely to apply for a PPP loan. Only six in ten Black-owned firms actually applied. Firms owned by people of color were more likely than White-owned firms to report that they missed the deadline or were unaware of the program. Firms owned by people of color were less likely than White-owned firms to use a bank as a financial services provider. Regardless of the sources at which they applied for PPP loans, firms that used banks were more likely to apply for PPP loans than firms that did not have a relationship with a bank. While firms across race and ethnicity were similarly likely to apply for PPP loans at large banks, White- and Asian-owned firms more often applied at small banks than did Black- and Hispanic-owned firms. Black-owned firms were nearly half as likely as White-owned firms to receive all of the PPP funding they sought and were approximately five times as likely to receive none of the funding they sought.

iv. Debt and Financing

Black-owned firms have smaller amounts of debt than other firms. About one in ten firms owned by people of color do not use financial services.

On average, Black-owned firms completed more financing applications than other applicant firms. Firms owned by people of color turned more often to large banks for financing. By contrast, White-owned firms turned more often to small banks. Black-owned applicant firms were half as likely as White-owned applicant firms to be fully approved for loans, lines of credit, and cash advances.

Firms owned by people of color were less satisfied than White-owned firms with the support from their primary financial services provider during the pandemic. Regardless of the owner's race or ethnicity, firms were less satisfied with online lenders than with banks and credit unions.

In the aggregate, 63% of all employer firms were non-applicants – they did not apply for non-emergency financing in the prior 12 months. Black-owned firms were more likely than other firms to apply for non-emergency funding in the 12 months prior to the survey. One-quarter of Black- and Hispanic-owned firms that applied for financing sought \$25,000 or less. In 2020, firms owned by people of color were more likely than White-owned firms to apply for financing to meet operating expenses. The majority of non-applicant firms owned by people of color needed funds but chose not to apply, compared to 44% of White-owned firms. Financing shortfalls were most common among Black-owned firms and least common among White-owned firms.

Firms of color, and particularly Asian-owned firms, were more likely than White-owned firms to have unmet funding needs. Just 13% of Black-owned firms received all of the non-emergency financing they sought in the 12 months prior to the survey, compared to 40% of White-owned firms. Black-owned firms with high credit scores were half as likely as their White counterparts to receive all of the non-emergency funding they sought.

v. Findings for Non-employer Firms

Non-employer firms, those that have no paid employees other than the owner, represent the overwhelming majority of small businesses across the nation. In all, 96% of Black-owned and 91% of Hispanic-owned firms are non-employer firms, compared to 78% of White-owned and 75% of Asian-owned firms.²²⁸

Compared to other non-employer firms, Asian-owned firms reported the most significant impact on sales as a result of the pandemic. They were most likely to report that their firm was in poor financial condition at the time of the survey.

Compared to other non-employer firms that applied for financing, Black-owned firms were less likely to receive all of the financing they sought. Black-owned non-employer firms that applied for PPP loans were less likely than other firms to apply at banks and more often turned to online lenders. Among PPP applicants, White-owned non-employer firms were twice as likely as Black-owned firms to receive all of the PPP funding they sought.

228. The Report notes that a future report will describe findings from the 2020 SBCS for non-employers in greater detail.

d. 2021 Small Business Credit Survey

The 2021 SBCS²²⁹ reached more than 15,000 small businesses, gathering insights about the COVID-19 pandemic's impact on small businesses, as well as business performance and credit conditions. The 2021 Survey yielded 9,693 responses from a nationwide convenience sample of small employer firms with between one and 499 full- or part-time employees across all 50 states and the District of Columbia. The 2021 Survey was fielded in September and October 2020, approximately six months after the onset of the pandemic. The timing of the 2021 Survey is important to the interpretation of the results. At the time of the 2021 survey, the PPP authorized by the Coronavirus Relief and Economic Security Act had recently closed applications, and prospects for additional stimulus funding were uncertain. Additionally, many government-mandated business closures had been lifted as the number of new COVID-19 cases plateaued in advance of a significant increase in cases by the year's end.

The 2021 Survey findings highlight the magnitude of the pandemic's impact on small businesses and the challenges they anticipate as they navigate changes in the business environment. Few firms avoided the negative impacts of the pandemic. Furthermore, the findings reveal disparities in experiences and outcomes across firm and owner demographics, including race and ethnicity, industry, and firm size.

Overall, firms' financial conditions declined sharply and those owned by people of color reported greater challenges. The most important anticipated financial challenge differed by race and ethnicity of the owners. Among the findings for employer firms relevant to discriminatory barriers were the following:

- For Black-owned firms, credit availability was the top expected challenge, while Asian-owned firms disproportionately cited weak demand.
- The share of firms in fair or poor financial conditions varied by race: 79% of Asian-owned firms, 77% of Black-owned firms, 66% of Hispanic-owned firms and 54% of White-owned firms reported this result.
- The share of firms that received all the financing sought to address the impacts of the pandemic varied by race: 40% of White-owned firms received all the funding sought, but only 31% of Asian-owned firms, 20% of Hispanic-owned firms and 13% of Black-owned firms achieved this outcome.

229. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report>.

e. 2018 Small Business Credit Survey

The 2018 SBCS²³⁰ focused on minority-owned firms. The analysis was divided into two types: employer firms and non-employer firms.

i. Employer firms

Queries were submitted to businesses with fewer than 500 employees in the third and fourth quarters of 2018. Of the 7,656 firms in the unweighted sample, five percent were Asian, ten percent were Black, six percent were Hispanic, and 79% were White. Data were then weighted by number of employees, age, industry, geographic location (census division and urban or rural location), and minority status to ensure that the data is representative of the nation's small employer firm demographics.²³¹

Among the findings for employer firms relevant to discriminatory barriers were the following:

- Not controlling for other firm characteristics, fewer minority-owned firms were profitable compared to non-minority-owned firms during the past two years.²³² On average, minority-owned firms and non-minority-owned firms were about as likely to be growing in terms of number of employees and revenues.²³³
- Black-owned firms reported more credit availability challenges or difficulties obtaining funds for expansion—even among firms with revenues of more than \$1M. For example, 62% of Black-owned firms reported that obtaining funds for expansion was a challenge, compared to 31% of White-owned firms²³⁴.
- Black-owned firms were more likely to report relying on personal funds of owner(s) when they experienced financial challenges to fund their business. At the same time, White- and Asian-owned firms reported higher debt levels than Black- and Hispanic-owned firms.²³⁵
- Black-owned firms reported more attempts to access credit than White-owned firms but sought lower amounts of financing.

230. Small Business Credit Survey, <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

231. *Id.* at 22. Samples for SBCS are not selected randomly. To control for potential biases, the sample data are weighted so that the weighted distribution of firms in the SBCS matches the distribution of the small firm population in the United States by number of employees, age industry, geographic location, gender of owner, and race or ethnicity of owners.

232. *Id.* at 3.

233. *Id.* at 4.

234. *Id.* at 5.

235. *Id.* at 6.

- Forty percent of Black-owned firms did not apply because they were discouraged, compared to 14% of White-owned firms.²³⁶
- Low credit score and lack
- of collateral were the top reported reasons for denial of applications by Black- and Hispanic-owned firms.²³⁷

ii. Non-employer firms²³⁸

Queries were submitted to non-employer firms in the third and fourth quarters of 2018. Of the 4,365 firms in the unweighted sample, five percent were Asian, 24% were Black, seven percent were Hispanic, and 64% were White. Data were then weighted by age, industry, geographic location (census division and urban or rural location), and minority status.²³⁹

Among the findings for non-employer firms relevant to discriminatory barriers were the following:

- Black-owned firms were more likely to operate at a loss than other firms.²⁴⁰
- Black-owned firms reported greater financial challenges, such as obtaining funds for expansion, accessing credit and paying operating expenses than other businesses.²⁴¹
- Black- and Hispanic-owned firms submitted more credit applications than White-owned firms.²⁴²

f. 2016 Small Business Credit Survey

The 2016 Small Business Credit Survey²⁴³ obtained 7,916 responses from employer firms with race/ethnicity information and 4,365 non-employer firms in the 50 states and the District of Columbia. Results were reported with four race/ethnicity categories: White, Black or African American, Hispanic, and Asian or Pacific Islander.²⁴⁴ It also reported results from woman-owned small employer firms, defined as firms where 51% or more of the

236. *Id.* at 9.

237. *Id.* at 15.

238. *Id.* at 18.

239. *Id.* at 18.

240. *Id.*

241. *Id.* at 19.

242. *Id.* at 20.

243. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

244. When the respondent sample size by race for a survey proved to be too small, results were communicated in terms of minority vis-à-vis non-minority firms.

business is owned by women, and compared their experiences with male-owned small employer firms.

i. **The 2016 Small Business Credit Survey: Report on Minority-Owned Firms²⁴⁵**

The 2016 SBCS Report on Minority-Owned Firms provided results for White-, Black- or African American-, Hispanic-, and Asian- or Pacific Islander-owned firms.

Demographics²⁴⁶

The Report found that Black-, Asian-, and Hispanic-owned firms tended to be younger and smaller in terms of revenue size, and they were concentrated in different industries. Black-owned firms were concentrated in the healthcare and education industry sectors (24%). Asian-owned firms were concentrated in professional services and real estate (28%). Hispanic-owned firms were concentrated in non-manufacturing goods production and associated services industry, including building trades and Goods (27%). White-owned firms were more evenly distributed across several industries but operated most commonly in the professional services industry and real estate industries (19%), and non-manufacturing goods production and associated services industry (18%).²⁴⁷

Profitability Performance Index²⁴⁸

After controlling for other firm characteristics, the Report found that fewer minority-owned firms were profitable compared to non-minority-owned firms during the prior two years. This gap proved most pronounced between White-owned (57%) and Black-owned firms (42%). On average, however, minority-owned firms and non-minority-owned firms were nearly as likely to be growing in terms of number of employees and revenues.

Financial and Debt Challenges/Demands²⁴⁹

The number one reason for financing was to expand the business or pursue a new opportunity. Eighty-five percent of applicants sought a loan or line of credit. Black-owned firms reported more attempts to

245. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

246. 2016 SBCS, at 2.

247. *Id.* Forty-two percent of Black-owned firms, 21% of Asian-owned firms, and 24% of Hispanic-owned firms were smaller than \$100K in revenue size compared with 17% of White-owned firms.

248. *Id.* at 3-4.

249. *Id.* at 8-9; 11-12; 13; 15.

access credit than White-owned firms but sought lower amounts of financing.

Black-, Hispanic-, and Asian-owned firms applied to large banks for financing more than they applied to any other sources of funds. Having an existing relationship with a lender was deemed more important to White-owned firms when choosing where to apply compared to Black-, Hispanic- and Asian-owned firms.

The Report also found that small Black-owned firms reported more credit availability challenges or difficulties for expansion than White-owned firms, even among firms with revenues in excess of \$1M. Black-owned firm application rates for new funding were ten percentage points higher than White-owned firms; however, their approval rates were 19 percentage points lower. A similar but less pronounced gap existed between Hispanic- and Asian-owned firms compared with White-owned firms. Of those approved for financing, only 40% of minority-owned firms received the entire amount sought compared to 68% of non-minority-owned firms, even among firms with comparably good credit scores.

Relative to financing approval, the Report found stark differences in loan approvals between minority-owned and White-owned firms. When controlling for other firm characteristics, approval rates from 2015 to 2016 increased for minority-owned firms and stayed roughly the same for non-minority-owned firms. Hispanic- and Black-owned firms reported the highest approval rates at online lenders.²⁵⁰

Low credit score and lack of collateral were the top reported reasons for denial of Black- and Hispanic-owned firms' applications. Satisfaction levels were lowest at online lenders for both minority- and non-minority-owned firms. A lack of transparency was cited as one of the top reasons for dissatisfaction for minority applicants and borrowers.

Forty percent of non-applicant Black-owned firms reported not applying for financing because they were discouraged (expected not to be approved), compared with 14% of White-owned firms. The use of personal funds was the most common action taken in response to financial challenges, with 86% of Black-owned firms, 77% of Asian-owned firms, 76% of White-owned firms, and 74% of Hispanic-owned firms using this as its source.

250. The share of minority-owned firms receiving at least some financing was lower across all financing products, compared with non-minority firms.

A greater share of black-owned firms (36%) and of Hispanic-owned firms (33%) reported existing debt in the past 12 months of less than \$100,000, compared with 21% of White-owned firms and 14% of Asian-owned firms. Black-owned firms applied for credit at a higher rate and tended to submit more applications, compared with White-owned firms. Black-, Hispanic-, and Asian-owned firms applied for higher-cost products and were more likely to apply to online lenders compared to White-owned firms.

Business Location Impact²⁵¹

Controlling for other firm characteristics, minority-owned firms located in low-income minority zip codes reported better credit outcomes at large banks, compared with minority-owned firms in other zip codes. By contrast, at small banks, minority-owned firms located in low- and moderate-income minority zip codes experienced lower approval rates than minority-owned firms located in other zip codes.

Non-employer Firms²⁵²

Non-employer firms reported seeking financing at lower rates and experienced lower approval rates than employer firms, with Black-owned non-employer firms and Hispanic-owned non-employer firms experiencing the most difficulty. White-owned non-employer firms experienced the highest approval rates for new financing, while Black-owned non-employer firms experienced the lowest approval rates for new financing.

ii. The 2016 Small Business Credit Survey: Report on Woman-Owned Firms²⁵³

The 2016 SBCS Report on Woman-Owned Firms provides results from woman-owned small employer firms where 51% or more of the business is owned by women. These data compared the experience of these firms compared with male-owned small employer firms.

251. *Id.* at 17.

252. *Id.* at 21.

253. <https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-WomenOwnedFirms-2016.pdf>.

Firm Characteristics: Woman-Owned Firms Start Small and Remain Small and Concentrate in Less Capital-Intensive Industries²⁵⁴

The Report found that 20% of small employer firms were woman-owned, compared to 65% male-owned and 15% equally owned. Woman-owned firms generally had smaller revenues and fewer employees than male-owned small employer firms. These firms tended to be younger than male-owned firms.

Woman-owned firms were concentrated in less capital-intensive industries. Two out of five woman-owned firms operated in the healthcare and education or professional services and real estate industries. Male-owned firms were concentrated in professional services, real estate, and non-manufacturing goods production and associated services.²⁵⁵

Profitability Challenges and Credit Risk Disparities²⁵⁶

Woman-owned firms were less likely to be profitable than male-owned firms. These firms were more likely to report being medium or high credit risk compared to male-owned firms. Notably, gender differences by credit risk were driven by woman-owned startups. Among firms older than five years, credit risk was indistinguishable by the owner's gender.

Financial Challenges During the Prior Twelve Months²⁵⁷

Woman-owned firms were more likely to report experiencing financial challenges in the prior twelve months: 64% compared to 58% of male-owned firms. They most frequently used personal funds to fill gaps and make up deficiencies. Similar to male-owned firms, woman-owned firms frequently funded operations through retained earnings. Ninety percent of woman-owned firms relied upon the owner's personal credit score to obtain financing.

Debt Differences²⁵⁸

Sixty-eight percent of woman-owned firms had outstanding debt, similar to that of male-owned firms. However, woman-owned firms tended

254. 2016 SBBS, at 1-5.

255. on-manufacturing goods production and associated services refers to firms engaged in Agriculture, Forestry, Fishing, and Hunting; Mining, Quarrying, and Oil and Gas Extraction; Utilities; Goods; Wholesale Trade; Transportation and Warehousing (NAICS codes: 11, 21, 22, 23, 42, 48-49).

256. *Id.* at 6-7.

257. *Id.* at 8.

258. *Id.* at 10.

to have smaller amounts of debt, even when controlled for the revenue size of the firm.

Demands for Financing²⁵⁹

Forty-three percent of woman-owned firms applied for financing. Woman-owned applicants tended to seek smaller amounts of financing even when their revenue size was comparable.

Overall, woman-owned firms were less likely to receive all financing applied for compared to male-owned firms. Woman-owned firms received a higher approval rate for U.S. Small Business Administration loans compared to male-owned firms. Low-credit, woman-owned firms were less likely to be approved for business loans than their male counterparts with similar credit (68% compared to 78%).

Firms That Did Not Apply for Financing²⁶⁰

Woman-owned firms reported being discouraged from applying for financing for fear of being turned down at a greater rate: 22% compared to 15% for male-owned firms. Woman-owned firms cited low credits scores more frequently than male-owned firms as their chief obstacle in securing credit. By contrast, male-owned businesses were more likely to cite performance issues.

Lender Satisfaction²⁶¹

Woman-owned firms were most consistently dissatisfied by lenders' lack of transparency and by long waits for credit decisions. However, they were notably more satisfied with their borrowing experiences at small banks rather than large ones.

2. Small Business Administration Loans to African American Businesses (2020)

As detailed in a 2021 article published in the *San Francisco Business Times*,²⁶² the number of loans to Black businesses through the SBA's 7(a) program²⁶³

259. *Id.* at 16.

260. *Id.* at 14.

261. *Id.* at 26.

262. SBA Loans to African American Businesses Decrease 35%, *San Francisco Business Times* (August 11, 2021) at: <https://www.bizjournals.com/sanfrancisco/news/2021/08/11/sba-loans-to-african-american-businesses-decrease.html>. Data were obtained through a Freedom of Information Act request.

263. Section 7(a) of the Small Business Act of 1953 (P.L. 83-163, as amended).

decreased 35% in 2020.²⁶⁴ This was the largest drop in lending to any race or ethnic group tracked by the SBA. The 7(a) program is the SBA's primary program for financial assistance to small businesses. Terms and conditions, like the guaranty percentage and loan amount, vary by the type of loan. Lenders and borrowers can negotiate the interest rate, but it may not exceed the SBA maximum.²⁶⁵

Bankers, lobbyists, and other financial professionals attributed the 2020 decline to the impact of the PPP pandemic relief effort.²⁶⁶ The PPP loan program provided the source of relief to underserved borrowers through a direct incentive for small businesses to keep their workers on payroll.²⁶⁷ Approximately 5.2M PPP loans were made in 2020, as compared with roughly 43,000 loans made through the 7(a) program.

In a published statement to the *Portland Business Journal*, the American Bankers Association, an industry trade group, noted that the 2020 decline in SBA 7(a) loans to Black-owned businesses is not a one-year anomaly; it has been declining for years at a much faster rate than 7(a) loans to other borrowers. The 2020 data²⁶⁸ reveal that the number of SBA loans made annually to Black businesses has declined 90% since a 2007 peak, more than any other group tracked by the SBA. In that interval, the overall number of loans decreased by 65%.

The nation's four largest banks (JP Morgan Chase, Bank of America, Citigroup, and Wells Fargo), which hold roughly 35% of national deposits, made 41% fewer SBA 7(a) loans to Blacks in 2020.²⁶⁹

PPP loans served as a lifeline during the pandemic for millions of businesses. However, industry experts maintained that PPP loans detracted from more conventional SBA lending efforts that year. Wells Fargo provided more than 282,000 PPP loans to small businesses nationwide in 2020, with an average loan size of \$50,000. Wells Fargo, the most active lender for Black businesses nationwide in 2020, saw its SBA loans to Blacks drop from 263 in 2019 to 162

264. The total number of 7(a) loans declined 24%.

265. The SBA caps the maximum spread lenders can charge based on the size and maturity of the loan. Rates range from prime plus 4.5% to prime plus 6.5%, depending on how much is borrowed.

266. The Coronavirus Act, Relief, and Economic Security Act ("CARES Act"), required the SBA to issue guidance to PPP lenders to prioritize loans to small businesses owned by socially and economically disadvantaged individuals including Black-owned businesses. See 116-136, §1, March 27, 2020, 134 Stat. 281.

267. PPP loans were used to help fund payroll costs, including benefits, and to pay for mortgage interest, rent, utilities, workers protection costs related to COVID-19, uninsured property damage costs caused by looting or vandalism during 2020 as well as certain supplier costs and operational expenses.

268. The SBA denied the original request for information; however, the publication prevailed on appeal.

269. Data obtained by the *Business Journal* does not include information from lenders who made less than ten loans in 2020.

in 2020. Bank of America, Chase, and Citigroup also reported fewer SBA loans to African American businesses in 2020.

While PPPs have been heralded for providing needed monies to distressed small and mid-size businesses, data reveals disparities in how loans were distributed.²⁷⁰ An analysis in 2020 by the *Portland Business Journal*, found that of all 5.2M PPP loans, businesses in neighborhoods of color received fewer loans and delayed access to the program during the early critical days of the pandemic.²⁷¹ More recent analysis released by the Associated Press indicates that access for borrowers of color improved exponentially during the later rounds of PPP funding, following steps designed to make the program more accessible to underserved borrowers.

3. 2010 Minority Business Development Agency Report²⁷²

The 2010 Minority Business Development Agency Report, “Disparities in Capital Access Between Minority and non-Minority Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs”, summarizes results from the Kauffman Firm Survey, data from the U.S. Small Business Administration’s Certified Development Company/504 Guaranteed Loan Program and additional extensive research on the effects of discrimination on opportunities for minority-owned firms. The report found that:

low levels of wealth and liquidity constraints create a substantial barrier to entry for minority entrepreneurs because the owner’s wealth can be invested directly in the business, used as collateral to obtain business loans or used to acquire other businesses.²⁷³

It also found, “the largest single factor explaining racial disparities in business creation rates are differences in asset levels.”²⁷⁴

Some additional key findings of the Report include:

270. While PPP loans are administered by the SBA, they are disbursed primarily through banks.

271. Many industry experts have observed that businesses that already had strong relationships with lenders were the most successful in accessing PPP loans. The nation’s long history of systemic racism in banking fostered disparities in PPP loan distribution. See Alicia Plerhoples, *Correcting Past Mistakes: PPP Loans and Black-Owned Small Businesses*, at <https://www.acslaw.org/expertforum/correcting-past-mistakes-ppp-loans-and-black-owned-small-businesses/>.

272. Robert W. Fairlie and Alicia Robb, *Disparities in Capital Access Between Minority and non-Minority Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, Minority Business Development Agency, U.S. Department of Commerce, 2010 (“MBDA Report”) (<https://archive.mbda.gov/sites/mbda.gov/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf>).

273. *Id.* at 17.

274. *Id.* at 22.

- Denial of Loan Applications. Forty-two percent of loan applications from minority firms were denied compared to 16% of loan applications from non-minority-owned firms.²⁷⁵
- Receiving Loans. Forty-one percent of all minority-owned firms received loans compared to 52% of all non-minority-owned firms. MBEs are less likely to receive loans than non-minority-owned firms regardless of firm size.²⁷⁶
- Size of Loans. The size of the loans received by minority-owned firms averaged \$149,000. For non-minority-owned firms, loan size averaged \$310,000.
- Cost of Loans. Interest rates for loans received by minority-owned firms averaged 7.8%. On average, non-minority-owned firms paid 6.4% in interest.²⁷⁷
- Equity Investment. The equity investments received by minority-owned firms were 43% of the equity investments received by non-minority-owned firms even when controlling for detailed business and owner characteristics. The differences are large and statistically significant. The average amount of new equity investments in minority-owned firms receiving equity is 43% of the average of new equity investments in non-minority-owned firms. The differences were even larger for loans received by high sales firms.²⁷⁸

4. Federal Reserve Board Surveys of Small Business Finances

The Federal Reserve Board and the U.S. Small Business Administration have conducted surveys of discrimination in the small business credit market for years 1993, 1998 and 2003.²⁷⁹ These Surveys of Small Business Finances are based on a large representative sample of firms with fewer than 500 employees. The main finding from these Surveys is that MBEs experience higher loan denial probabilities and pay higher interest rates than White-owned businesses, even after controlling for differences in credit worthiness and other factors. Blacks, Hispanics and Asians were more likely to be denied credit than Whites, even after controlling for firm characteristics like credit history, credit

275. *Id.* at 5.

276. *Id.*

277. *Id.*

278. *Id.*

279. <https://www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm>. These Surveys have been discontinued. They are referenced to provide some historical context.

score and wealth. Blacks and Hispanics were also more likely to pay higher interest rates on the loans they did receive.²⁸⁰

5. Other Reports

- Dr. Timothy Bates found venture capital funds focusing on investing in minority firms provide returns that are comparable to mainstream venture capital firms.²⁸¹
- According to the analysis of the data from the Kauffman Firm Survey, minority-owned firms' investments into their own firms were about 18% lower in the first year of operations compared to those of non-minority-owned firms. This disparity grew in the subsequent three years of operations, where minorities' investments into their own firms were about 36% lower compared to those of non-minority-owned firms.²⁸²
- Another study by Fairlie and Robb found minority entrepreneurs face challenges (including lower family wealth and difficulty penetrating financial markets and networks) directly related to race that limit their ability to secure financing for their businesses.²⁸³

E. Evidence of Disparities in Access to Human Capital

There is a strong intergenerational correlation with business ownership. The probability of self-employment is significantly higher among the children of the self-employed. A generational lack of self-employment capital disadvantages minorities, whose earlier generations were denied business ownership through either *de jure* segregation or *de facto* exclusion.

There is evidence that current racial patterns of self-employment are in part determined by racial patterns of self-employment in the previous generation.²⁸⁴ Black men have been found to face a "triple disadvantage" in that they are less likely than White men to: 1. Have self-employed fathers; 2. Become self-employed if their fathers were not self-employed; and 3. To follow their fathers into self-employment.²⁸⁵

280. See Blanchflower, D.G., Levine, P. and Zimmerman, D., "Discrimination In The Small Business Credit Market," *Review of Economics and Statistics*, (2003); Cavalluzzo, K. S. and Cavalluzzo, L. C., "Market structure and discrimination, the case of small businesses," *Journal of Money, Credit, and Banking*, (1998).

281. See Bates, T., "Venture Capital Investment in Minority Business," *Journal of Money Credit and Banking* 40, 2-3 (2008).

282. Fairlie, R.W. and Robb, A, *Race and Entrepreneurial Success: Black-, Asian- and White-Owned Businesses in the United States*, (Cambridge: MIT Press, 2008).

283. *Id.*

284. Fairlie, R W., "The Absence of the African-American Owned Business, An Analysis of the Dynamics of Self-Employment," *Journal of Labor Economics*, Vol. 17, 1999, pp 80-108.

Intergenerational links are also critical to the success of the businesses that do form.²⁸⁶ Working in a family business leads to more successful firms by new owners. One study found that only 12.6% of Black business owners had prior work experiences in a family business as compared to 23.3% of White business owners.²⁸⁷ This creates a cycle of low rates of minority ownership and worse outcomes being passed from one generation to the next, with the corresponding perpetuation of advantages to White-owned firms.

Similarly, unequal access to business networks reinforces exclusionary patterns. The composition and size of business networks are associated with self-employment rates.²⁸⁸ The U.S. Department of Commerce has reported that the ability to form strategic alliances with other firms is important for success.²⁸⁹ Minorities and women in our interviews reported that they felt excluded from the networks that help to create success in their industries.

F. Conclusion

The economy-wide data, taken as a whole, paint a picture of systemic and endemic inequalities in the ability of firms owned by minorities and women to have full and fair access to state contracts and associated subcontracts. This evidence supports the conclusion that absent the use of narrowly tailored contract goals, these inequities will create disparate impacts on minorities and women.

285. Hout, M. and Rosen, H. S., "Self-employment, Family Background, and Race," *Journal of Human Resources*, Vol. 35, No. 4, 2000, pp. 670-692.

286. Fairlie, R.W. and Robb, A., "Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital," *Journal of Labor Economics*, Vol. 24, No. 2, 2007, pp. 289-323.

287. *Id.*

288. Allen, W. D., "Social Networks and Self-Employment," *Journal of Behavioral and Experimental Economics (formerly The Journal of Socio-Economics)*, Vol. 29, No. 5, 2000, pp. 487-501.

289. "Increasing MBE Competitiveness through Strategic Alliances" (Minority Business Development Agency, 2008).

VI. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN THE ILLINOIS TOLLWAY'S MARKET FOR GOODS AND SERVICES

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities. This evidence is relevant to the question of whether despite the successful operations of the Tollway's Business Enterprise Program ("BEP") for goods and services, BEPs continue to face discriminatory barriers to their full and fair participation in Tollway opportunities. Anecdotal evidence also sheds light on the likely efficacy of using only race- and gender-neutral remedies, designed to benefit all small contractors, to combat discrimination and achieve the objectives of the BEP Program. As discussed in the Legal Chapter, this type of anecdotal data has been held by the courts, including in the unsuccessful challenge to the Tollway's program, to be relevant and probative of whether an agency continues to have a need to use narrowly tailored BEP contract goals to remedy the effects of past and current discrimination and to create a level playing field for contract opportunities for all firms.

The Supreme Court has held that anecdotal evidence can be persuasive because it "brought the cold [statistics] convincingly to life."²⁹⁰ Evidence about discriminatory practices engaged in by prime contractors, agency personnel, and other actors relevant to business opportunities has been found relevant regarding barriers both to minority firms' business formation and to their success on governmental projects.²⁹¹ The courts have held that while anecdotal evidence is insufficient standing alone, "[p]ersonal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a [government's] institutional practices that exacerbate discriminatory market conditions are [sic] often particularly probative."²⁹² "[W]e do not set out a categorical

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

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

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

rule that every case must rise or fall entirely on the sufficiency of the numbers. To the contrary, anecdotal evidence might make the pivotal difference in some cases; indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”²⁹³

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making, as opposed to judicial proceedings. In finding the State of North Carolina’s Historically Underutilized Business program to be constitutional, the Fourth Circuit Court of Appeals opined that “[p]laintiff offers no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not—indeed cannot—be verified because it is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perception.”²⁹⁴ Likewise, the Tenth Circuit held that “Denver was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.”²⁹⁵

To explore this type of anecdotal evidence of possible discrimination against minorities and women in the Tollway’s geographic and industry markets and the effectiveness of its current race-conscious and race-neutral measures, we conducted four small group and individual business owner and stakeholder interviews, totaling 62 participants. We also received written comments. We met with a cross section of business owners from the Tollway’s goods and services geographic and industry markets. Firms ranged in size from large, long established prime contracting and consulting firms to new market entrants. We sought to explore their experiences in seeking and performing public sector prime contracts and subcontracts with the Tollway, other government agencies, and in the private sector. We also elicited recommendations for improvements to the Tollway’s BEP Program.

Many minority and woman owners reported that while progress has been made in integrating their firms into public and private sector contracting opportunities through race- and gender-conscious contracting programs like the Tollway’s, significant barriers on the basis of race and/or gender remain.

In addition to the group interviews, we conducted an electronic survey of firms in the Tollway’s market area about their experiences in obtaining work, marketplace conditions and the Tollway’s BEP Program. One-hundred and fifty-eight recipients responded to the survey. The results were similar to those of the interviews. Among minority- and woman-owned firms, 40.8% reported that they still experience barriers

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

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

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

to equal contracting opportunities; 31.1% said their competency was questioned because of their race or gender; and 13.6% indicated that they had experienced job-related sexual or racial harassment or stereotyping.

A. Business Owner Interviews

The following are summaries of the issues discussed. Quotations are indented and may have been shortened for readability. The statements are representative of the views expressed by numerous participants.

We have also appended a summary of the anecdotal results of the numerous disparity studies we have conducted in Illinois. These studies are directly relevant and probative of the barriers to success that minority and woman entrepreneurs continue to face in the Illinois market and the Chicago area.²⁹⁶

1. Biased assumptions and negative perceptions of competency

Many minority or woman owners encountered biases about their competency. There was often a stigma attached to being an M/WBE.

Before I started my business, even the company that I worked for was a DBE company, but most of the employees were not minority and you can hear the other guys, "Okay, this company did not perform because...".... So, that's the stigma that we receive. "Okay, well, we're going to do it, but we don't expect them to perform to their expectations."

After all of these years— I've been in the industry 40 years— that I still get that from people that don't know me and I just laugh. I think there is some stigma.

Several interviewees stated that after other firms become familiar with their capabilities, biases are overcome.

At the beginning of this, of the M/W/DBE certification, yes, there was a stigma, but because there has been such a push and a priority and a mandate to have the program, primes and contractors and owners have decided that it is of value and importance, so the program needs to continue.... The more we talk about it and make sure that it's important, then the less stigma will arise. I would say that out of the times there are probably eight out of the ten times where it's been a benefit versus not a benefit. And then at the end of the day, those

296. Appendix E: Qualitative Evidence from Illinois Disparity Studies.

other two outliers, down the road, as the relationship is built, and I didn't take the stigma, they began to know [name] and not [firm name] M/W/DBE, they saw the value proposition.

In the beginning, we definitely did face that stigma and not being given the opportunities that our counterparts may have gotten just because. But now I think you have earned your respect as you grow.

Starting out there was a little bit of a stigma and basically had to go out there and prove myself. So, the people that I do work with now, it's a blessing instead of a curse. And we've proved to them that we will do the job that they need us to do, so it's a lot about relationships.

One owner felt that there was no stigma associated with race or gender.

I don't think it's a disadvantage.

2. Obtaining Work

Most M/WBEs reported that contract goals and the overall BEP program remain necessary to ensure equal opportunities to compete.

We definitely need to make sure the program continues.

If the state was to close this program, we will be having a hard time to compete in the private sector. And the most critical for us, because we're a professional services company, we do not depend on bidding, so we depend on companies calling us to participate.... We need to do a lot of networking with the companies.

It earns you the opportunity.

The impact for our business of these programs has been extremely important.

The WBE program has been very helpful to the growth of our business.

It's pretty important to have these types of programs. It helps with our particular type of work, those carve outs.

I think the program just really needs to be continued to complete that inclusivity, to have the teams that include everyone and include all the diversity. Because that's what it's

brought to the table and that's what makes the projects really successful. So, the program, I think, definitely should continue.

Sometimes you get pushed out because you are a BEP, because you are a DBE, because you are that they try to take that work from you. Because the big primes are so used to winning all the time. It's like, "Hey, here comes a small business. They're coming in. They're winning. They're taking work from us. I don't want that." I think it's racial and gender-motivated. Because the first thing they called afterwards was, when they first seen us, "Oh, we thought you guys were Mexican." And I'm like, "Well, why did you think that?" And they were like, "Well, because it's [name] Lawn Service." And I'm like, "No, we're African American. We're not Mexican. But even if we were, what does that matter?" I'm like, "What kind of stuff is that to say?"

B. Anecdotal Survey of Tollway Goods and Services Firms

To supplement the in-person interviews, we also conducted an anecdotal, electronic survey of firms on our Master D/M/WBE Directory; prime firms on the contract data file; and firms identified through our outreach efforts. We further solicited written comments. The survey was comprised of up to 45 closed- and open-ended questions and replicated the topics discussed in the business owner interviews. Questions focused on doing business in the Tollway's market area, specifically barriers and negative perceptions, access to networks, information and experiences in obtaining work, and capacity development, as well as the Tollway's BEP program.

One-hundred and fifty-eight gross responses were received. After accounting for incomplete and non-relevant responses, there were 103 useable responses. Percentage results have been rounded to one decimal place to increase readability.

1. Survey Responses

a. Respondents' Profiles

Table 6-1 and Chart 6-1: The race and gender distribution of the minority and woman survey respondents is listed below. Non-construction related services accounted for 66%, goods and commodity firms accounted for 23%, architecture, engineering, surveying and construction-related professional services firms accounted for 5% and heavy construction firms accounted for 6% of the responses.

Table 6-1: Firm Ownership

Firm Ownership	#	%
African American	52	49.1%
Hispanic	11	10.4%
Asian Pacific/ Subcontinent Asian American	9	8.5%
Native American/ Alaska Native	0	0.0%
Non-Minority Women	31	29.2%
Total M/WBEs	103	97.2%
Non-M/WBEs	3	2.8%
Total Firms	106	100.0%

Chart 6-1: M/WBE Respondents Type of Work

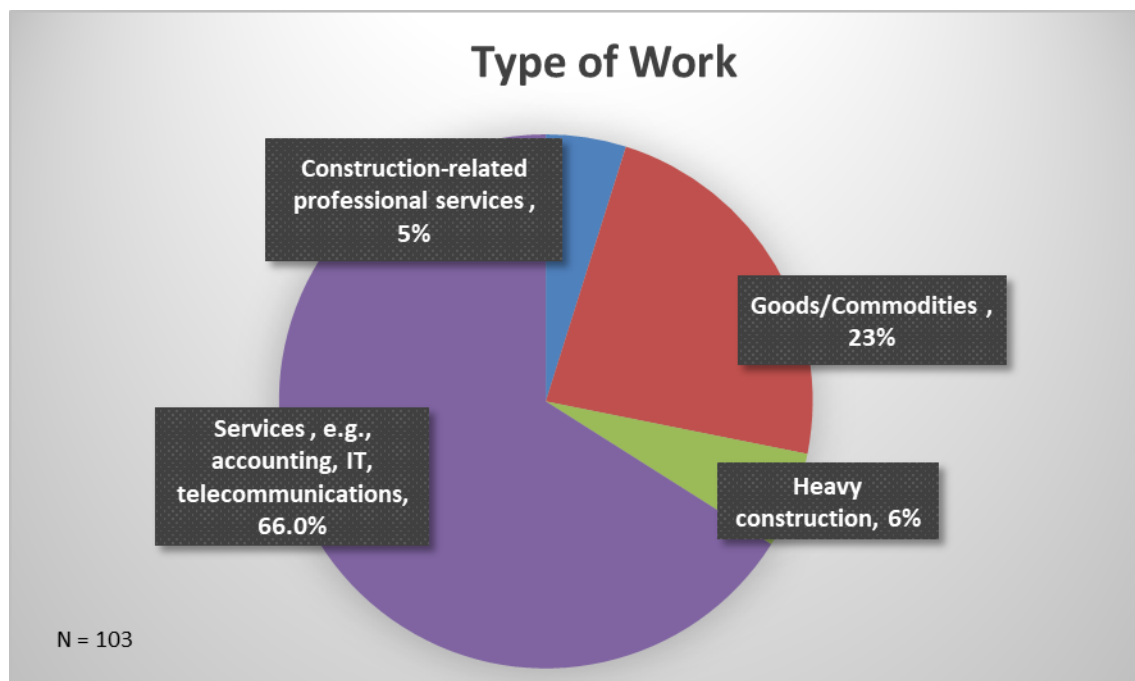


Chart 6-2: Among M/WBEs, 6.8% of the firms had worked on Tollway projects only as a prime contractor or supplier; 18.4% had worked only as a subcontractor or supplier; 3.9% had worked as both a prime contractor or supplier and as a subcontractor; and 70.9% had not done business with the Tollway. More than eighty percent (82.5%) were certified as a BEP firm with the State of Illinois. About the same number, 85.4% were certified as a

minority, woman or disadvantaged business with additional government agencies.

Chart 6-2: M/WBE Respondent Contractor Status with the Tollway

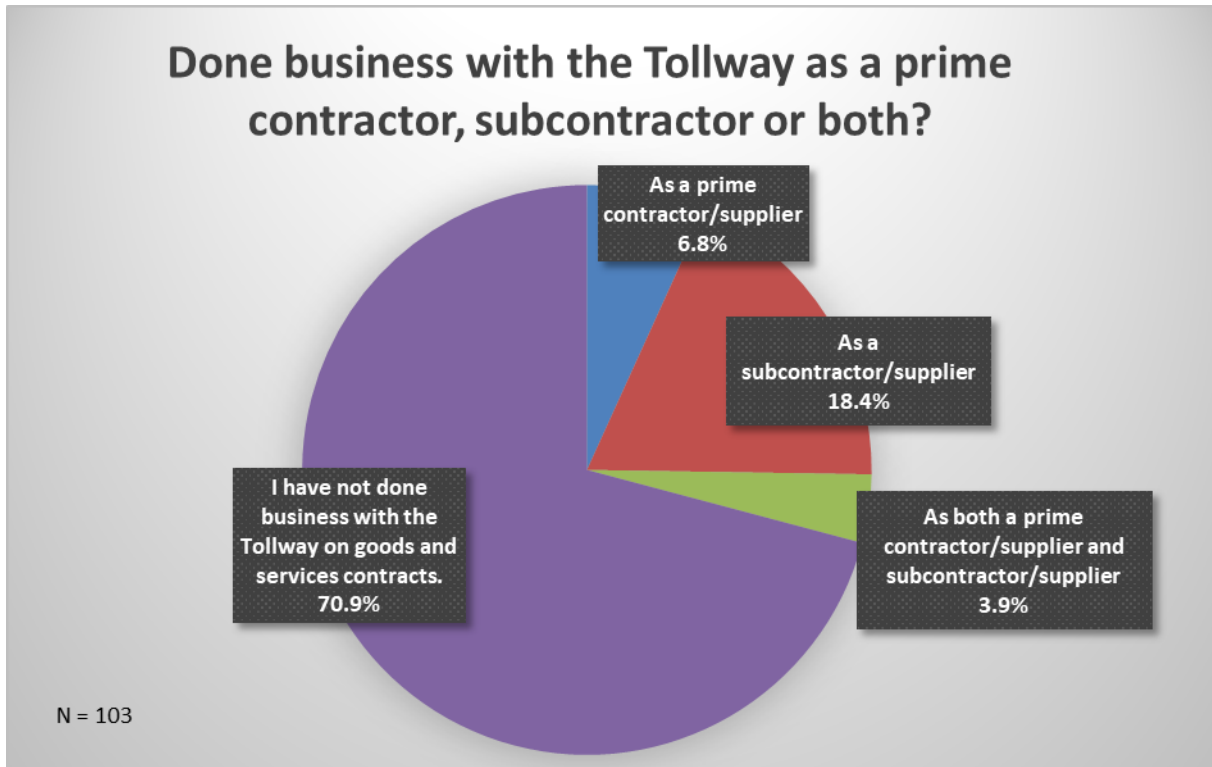
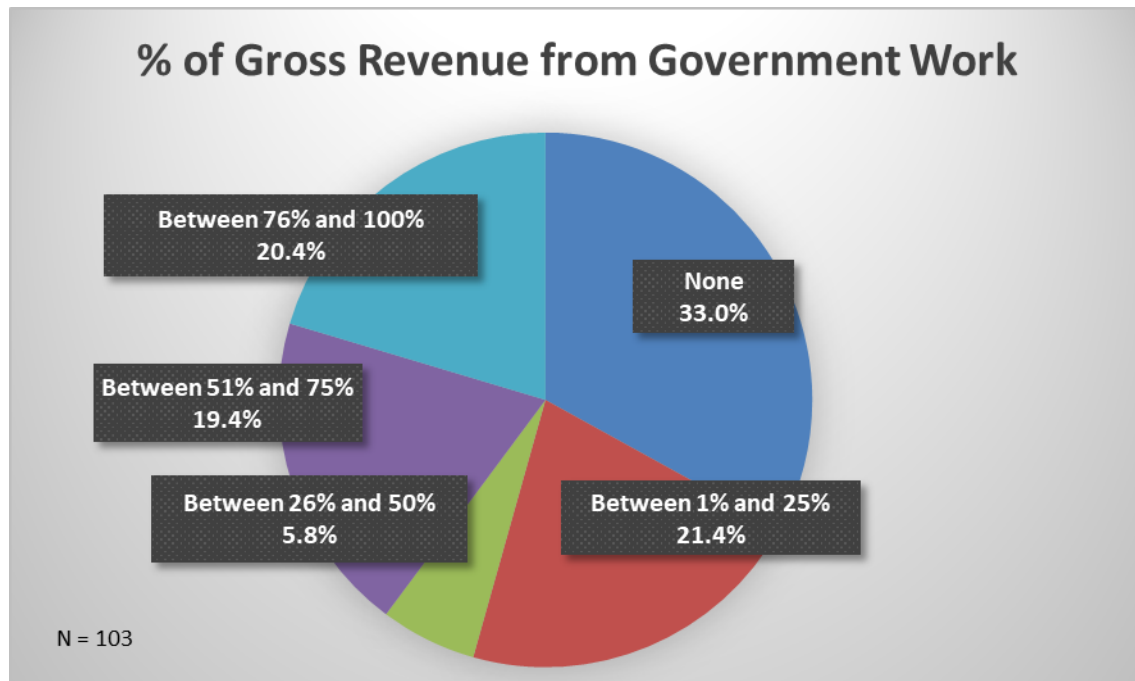


Chart 6.3: Over two thirds (67%) of M/WBE respondents reported that some of their revenue was derived from government work. 21.4% of the firms reported that up to twenty-five percent was from government contracts; 5.8% reported between twenty-five and fifty percent; 19.4% reported between fifty-one and seventy-five percent and 20.4% reported between seventy-six and one hundred percent. Government work did not contribute to the gross revenue of 33% of the firms.

Chart 6-3: M/WBE Respondent Contractor Revenue from Government Work



b. Discriminatory Barriers and Perceptions

Chart 6-4: Two fifths (40.8%) of M/WBEs reported that they had experienced barriers to contracting opportunities based on their race and/or gender.

Chart 6-4: Barriers to Contracting Opportunities Based on Race and Gender

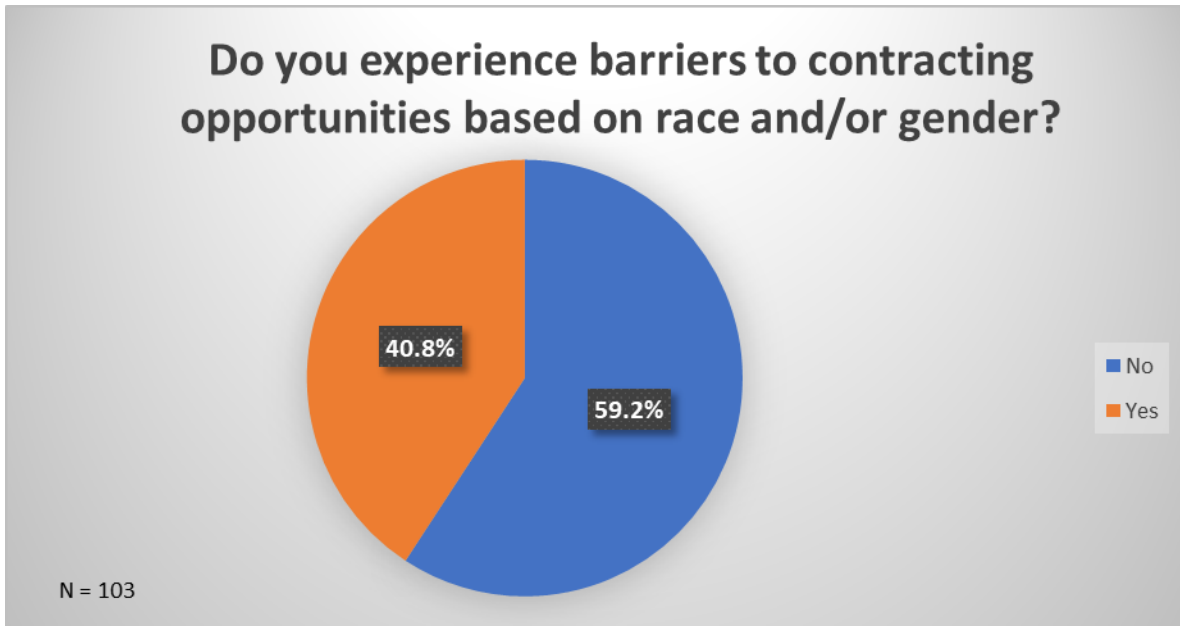


Chart 6-5: Among M/WBE respondents, 31.1% answered "Yes" to the question, "Is your competency questioned based on your race and/or gender?".

Chart 6-5: Negative Perception of Competency Based on Race or Gender

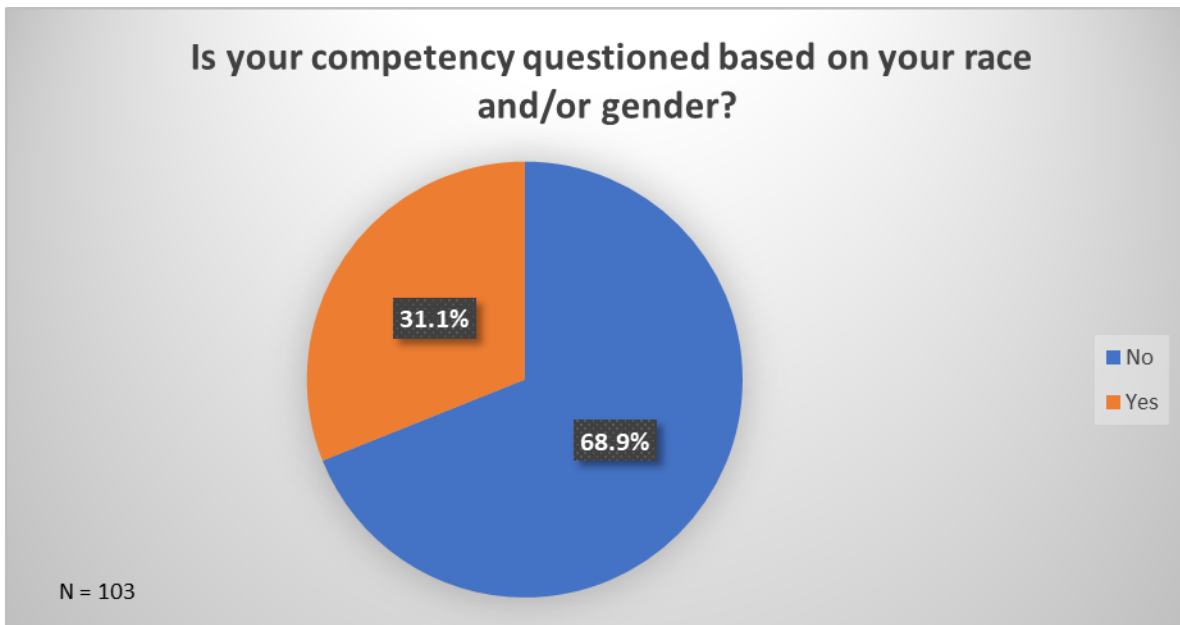


Chart 6-6: A little over 13% (13.6%) indicated that they had experience job-related sexual or racial harassment or stereotyping.

Chart 6-6: Industry-Related Sexual or Racial Harassment or Stereotyping

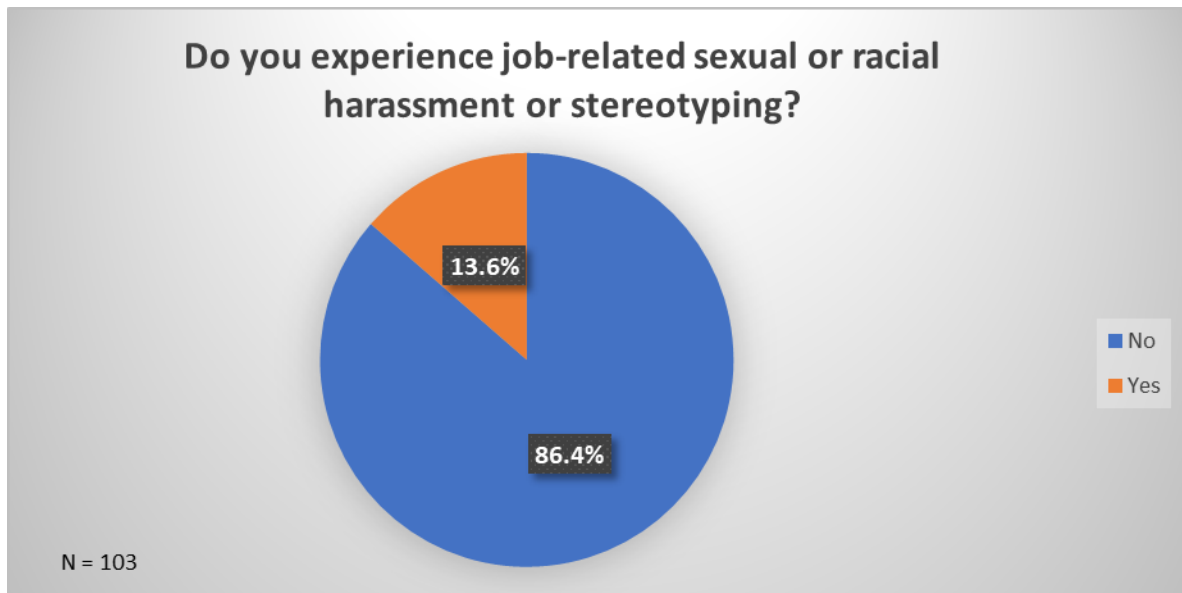
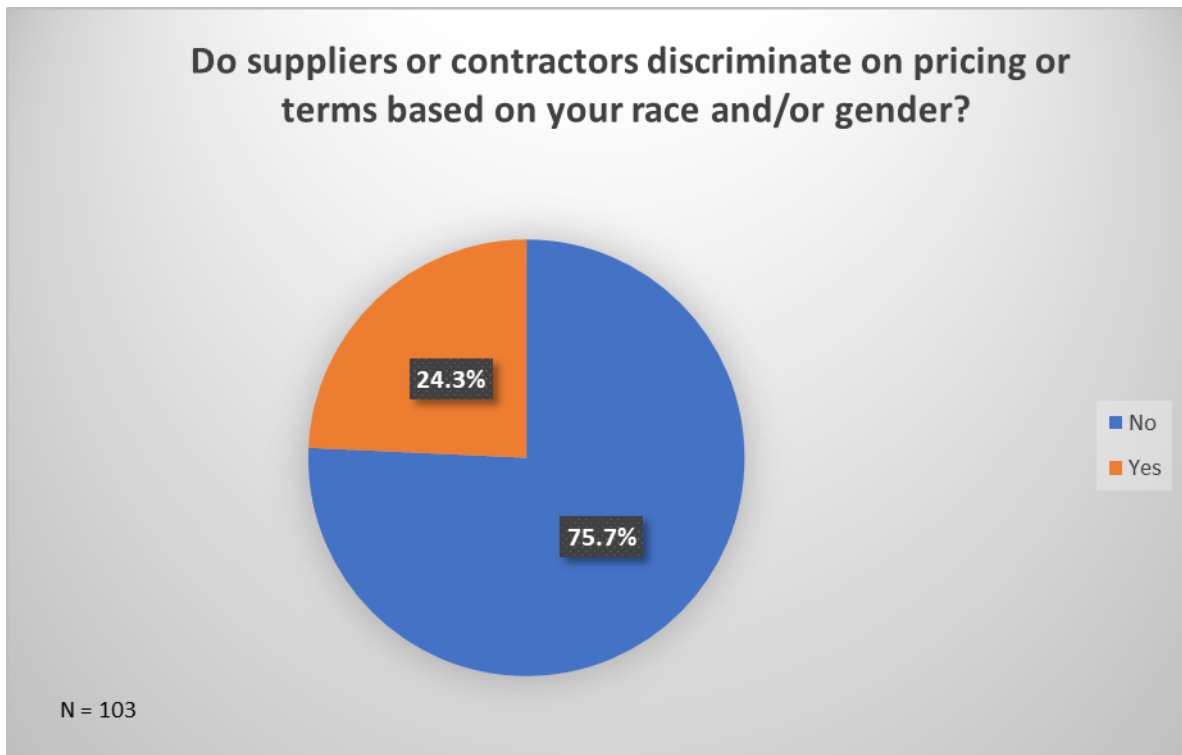


Chart 6-7: Discrimination from suppliers or subcontractors because of their race and/or gender was experienced by almost a quarter (24.3%) of the respondents.

Chart 6-7: Supplier Pricing and Terms Discrimination Based on Race and Gender



c. Access to Formal/Informal Business and Professional Networks

Chart 6-8: Almost a third (30.1%) of M/WBE respondents reported that they did not have equal access to the same information as non-certified firms in their industry.

Chart 6-8: Access to the Same Information as non-Certified Firms

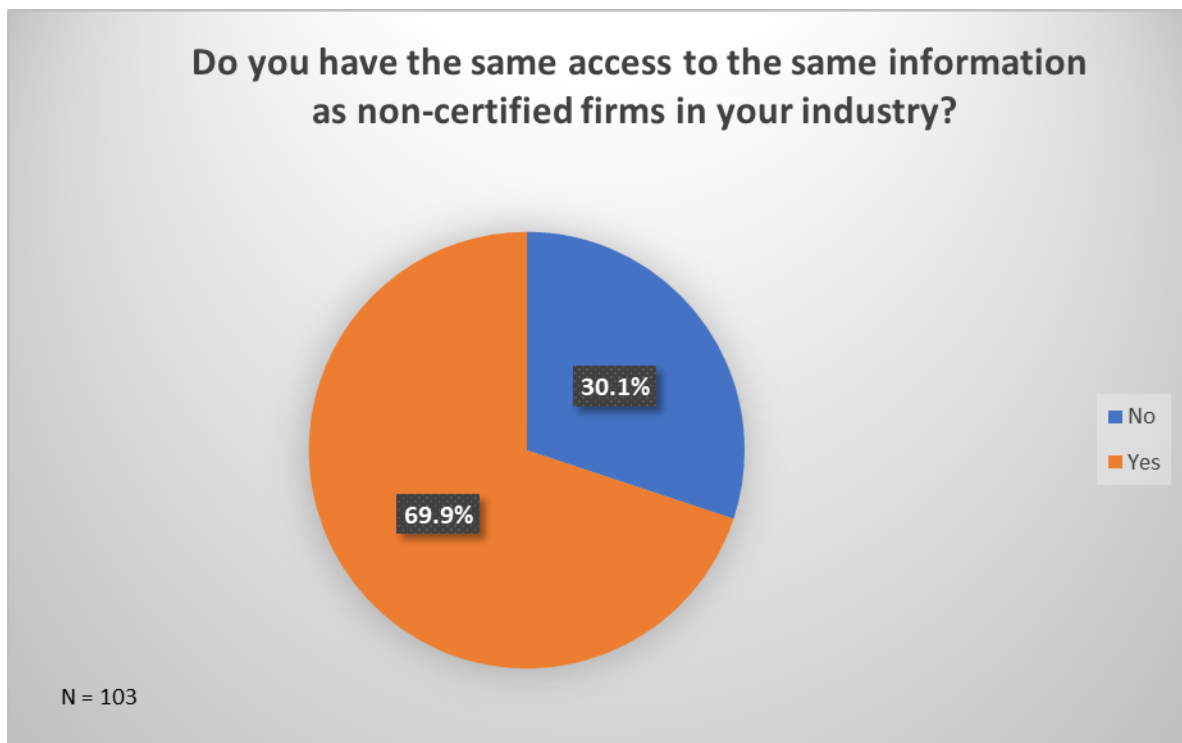
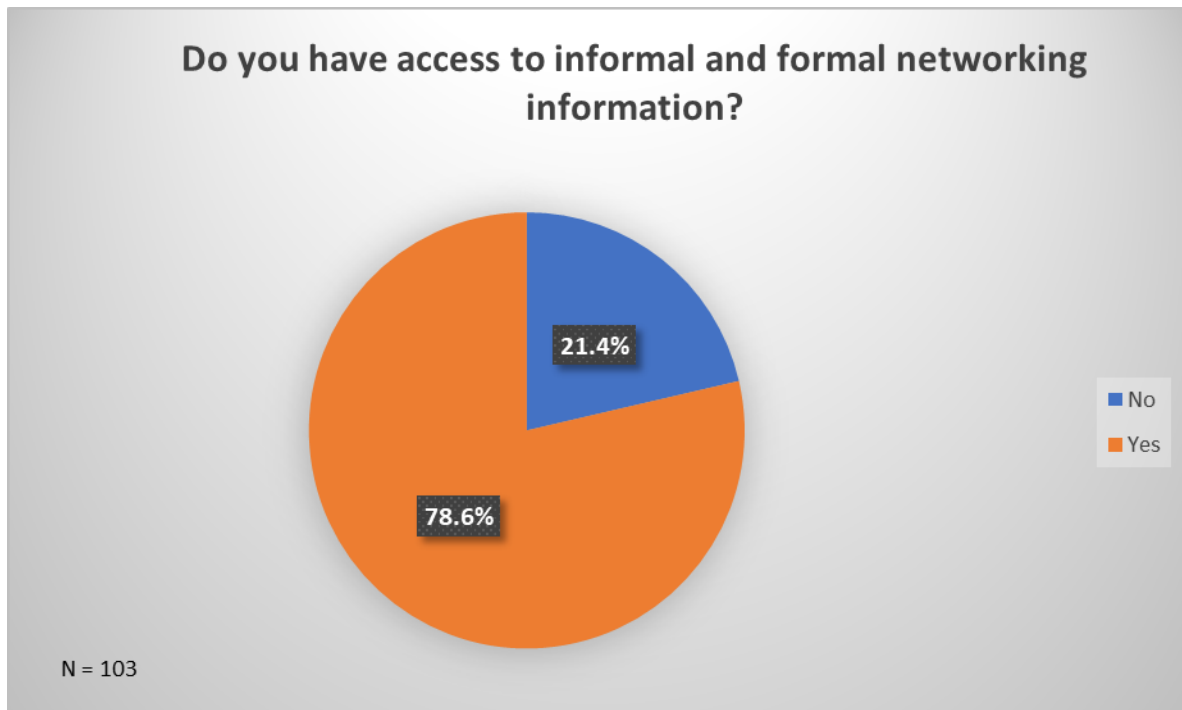


Chart 6-9: Limited access to informal and formal networking information was reported by 21.4% of M/WBE respondents.

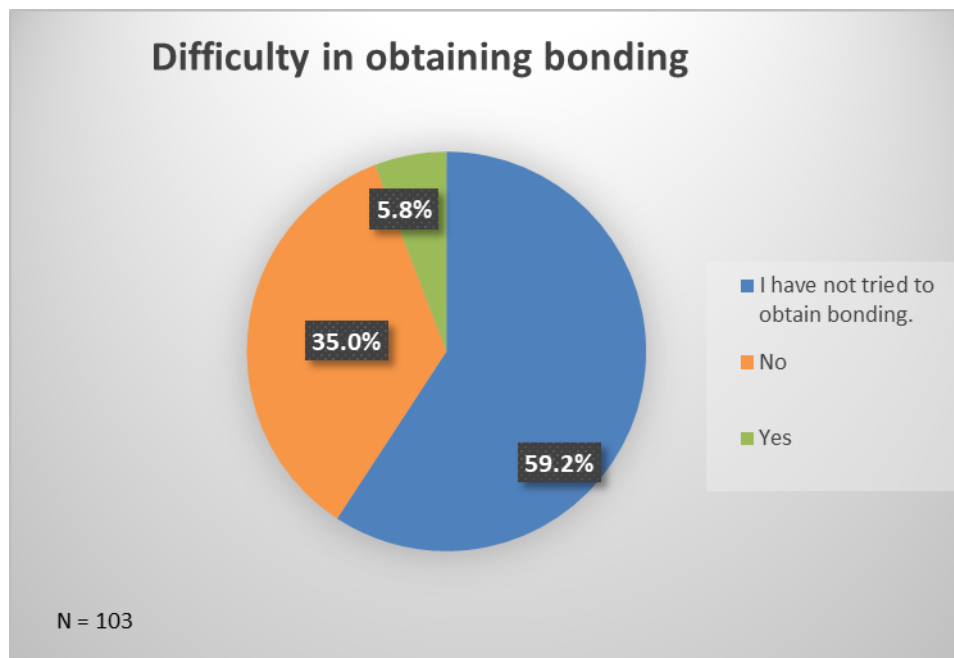
Chart 6-9: Access to Informal and Formal Networking Information



d. Access to Financial Supports

Chart 6-10: Among M/WBEs, 5.8% reported challenges in their efforts to obtain bonding.

Chart 6-10: Barriers to Obtaining Bonding



Almost a third (31.1%) of M/WBEs reported experiencing barriers in their efforts to obtain financing and loans.

Chart 6-11: Barriers to Obtaining Financing and Loans

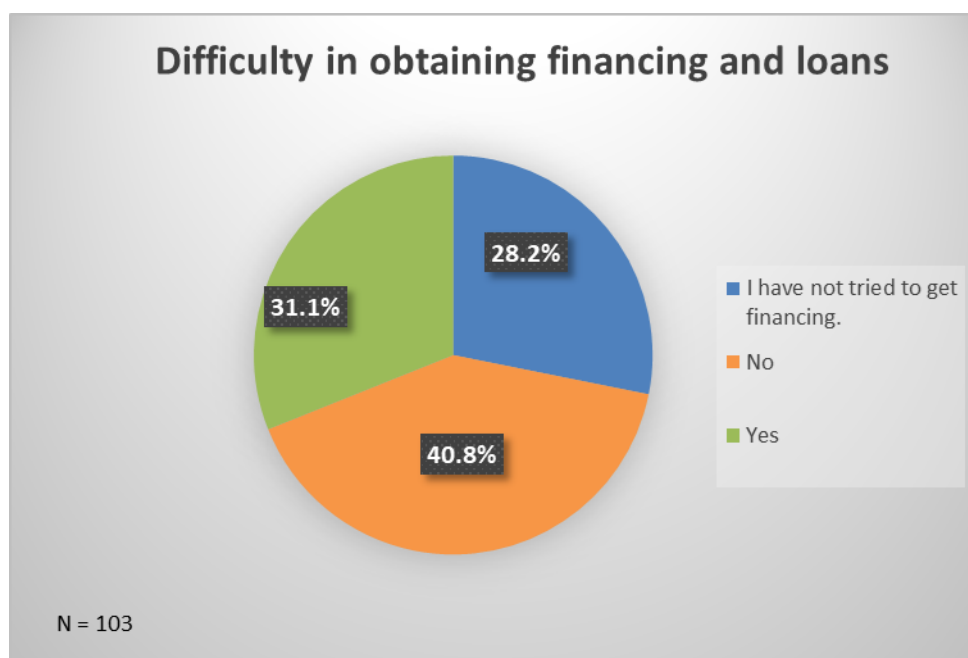
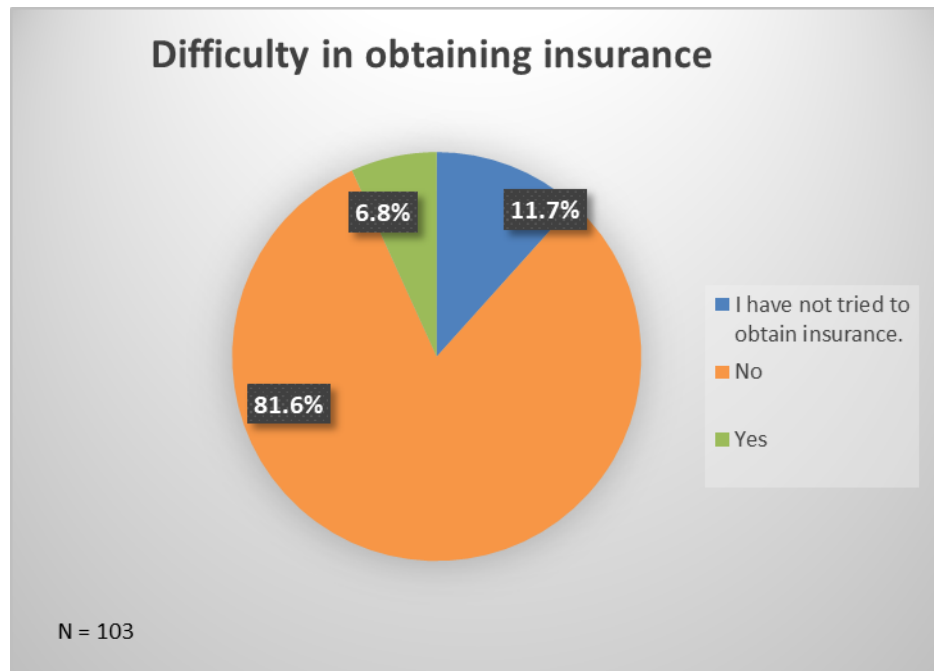


Chart 6-12: Among M/WBEs, 6.8% reported experiencing barriers to obtaining insurance.

Chart 6-12: Barriers to Obtaining Insurance



e. Obtaining Work on an Equal Basis

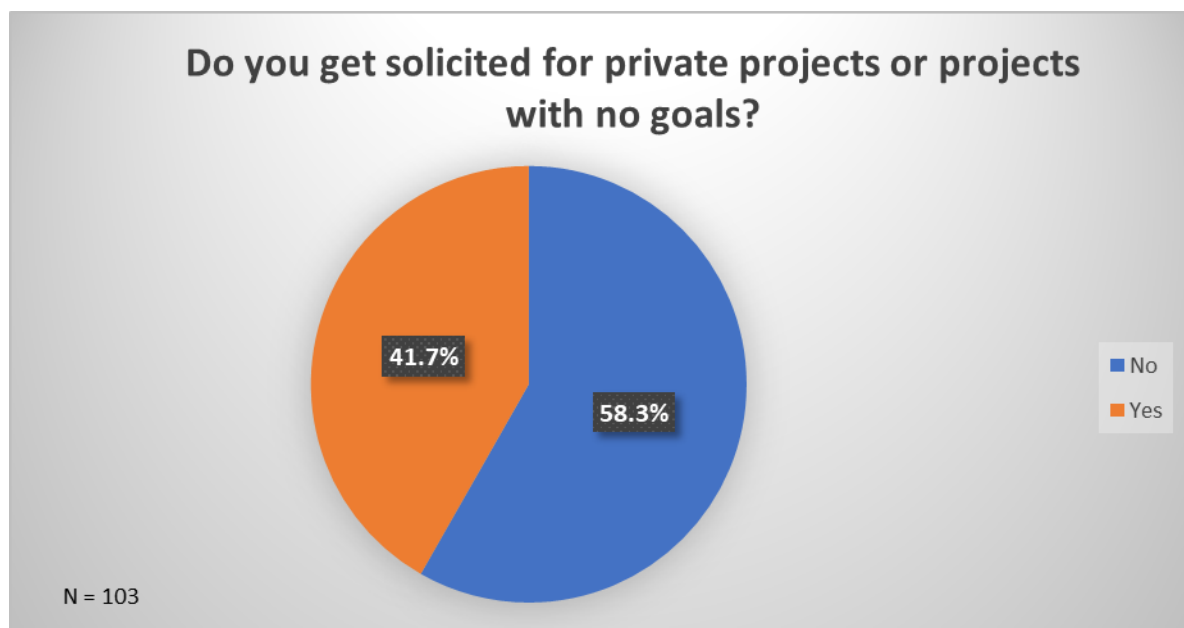
Chart 6-13: Over fifty percent (53.4%) of M/WBEs reported that they are solicited for Tollway or government projects with BEP goals.

Chart 6-13: Solicitation for Tollway or Government Projects with BEP Goals



Chart 6-14: Less than half (41.7%) reported that they are solicited for private projects or projects without goals.

Chart 6-14: Solicitation for Private Projects or Projects Without Goals



f. Capacity for Growth

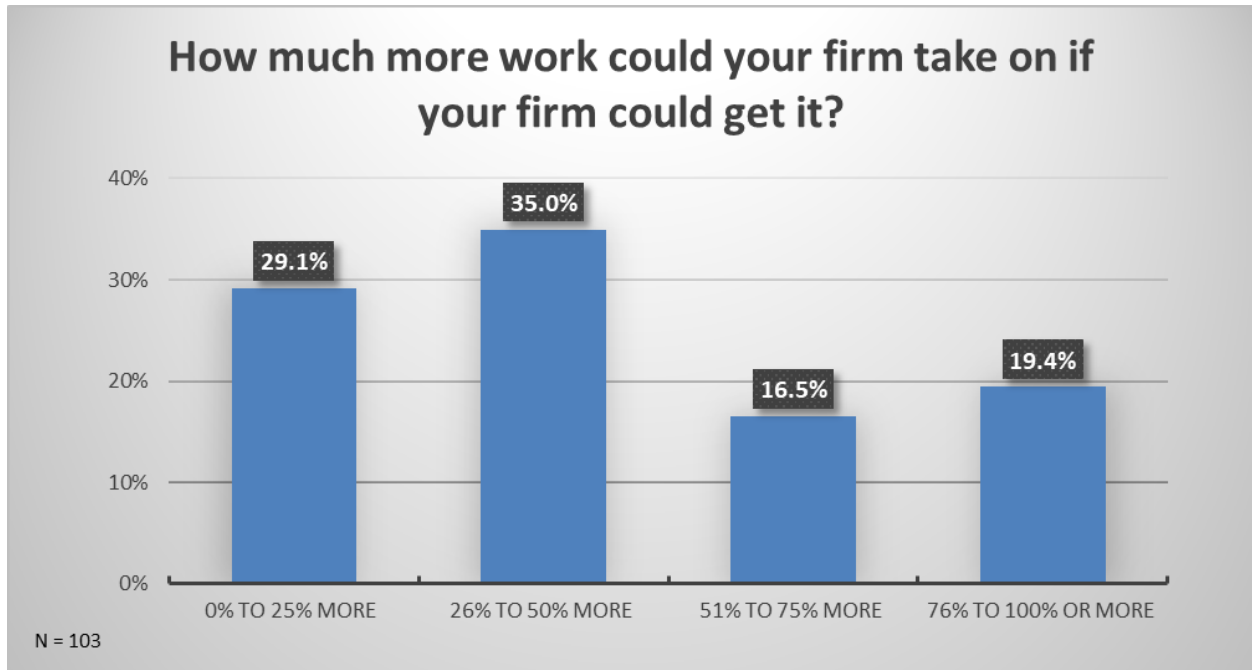
Chart 6-15: Over half of the M/WBEs (58.2%) reported that their firm's contract size was either well or slightly below the amount they are qualified to perform.

Chart 6-15: Firm Contract Size vs. Contract Amounts Qualified to Perform



Chart 6-16: A majority (70.9%) of minority and female respondents reported that they could take on a quarter to double the amount of work if it were offered.

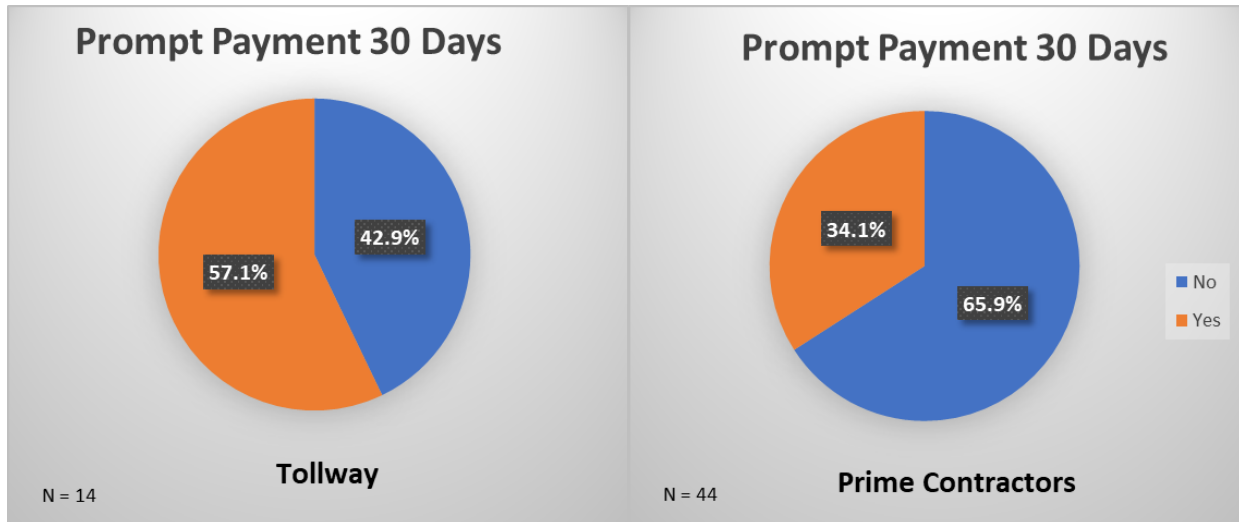
Chart 6-1: Capacity for More Work



g. Prompt Payment

Chart 6-17: Of the prime M/WBE contractors who reported doing work for the Tollway, 57.1% said that the Tollway paid them promptly. Prime contractors were reported to pay less timely, with 34.1% of M/WBE respondents reporting that when they worked as subcontractors, prime contractors paid promptly within 30 days.

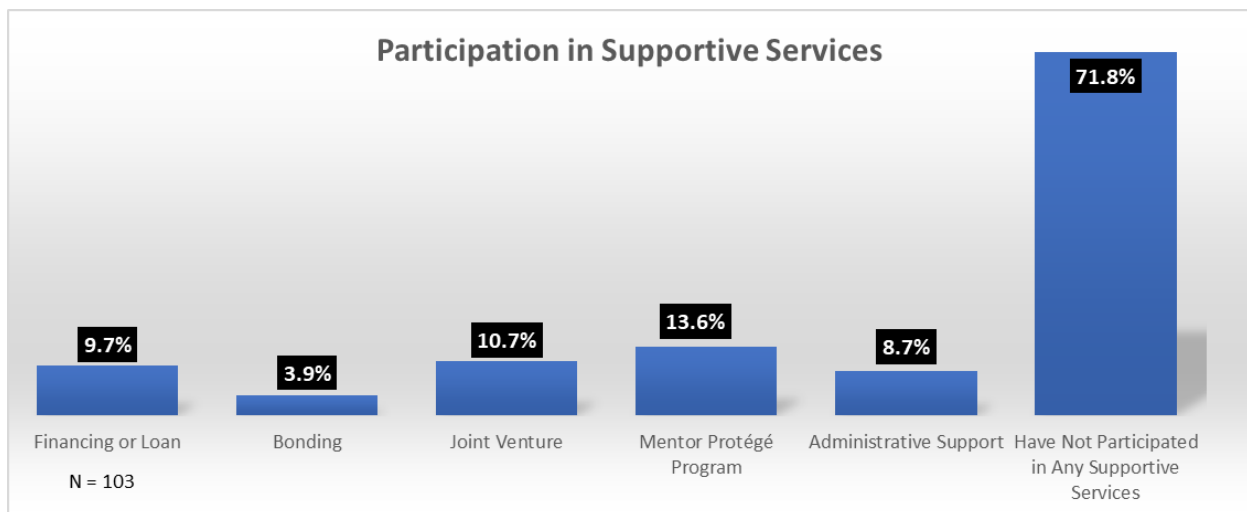
Chart 6-2: Prompt Payment within 30 Days



h. Capacity Development and Participation Incentives

Chart 6-18: More than a quarter (28.2%) of the M/WBE respondents reported they had participated in a business support program. A little under ten percent (9.7%) had participated in financing or loan assistance programs, and 3.9% had accessed bonding support programs. A little over a tenth (10.7%) joint ventured with another firm and 13.6% had participated in a mentor-protégé program. Less than ten percent (8.7%) had received support services such as assistance with marketing, estimating, information technology.

Chart 6-3: Participation in Supportive Services



2. Written Survey Responses

The survey also included open-ended response questions. These responses were consistent with information provided in the business owner interviews and the survey's closed-ended questions. Responses to these questions have been categorized and are presented below.

a. Negative perceptions of competency and professionalism

Minority business owners reported that they continue to experience negative assumptions and perceptions about their competency and capabilities.

Don't expect us to be qualified, can't handle the project, assuming we don't even know how to access plans.

Many agencies do not have confidence in the quality of work performed by minority-owned businesses so we are often dismissed or overlooked.

Always thinking that I don't have the necessary skills or certifications or insurance to do the assignment.

We are constantly second-guessed on matters where we are the subject matter experts.

Additional scrutiny and unconscious bias is par for the course. One mistake is perceived as incompetence while others are given coaching and feedback to prevent similar errors.

As mentioned above, we are a Black-owned business so we commonly work against the stereotype that we perform at a lower level of competency than our competitors.

Every day is a test.

There are too many examples [of when my competency was questioned] to list here.

This occasionally happens when seeking new business or vendors. It's the over emphasizing of certain questions such as "Can we rely on you", "Is this something you can handle", "How's your credit", "Do you understand the commitment and responsibility", "can we trust you'll pay on-time?" When asked the right way, some of these questions can be innocent but when constantly repeated/grilled it makes you wonder why.

Yes, value is not placed on working with women or minorities. Established prime companies think they know best and that women and minority-owned companies aren't smart.

b. Systemic racial exclusion

Several minority respondents reported that fair opportunities to compete for contracts were not available because of systemic racial barriers.

As a Black-owned business, sometimes I get the cold shoulder from some prime companies.

Bias, micro-aggressions.

Not selected due to race.

Overlooked by sight not by experience, certifications.

As a general contractor, there are many times that I am overlooked. They never consider that a Black woman can be a general contractor and provide quality service.

We are a Black-owned business and are therefore called to a higher level of scrutiny than other businesses that do not share our racial profile.

A hostile work environment and outright worksite harassment was reported by one Hispanic firm owner.

There was a noose hung at one our job sites recently.

Some respondents noted that it can be difficult, if not impossible, to know whether they had been subjected to discrimination.

To be honest I'm not sure, barriers usually happen because of certain individuals. I've experienced people who were very receptive to me on the phone but shut down when they first see me. Or comments such as, "you're very well spoken", "Where are you from", "Your different then I imagined". It's the out of place comments/questions that alarm you. It's the over emphasizing "Can I count on you/ your Company". The majority of times it's not like that but when you do encounter those moments it makes you wonder if you're missing out on an opportunity because of your race.

Some companies mask how they feel about my Black-owned company as "lack of experience".

As a professional service firm our credentials are always questioned. Not sure it is based upon race.

You don't know what you don't know. However, I see the same companies get the contracts.

c. Gender bias and barriers

Many woman owners reported sexism, negative perceptions about their competency and stereotyping about their roles and authority.

As a female roofing contractor, it has been a hard ladder to climb and gain contracts and accomplishments in a male dominated trade.

Not to my knowledge directly, sometimes I do feel as if I may not be respected because I am female in a male dominated industry.

I sell truck parts and supplies. Many feel that this is a man's job.

Several times I've have been dismissed in a meeting, even though I had the most experience on the topic and I feel it was because I was a female challenging what was being said by a man in a leadership position.

If you are minority or a woman there is ALWAYS a test!!

Several occasions I was asked what [do] I know about roofs. I have to explain my 23 years of hands-on experience.

As a woman in manufacturing, we are frequently subjected to stereotyping and sexual harassment.

Less contracts, sexual harassment, stereotyped.

Because of the business I provide that is male dominant I believe contracts are limited.

The male employee or associate was often assumed to be in charge.

Many of the VP and other higher positions are held by men at other larger firms. I feel as if decision makers at other companies would rather speak with my Caucasian male employee because it is assumed he is much more knowledgeable than me. I feel this is due to my gender and race.

I'm Black and a woman and I am asked if I have someone working with me and do "they have a GC License". I have my own and I'm the President of my company.

Most construction or real estate development related questions are directed to the man in the room. Most of the ones referenced work for me or are a client....

When my responses are not acknowledged, a man who responds similarly to me will be acknowledged.

If I am the only female in the meeting, I am expected to be the note-taker for the meeting.

Old white guys who are patronizing and think they know everything or ignore suggestions/ideas from female colleagues.

d. Access to networks

M/WBEs reported entrenched relationships and "good 'ole boy" networks impede access to contract opportunities.

I believe these are not as obvious but, I do believe there are informal networks that trade and exchange work with each other and minorities, if [you are] not aware of these networks [you] are excluded. If minorities are aware, I believe work is rationed or limited.

Our barriers seem to be access. We need the ability to find the opportunities and the ability to compete with larger, more connected companies.

Don't get invited to networking events. Prime vendors reach out last minute without a match in the opportunity they are applying for in a mass email to subcontractors only to "show" how they are doing their "due diligence" and get a waiver that they couldn't find a subcontractor.

Firms with the same demographics typically share with others in the same group. Never considering to share with others outside of their comfort zone.

Many non-certified firms hear about proposals prior to them being advertised. I know this because the firms I partner with hear before I do now.

Many of the larger firms have inside industry knowledge on which firms will be pursuing which contracts, who is teaming with who, when the projects will be coming out, etc. As a small BEP/MBE/WBE firm, I do not have as many contacts in the industry and feel as if there is information out there that I am unaware of. I am also spending majority of my time performing duties of accounting, marketing, proposal writing, etc. since I do not have enough cash flow to hire employees.

Other firms have access to big jobs and connections with apartment complexes and other sources of ongoing work contracts.

Resources are limited to access information, especially when it's being sold (expensive registrations for conferences, summits that come with travel expenses are examples).

There are legacy relationships and networks that exist.

We are [sic] not socialize in the same manner.

I don't believe I have access because I don't even know where I would start in doing the right networking to get the work.

e. Financial barriers to opportunities

Some M/WBEs reported high rates and discriminatory obstacles when trying to obtain financing, bonding and insurance that are necessary to compete on an equal basis. Small and new firms face particularly large challenges.

The majority of the barriers are capital related.

I am required to prove credit worthiness and I have limited terms that require payment sooner than I would recover thus limiting my cashflow.

Difficult getting business credit.

I am offered less of a level of funding than what the normal should be. However, it was considered the "express loan" or line of credit.

I have to personally guarantee any loans.

It depends on who I am working with. I have actually had better experience with private lenders and smaller financial institutions. Larger organizations tend to ask more questions and require more validation.

Several reported obtaining surety bonding and insurance were especially challenging.

As a female-owned company, the bonding company wanted to have my husband sign even though he has no relationship or ownership to my business.

The rates get enormous when they see I've never been bonded before.

Because we are a delivery company sometimes it's difficult to get insurance at a reasonable rate.

Only a few companies provide non-emergency medical transportation insurance and it is costly. Some may say it is cost prohibitive.

Due to the size of our company, we have had difficulty finding high liability limits of insurance required by some RFPs. If it is available, it is price prohibitive.

f. Barriers to equal contract terms

Some minority and woman respondents reported that they are often under pressure to reduce their pricing relative to their White male counterparts.

We don't have the dollars or where with all [sic] to be primes therefore we have to wait to be called by the primes that get the projects and they tell us how cheap they had to take the project and we have to take it even cheaper, at numbers that will NOT allow us to grow.

I feel like I am low-balled based on my race at times.

Most primes feel that since we are a BEP firm, our prices should be much lower than the primes.

I noticed that other ethnicities were able to get a larger bid price than me as an African American and others sometimes \$25,000 more for the same job.

The expectation is that I can significantly reduce pricing which implies my services have less value.

Yes, they try to slice and dice our proposals to make the diversity commitments but then use our numbers to provide others the work over and above.

g. Discriminatory Supplier Pricing

Some M/WBEs reported being charged higher pricing for materials based on their race, ethnicity and gender.

Again, not sure because you assume you are getting the same pricing, until you find out the lower bidder is below your cost.

I believe suppliers give me a higher price.

I cannot describe specific situations [where suppliers discriminate on pricing terms], but it happens often.

I have noticed that the other companies get lower fracture material costs and I get prices that are higher than anyone else. So, my service prices become high and my competition has lower prices because they get their materials cheaper. We don't all get the same price either.

I have had suppliers increase pricing when they found out that I was Black.

[I don't always get] fair and equal treatment by suppliers.

However, some M/WBEs attributed the higher supplier pricing to their small size.

We often cannot compete. Prices are a little higher for smaller businesses so we odd out on business since price is the only factor.

Because I am a small business I don't have the purchasing discounts or the "inhouse" printing capabilities. It would be nice to have a STAPLES government discount for printed and bound proposal generation and project printing for oversize maps and posters for outreach.

We're small and don't have the finical backing to buy in volume, therefore those that do get better pricing and service. This is America.

C. Conclusion

Consistent with other evidence reported in this Study, the business owner and stakeholder interviews and the survey results strongly suggest that minorities and women continue to suffer widespread discriminatory barriers to full and fair access to contracts and associated subcontracts in the Tollway's market area. Many M/WBEs reported negative perceptions and assumptions about their competency that hampered their ability to conduct business. Minorities and women still face challenges related to stereotyping, racial harassment and sexism. Minorities and women often had reduced opportunities to obtain contracts, less access to formal and informal networks, and much greater difficulties in securing financial support relative to non-M/WBEs in their industries. A large number indicated that they were working well below their capacity.

Anecdotal evidence may "vividly complement" statistical evidence of discrimination. While not definitive proof that the Tollway needs to continue to implement race- and gender-conscious remedies for these impediments, the results of the qualitative data are the types of evidence that, especially when considered in conjunction with other evidence assembled, are relevant and probative of the Tollway's evidentiary basis to consider the continued use of race- and gender-conscious measures.

VII. RECOMMENDATIONS FOR THE ILLINOIS TOLLWAY'S BUSINESS ENTERPRISE PROGRAM

The quantitative and qualitative data in this study provide a thorough examination of the experiences of minority- and woman-owned firms in the Illinois Tollway's ("Tollway") geographic and industry markets for goods and services contracts and associated subcontracts. As required by strict constitutional scrutiny, we analyzed evidence of the Tollway's utilization of Minority- and Woman-owned Business Enterprises ("M/WBEs") as measured by dollars spent. We next estimated the availability of M/WBEs in the Tollway's markets in the aggregate and by detailed industry code. We then compared the Tollway's utilization of M/WBEs to the availability of all ready, willing and able firms in its market to calculate whether there are disparities between the Tollway's utilization of M/WBEs and availability of M/WBEs to perform on its contracts.

We further solicited anecdotal or qualitative evidence of minority and woman owners' experiences in obtaining contracts in the public and private sector goods and services industries. Tollway staff also provided extensive input about the operations of the program and suggestions for enhancements. These results provide the Tollway with the evidence necessary to narrowly tailor its Business Enterprise Program ("BEP") that applies to goods and services contracts as required by the federal courts.

A. Enhance Race- and Gender-Neutral Measures

The courts require that an agency use race-neutral²⁹⁷ approaches to the maximum feasible extent to meet its race- or gender-conscious goals. This is a critical element of narrowly tailoring the program, so that the burden on non-MWBEs is no more than necessary to achieve the Tollway's remedial purposes. Increased participation of BEP firms through race-neutral measures will also reduce the need to set contract goals.

1. Conduct Increased Outreach

Many M/WBEs requested assistance with accessing information about the Tollway's goods and services contracts. Regular "meet and greets" with Toll-

297. The term race-neutral as used here includes gender-neutrality, as defined in 49 C.F.R. §5.

way staff and large prime vendors would be helpful to assist these small firms to learn about upcoming opportunities and make important connections.

It is also important to focus on the subindustries where M/WBEs have received few, if any, Tollway dollars. To uncover any barriers and elicit ideas for broader subindustry participation, we suggest meetings with firms certified in the areas in which the state spends significant dollars, but in which M/WBEs do not participate at the level of their availability. The Tollway should also consider conducting early and targeted outreach about specific solicitations to expand the areas in which M/WBE obtain agency work.

2. Increase Prime Contracting Opportunities

While M/WBEs, other than Black-owned firms, did not experience disparities in access to Tollway contracts overall, contracts for prime work are out of reach for most M/WBEs (especially Black vendors). We recommend the Tollway place special emphasis on reducing barriers to prime awards for goods and services contracts.

Tollway's Small Business Initiative ("SBI") is an important race- and gender-neutral element of its efforts to ensure equal opportunities for its construction and construction related services contracts. The SBI sets aside smaller contracts for bidding only by certified Small Businesses Enterprises ("SBEs"). It has provided opportunities to SBEs to serve as prime contractors, thereby increasing their capacities and supporting their growth and development.

We suggest this approach be extended to goods and services contracts. This is especially important, given the Tollway's very high utilization of M/WBEs. Achieving participation through measures other than contract goals will be important to the legal defensibility of the program.

Another race- and gender-neutral method to reduce barriers would be to "unbundle" contracts. State goods and services projects are often very large and complex. Not surprisingly, contract size is a disincentive to small firms to submit bids or proposals. Smaller contracts are an important race-neutral component to a defensible program. Unbundling projects, providing longer lead times and simplifying requirements would assist smaller businesses to take on more state work. In conjunction with reduced experience and insurance requirements where possible, unbundled contracts would permit smaller firms and M/WBEs to bid as prime contractors, as well as enhance their subcontracting opportunities. Unbundling must be conducted within the constraints of the need to ensure efficiency and limit costs to taxpayers.

3. Expand Technical Assistance Offerings

Many M/WBEs requested additional training on specific aspects of doing business with the Tollway. Assistance is currently focused on the construction industry and expanding offering to goods and services will help to increase the capacity of M/WBEs to do Tollway work beyond these areas.

The concentration analyses in Chapter IV suggest that M/WBEs could benefit from efforts to expand the subindustries in which they receive work. M/WBEs had received few to no dollars in some North American Industry Classification System (“NAICS”) codes and utilization was highly concentrated in a handful of M/WBEs.

4. Enhance Contract Data Collection and Reporting

A critical element of this study and a major challenge was data collection of full and complete prime contract and associated subcontractor records. The Tollway is a large and complex organization and, as is very common, did not have all of the information needed for the analysis. Based on our experiences collecting contract records for this report, we suggest the following:

1. Collect full information on all contacts regardless of size, procurement method or certification status for all firms, both prime contractors and subcontractors. This should include email addresses, six-digit NAICS codes for the work performed or the goods/services provided on the contract, race and gender ownership, and DBE certification status disaggregated by race and gender. This will facilitate creating full and complete data, which are necessary for any future disparity study.
2. Conduct ongoing and follow-up training on how to use the B2Gnow® system for Tollway personnel, prime contractors and subcontractors.
3. Provide training to Tollway staff on how to assign NAICS codes for contract goal setting.
4. Delineate reporting of BEP participation by whether the dollars were achieved using BEP contract goals or through race- and gender-neutral approaches (i.e., SBI contracts, and BEP prime dollars on open market contracts).

5. Integrate All DBE Program Aspects into One Department

In 2019, the Tollway split off the compliance component of program administration from the outreach, community engagement and technical support component of the program. Whatever the intention, firms of all types reported this has caused confusion, delays and unnecessary complications. In our experience, it is highly unusual for program elements to be siloed in this manner. To

the contrary, such fragmentation serves only to hinder coordination, communication and consistency. The Tollway would benefit from “one stop shopping” for the program, so that it speaks with one voice and presents a smooth operation to its vendors and the public. We therefore recommend that all program functions be again centralized in one department, with various divisions focused on specific program aspects.

B. Continue to Implement a Narrowly Tailored Business Enterprise Program

The Tollway’s BEP program has been very successful in opening opportunities for minority and woman firms on its contracts. As reported in Chapter IV, overall, M/WBEs have reached parity with non-M/WBEs in receiving Tollway dollars. We note, however, that Black-owned firms still experienced large and statistically significant disparities. Further, when we examined whether firms were concentrated within an industry, or between industries, because of race or gender, a picture emerged of unequal outcomes for M/WBEs compared to non-M/WBEs. Further, the utilization was highly concentrated amongst a small number of firms, which suggests that market wide barriers have not been overcome for all groups.

In addition, as documented in Chapter V, when examining outcomes in the wider economy, it is clear that minority- and woman-owned firms do not yet enjoy full and fair access to opportunities to compete for construction and construction-related services contracts. Data from the Census Bureau’s *Survey of Business Owners* indicate very large disparities between M/WBEs and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms. Similarly, data from the Census Bureau’s *American Community Survey* (“ACS”) indicate that Blacks, Hispanics and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men. The results of numerous small business credit surveys reveal that M/WBEs, especially Black-owned firms, suffer significant barriers to business financing. There are also race-based barriers to the development of the human capital necessary for entrepreneurial success.

Our interviews with individual business owners and stakeholders and the results of our other studies for Chicago and Illinois governments further buttress the conclusion that race and sex discrimination remain persistent barriers to equal contracting opportunities. Many minority and female owners reported that they still encounter barriers based on their race and/or gender and that without affirmative

intervention to increase opportunities through contract goals, they will continue to be denied full and fair chances to compete.

We therefore recommend that the Tollway continue to implement narrowly tailored race- and gender-based measures.

1. Use the Study to Set Narrowly Tailored BEP Contract Goals

The Tollway should use the study's detailed unweighted availability estimates as the starting point for contract specific goals. As discussed in Chapter II of this Report, an agency's constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. This methodology involves four steps²⁹⁸:

1. Weight the estimated dollar value of the scopes of the contract by NAICS codes, as determined during the process of creating the solicitation.
2. Determine the unweighted availability of BEP firms in those scopes, as estimated in the disparity study.
3. Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
4. Adjust the result based on geography and current market conditions (for example, the volume of work currently underway in the market, project location, the entrance of newly certified firms, specialized nature of the project, etc.), past achievement on similar projects and any other relevant factors.

This constitutionally mandated approach may result in no goals where there are insufficient subcontracting opportunities (as is often the case with supply contracts) or an insufficient number of available firms.

Written procedures spelling out these steps should be drafted. The Tollway uses the B2Gnow[®] electronic diversity management system to support supplier diversity program implementation. We have worked with this firm to develop a contract goal setting module to assist with the process of setting narrowly tailored goals that are legally defensible and administratively feasible. The detailed, six-digit NAICS availability figures in Chapter IV should be entered into the goal setting formula, then adjusted to the dollar weights of the specific contract scopes. The results of this formula must then be reviewed by the Tollway for any adjustments.²⁹⁹

298. See www.contractgoalsetting.com, for instructions on correct contract goal setting. Our firm, in conjunction with B2Gnow[®], developed this free site to provide the methodology and forms for contract goal setting.

299. For information about using disparity study data to set narrowly tailored contract goals, please see www.contractgoalsetting.com. We developed this free website in conjunction with B2Gnow[®], Inc., to assist agencies to set defensible and achievable contract goals.

We further urge the Tollway to bid some goods and services contracts without BEP goals that it determines have significant opportunities for BEP firm participation. These control contracts can illuminate whether certified firms are used or even solicited in the absence of goals. The development of some “unremediated markets” data, as held by the courts, including the Seventh Circuit in upholding the Illinois Department of Transportation’s DBE program, will be probative of whether the program remains needed to level the playing field for minorities and women. The legal standard is that an agency must use race-neutral methods to the “maximum feasible extent” and the outcomes of “no goals” contracts will illuminate how effective race-neutral measures are in achieving non-discriminatory outcomes.

We further recommend that contract goals be reviewed when there is a change order greater than some minimum amount (*e.g.*, 10%). This could result in an increase, a decrease or no change in the contract goal, but it will ensure the constitutionally required flexibility that is the hallmark of a narrowly tailored goal setting and implementation methodology. Insisting that a vendor must meet a goal that should have been revised based on the agency’s post-award changes is unlikely to survive legal scrutiny.

2. Enhance BEP Program Policies and Procedures

BEP operates well, as a general matter. We suggest some revisions, however, based on the feedback of business owners and staff and national best practices. We note that some of these enhancements will require more staff resources.

- More transparency about how BEP contract goals are set would be helpful. As discussed above, we recommend using the highly detailed data in this Report to set contract goals. This is a narrowly tailored, legally defensible, transparent and replicable methodology that should allay concerns about how goals are set. A readily accessible methodology might help to address resistance or questions from prime contractors and even Tollway staff. In addition to using this approach, a list of the five-digit NIGP codes used to set the goal could be listed in the bid documents to provide guidance on how to meet the target for that solicitation.
- Clarify that bids or proposals will be accepted based on the bidder’s submission of Good Faith Efforts (“GFE”). Flexibility is a critical requirement of a constitutionally sound program, and the Tollway should ensure that its GFE review process is robust and that firms understand that it is possible to use it. We suggest that the Tollway develop training materials, which could include video instructions, on GFE to ensure that everyone understands the criteria and that the standards are being followed.

- Drop the ability of a low bidder to supplement its BEP participation or GFE (beyond any clarifying information) where it did not meet the contract goal. While well intentioned, this undercuts the concept that BEP compliance is an integral part of the bidding process. Why negotiate in good faith before submission if you can supplement the Utilization Plan after the fact? It has the further pernicious effect of encouraging bid shopping of BEP firms because the as-read low bidder now has a committed price and the certified firms can be shopped until one agrees to whatever the bidder presented for that item in its bid.
- Increase monitoring of BEP compliance was urged by certified firms and Tollway staff. This may require more training for Tollway staff.

3. Develop Performance Measures for Program Success

The Tollway should develop quantitative performance measures for the overall success of the program. To evaluate its effectiveness in reducing the systemic barriers identified in this Report, possible benchmarks might be:

- Increased participation by Black-owned businesses as prime contractors and subcontractors.
- Increased prime contract awards to certified firms.
- Increased variety in the industries in which minority- and woman-owned firms are awarded prime contracts and subcontracts.

C. Conduct Regular Program Reviews

The federal courts require a race-conscious program to have a sunset date. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, the Tollway must ensure that they remain narrowly tailored.

APPENDIX A:

FURTHER EXPLANATION OF THE MULTIPLE REGRESSION ANALYSIS

As explained in the report, multiple regression statistical techniques seek to explore the relationship between a set of independent variables and a dependent variable. The following equation is a way to visualize this relationship:

$$DV = f(D, I, O)$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu$$

where C is the constant term; β_1 , β_2 and β_3 are coefficients, and μ is the random error term.

The statistical technique seeks to estimate the values of the constant term and the coefficients.

In order to complete the estimation, the set of independent variables must be operationalized. For demographic variables, the estimation used race, gender and age. For industry and occupation variables, the relevant industry and occupation were utilized. For the other variables, age and education were used.

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. Since this report examined the Metropolitan Water Reclamation District of Greater Chicago, the analysis was limited to data from the counties of Cook, DuPage, Kane, Kendall, Lake and Will. The coefficient for the new variable showed the impact of being a member of that race or gender in the metropolitan area.

APPENDIX B:

FURTHER EXPLANATION OF THE PROBIT REGRESSION ANALYSIS

Probit regression is a special type of regression analysis. Probit regression analysis is used to explore the determinants of business formation because the question of business formation is a “yes” or “no” question: the individual does or does not form a business. Hence, the dependent variable (business formation) is a dichotomous one with a value of “one” or “zero”. This differs from the question of the impact of race and gender on wages, for instance, because wage is a continuous variable and can have any non-negative value. Since business formation is a “yes/no” issue, the fundamental issue is: how do the independent variables (race, gender, etc.) impact the probability that a particular group forms a business? Does the race or gender of a person raise or lower the probability he or she will form a business and by what degree does this probability change? The standard regression model does not examine probabilities; it examines if the level of a variable (*e.g.*, the wage) rises or falls because of race or gender and the magnitude of this change.

The basic probit regression model looks identical to the basic standard regression model:

$$DV = f(D, I, O)$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry and occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu$$

where C is the constant term; β_1 , β_2 , and β_3 are coefficients, and μ is the random error term.

As discussed above, the dependent variable in the standard regression model is continuous and can take on many values while in the probit model, the dependent variable is dichotomous and can take on only two values: zero or one. The two models also differ in the interpretation of the independent variables' coefficients; in the standard model, the interpretation is fairly straight-

forward: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.³⁰⁰ However, in the probit model, because the model is examining changes in probabilities, the initial coefficients cannot be interpreted this way. One additional computation step of the initial coefficient must be undertaken in order to yield a result that indicates how the change in the independent variable affects the probability of an event (*e.g.*, business formation) occurring. For instance, with the question of the impact of gender on business formation, if the independent variable was WOMAN (with a value of 0 if the individual was male and 1 if the individual was female) and the additional computation chance of the coefficient of WOMAN yielded a value of -0.12, we would interpret this to mean that women have a 12 percent lower probability of forming a business compared to men.

300. The exact interpretation depends upon the functional form of the model.

APPENDIX C:

SIGNIFICANCE LEVELS

Many tables in this Report contain asterisks indicating that a number has statistical significance at 0.001, 0.01, or 0.05 levels (sometimes, this is presented as 99.9 percent; 99 percent and 95 percent, respectively) and the body of the report repeats these descriptions. While the use of the term seems important, it is not self-evident what the term means. This Appendix provides a general explanation of significance levels.

This Report seeks to address the question of whether or not non-Whites and White women received disparate treatment in the economy relative to White males. From a statistical viewpoint, this primary question has two sub-questions:

- What is the relationship between the independent variable and the dependent variable?
- What is the probability that the relationship between the independent variable and the dependent variable is equal to zero?

For example, an important question facing the Tollway as it explores whether each racial and ethnic group and White women continue to experience discrimination in its markets is do non-Whites and White women receive lower wages than White men? As discussed in Appendix A, one way to uncover the relationship between the dependent variable (e.g., wages) and the independent variable (e.g., non-Whites) is through multiple regression analysis. An example helps to explain this concept.

Let us say, for example, that this analysis determines that non-Whites receive wages that are 35 percent less than White men after controlling for other factors, such as education and industry, which might account for the differences in wages. However, this finding is only an estimate of the relationship between the independent variable (e.g., non-Whites) and the dependent variable (e.g., wages) – the first sub-question. It is still important to determine how accurate the estimation is. In other words, what is the probability that the estimated relationship is equal to zero – the second sub-question.

To resolve the second sub-question, statistical hypothesis tests are utilized. Hypothesis testing assumes that there is no relationship between belonging to a particular demographic group and the level of economic utilization relative to White men (e.g., non-Whites earn identical wages compared to White men

or non-Whites earn 0 percent less than White men). This sometimes is called the null hypothesis. We then calculate a confidence interval to find the probability that the observed relationship (e.g., -35 percent) is between 0 and minus that confidence interval.³⁰¹ The confidence interval will vary depending upon the level of confidence (statistical significance) we wish to have in our conclusion. When a number is statistically significant at the 0.001 level, this indicates that we can be 99.9 percent certain that the number in question (in this example, -35 percent) lies outside of the confidence interval. When a number is statistically significant at the 0.01 level, this indicates that we can be 99.0 percent certain that the number in question lies outside of the confidence interval. When a number is statistically significant at the 0.05 level, this indicates that we can be 95.0 percent certain that the number in question lies outside of the confidence interval.

301. Because 0 can only be greater than -35 percent, we only speak of “minus the confidence level”. This is a one-tailed hypothesis test. If, in another example, the observed relationship could be above or below the hypothesized value, then we would say “plus or minus the confidence level” and this would be a two-tailed test.

APPENDIX D:

UNWEIGHTED AND WEIGHTED AVAILABILITY

Central to the analysis, under strict constitutional scrutiny, of an agency's contracting activity is understanding what firms could have received contracts. Availability has two components: unweighted availability and weighted availability. Below we define these two terms; why we make the distinction; and how to convert unweighted availability into weighted availability.

Defining Unweighted and Weighted Availability

Unweighted availability measures a group's share of all firms that could receive a contract or subcontract. If 100 firms could receive a contract and 15 of these firms are minority-owned, then MBE unweighted availability is 15 percent (15/100). *Weighted availability* converts the unweighted availability through the use of a weighting factor: the share of total agency spending in a particular NAICS code. If total agency spending is \$1,000,000 and NAICS Code AAAAAA captures \$100,000 of the total spending, then the weighting factor for NAICS code AAAAAA is 10 percent ($\$100,000/\$1,000,000$).

Why Weight the Unweighted Availability

It is important to understand *why* weighted availability should be calculated. A disparity study examines the overall contracting activity of an agency by looking at the firms that *received* contracts and the firms that *could have received* contracts. A proper analysis does not allow activity in a NAICS code that is not important an agency's overall spending behavior to have a disproportionate impact on the analysis. In other words, the availability of a certain group in a specific NAICS code in which the agency spends few of its dollars should have less importance to the analysis than the availability of a certain group in another NAICS code where the agency spends a large share of its dollars.

To account for these differences, the availability in each NAICS code is weighted by the agency's spending in the code. The calculation of the weighted availability compares the firms that received contracts (utilization) and the firms that could receive contracts (availability). Utilization is a group's share of total spending by an agency; this metric is measure in dollars, *i.e.*,

MBEs received 8 percent of all dollars spent by the agency. Since utilization is measured in dollars, availability must be measures in dollars to permit an “apples-to-apples” comparison.

How to Calculate the Weighted Availability

Three steps are involved in converting unweighted availability into weighted availability:

- Determine the unweighted availability
- Determine the weights for each NAICS code
- Apply the weights to the unweighted availability to calculate weighted availability

The following is a hypothetical calculation.

Table A contains data on unweighted availability measured by the number of firms:

Table A

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE	Total
AAAAAA	10	20	20	5	15	400	470
BBBBBB	20	15	15	4	16	410	480
CCCCCC	10	10	18	3	17	420	478
TOTAL	40	45	53	12	48	1230	1428

Unweighted availability measured as the share of firms requires us to divide the number of firms in each group by the total number of firms (the last column in Table A). For example, the Black share of total firms in NAICS code AAAAAA is 2.1 percent (10/470). Table B presents the unweighted availability measure as a group’s share of all firms.

Table B

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE	Total
AAAAAA	2.1%	4.3%	4.3%	1.1%	3.2%	85.1%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE	Total
BBBBBB	4.2%	3.1%	3.1%	0.8%	3.3%	85.4%	100.0%
CCCCC	2.1%	2.1%	3.8%	0.6%	3.6%	87.9%	100.0%
TOTAL	2.8%	3.2%	3.7%	0.8%	3.4%	86.1%	100.0%

Table C presents data on the agency's spending in each NAICS code:

Table C

NAICS	Total Dollars	Share
AAAAAA	\$1,000.00	22.2%
BBBBBB	\$1,500.00	33.3%
CCCCC	\$2,000.00	44.4%
TOTAL	\$4,500.00	100.0%

Each NAICS code's share of total agency spending (the last column in Table C) is the weight from each NAICS code that will be used in calculating the weighted availability. To calculate the overall weighted availability for each group, we first derive the every NAICS code component of a group's overall weighted availability. This is done by multiplying the NAICS code weight by the particular group's unweighted availability in that NAICS code. For instance, to determine NAICS code AAAAAA's component of the overall Black weighted availability, we would multiply 22.2 percent (the NAICS code weight) by 2.1 percent (the Black unweighted availability in NAICS code AAAAAA). The resulting number is 0.005 and this number is found in Table D under the cell which presents NAICS code AAAAAA's share of the Black weighted availability. The procedure is repeated for each group in each NAICS code. The calculation is completed by adding up each NAICS component for a particular group to calculate that group's overall weighted availability. Table D presents this information:

Table D

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE
AAAAAA	0.005	0.009	0.009	0.002	0.007	0.189
BBBBBB	0.014	0.010	0.010	0.003	0.011	0.285
CCCCCC	0.009	0.009	0.017	0.003	0.016	0.391
TOTAL	0.028	0.029	0.037	0.008	0.034	0.864

To determine the overall *weighted availability*, the last row of Table D is converted into a percentage (*e.g.*, for the Black weighted availability: $0.028 * 100 = 2.8$ percent). Table E presents these results.

Table E

Black	Hispanic	Asian	Native American	White Women	Non-MWBE	Total
2.8%	2.9%	3.7%	0.8%	3.4%	86.4%	100.0%

APPENDIX E:

QUALITATIVE EVIDENCE FROM ILLINOIS DISPARITY STUDIES

In addition to the anecdotal data collected for this study and provided in the Qualitative chapter of this report, Colette Holt & Associates has conducted several studies in Illinois over the last several years that shed light on the experiences of minority- and woman-owned business enterprises (“M/WBEs”) and Disadvantaged Business in the Chicago area and overall Illinois marketplace. We interviewed minority and woman owners and non-M/WBE representatives about barriers to the full and fair participation of all firms in the agency’s market area. The total number of participants for these interviews was 987 individuals. We also conducted electronic surveys; the total number of respondents was 991.

This summary of anecdotal reports provides an overview of the following disparity studies: the Illinois State Toll Highway Authority 2023 (“Tollway DBE 2023”) ³⁰²; the Chicago Park District 2022 (“CPD”) ³⁰³; the State of Illinois Goods and Services (“State of Illinois 2022”) ³⁰⁴; Cook County, Illinois 2022 (“Cook County 2022”) ³⁰⁵; Metropolitan Water Reclamation District of Greater Chicago 2021 (“MWRD 2021”) ³⁰⁶; the City of Chicago 2021 (“City of Chicago”) ³⁰⁷; the Chicago Transit Authority 2019 (“CTA”) ³⁰⁸; the Regional Transportation Authority 2016 (“RTA”) ³⁰⁹; the Northeast Illinois Regional Commuter Railroad Corporation doing business as Metra 2016 (“Metra”) ³¹⁰; the Illinois State Toll Highway Authority 2015 (“Tollway 2015”) ³¹¹; the State of Illinois

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- 302. Tollway DBE 2023: <https://www.illinoistollway.com/documents/20184/87215/Illinois+Tollway+Disadvantaged+Business+Enterprise+Program+Disparity+Study+2023+-+WATERMARKED.pdf>
 - 303. CPD <http://www.mwbelaw.com/wp-content/uploads/2022/09/Chicago-Park-District-Disparity-Study-2022.pdf>
 - 304. State of Illinois 2022 <https://cei.illinois.gov/content/dam/soi/en/web/cei/documents/State%20of%20Illinois%20Goods%20and%20Services%20Disparity%20Study%202022.pdf>
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 - 308. CTA <http://www.mwbelaw.com/wp-content/uploads/2019/12/Chicago-Transit-Authority-Disparity-Study-2019.pdf>
 - 309. RTA <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-RTA-Availability-Study.pdf>
 - 310. Metra <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-Metra-Availability-Study.pdf>

Department of Central Management 2015 (“CMS 2015”)³¹²; Cook County, Illinois 2015 (“Cook County 2015”)³¹³; Metropolitan Water Reclamation District of Greater Chicago 2015 (“MWRD 2015”)³¹⁴; and Pace Suburban Bus 2015 (“Pace 2015”)³¹⁵.

1. Discriminatory Attitudes and Negative Perceptions of Competency and Professionalism Continue to Impede the Success of M/WBEs

Many minority and woman owners reported being stigmatized by their race and/or gender or being a certified firm. Subtle and overt stereotyping and race and gender discrimination were commonplace. Respondents reported that White men often evince negative attitudes concerning their competency, skill, and professionalism.

There is never a time when it’s [competency is] not questioned. It’s part of minority business biases and disparity. (State of Illinois 2022, page 185)

People assume MBE means low quality or inability to perform. (Cook County 2022, page 287)

It's race and gender because they seem like [general contractors] targeted, for me in my opinion, they targeted the MBE WBE firms more, and they kind of pounded more on those firms.... They did pick on the smaller companies, particularly the MBE and WBE subs. So that’s why I just got totally out of the market because I felt that was just a total business, a bad business decision for me as a Black woman. I’m not, I don’t know about other cultures, but I know as a Black female in the industry as a sub, it was a nightmare. (CPS 2022, page 195)

The standards of service are different if you are certified. One mistake or delay and they feel you are not competent. If you were in the boy’s club, they always understand that shit happens. (Tollway DBE 2023, page 181)

311. Tollway 2015 <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Illinois-State-Toll-Highway-Authority-Disparity-Study.pdf>

312. CMS <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-State-of-Illinois-Department-of-Central-Management-Services-Disparity-Study.pdf>

313. Cook County 2015 <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-Cook-County-Illinois-Disparity-Study.pdf>

314. MWRD 2015 <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-The-Metropolitan-Water-District-of-Greater-Chicago-Disparity-Study.pdf>

315. PACE <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Pace-Chicago-Suburban-Bus-Disparity-Study.pdf>

There is often a stigma attached to being a certified firm.

There is a stigma [to being an MBE]. Quite frankly, when we go after projects, I have to remind the client we have more people in Chicago than [large engineering firm], and yet you're looking at them as though they're [name], and we are bigger than [name] in Chicago. But that's not what you're seeing. There's a ton of firms that are significantly smaller than us, who they expect us to sub to. And we have more experience, more people. And to be honest with you, I often say, "I don't have a Black engineering degree." There was no minority engineering or business degree, there wasn't any of that, right? I got the same one as everybody else. And yet somehow my experience is different. Somehow my engineering experience is less there even though I have all the same qualifications, I've worked on all the same projects. My team has worked on all the same stuff, quite frankly, our staff work for the vast majority of these larger engineering firms that we're competing against now. And they were the smartest people in the world when they worked for [name], and I of a sudden they worked for [name] firm, and they clearly are stupid. (MWRD 2021, page 173)

[What] we learned a long time ago was the MBE or the WBE or the DBE [certifications], they can help you or hurt you. We changed our marketing materials years ago and put that in the back end because what are we first and foremost? We are an engineering solution provider for the clients, and if this project happens to have goals, we can help you fulfill that as well, it's a win-win.... There is always this preconceived notion that [because] you are an M[BE] you can't be that competent. (RTA, page 119)

It's just a stigma that MBEs can't perform like the market leaders. (CPD, page 179)

They try to put a stigma on us.... It's like a stigma that they have to use us because there's participation requirements and they make us sound like we're not good at what we do. And there are some really good MBE, WBEs out there. (Cook County 2015, page 129)

I have not been an MBE because I didn't want the stigma associated with some of the MBEs.... I do send some of my Caucasian project managers to some units. I will say and even though my company is 75% minority and women out of my 40 to 50 employees, I have to do that because there is a stigma

associated.... You have to perform at a 50% higher rate, even though we don't get the good jobs, because they go to the large companies. Whether their construction or consulting, or services and goods, it's hard to compete in that environment. (MWRD 2021, page 173)

Where you run into the barriers or the stigmas is when you're dealing with majority firms that are not familiar with you, or really just would prefer not to deal with the program. (Tollway DBE 2023, page 165) We get a label that's put on us because we're the BEP supplier. And going in the room immediately, it's as if I don't know what I'm doing after 43 years of doing it. And the primes just, they feel like "I have to do business with you". (State of Illinois 2022, page 169)

If you have an MBE, WBE status it somehow implies non-prime. (Cook County 2015, page 131)

There is still a stigma within the procurement departments about what minority-owned companies are able to do and what we're able to handle. (CPS 2022, page 195)

Biases about the capabilities of minority and women business owners impact all aspects of their attempts to obtain contracts and to ensure they are treated equally in performing contract work. The often-prevailing viewpoint is that M/WBEs and small firms in general are less qualified and less capable.

Just this past year, a colleague of mine had a GC say, "do we want quality, or do we want diversification". The reality is, this is what is thought out there. (MWRD 2021, page 173)

They think that because you're a minority or a woman business that you don't have your act together. (Pace, page 118)

I [an African American male and] have been questioned about who actually puts together the bids that my company submits. I guess the assumption was that I was not capable of doing this myself. (State of Illinois 2022, page 185)

There's still the perception that if you're a minority or a woman, you can't perform.... That there's something wrong with you, you know, there's something lacking.... They stick with the good old boys. (Tollway 2015, page 111)

[We are a Hispanic/Latino firm.] We are not accepted as subject matter experts. Others called to verify information. (State of Illinois 2022, page 186)

As a minority-owned business, even going into presentations, there's more fascination with, well, how did you even get to where you are as opposed to what's your capability? Learning more about your capabilities as a business owner. And it's very frustrating to have to go through this. (State of Illinois 2022, page 170)

[Hispanic/Latino firm] was in a preconstruction meeting with engineers, architects and managers. The State representative asked me if I had a copy of my surveying license, no other person out of the 6 plus attendees was required to provide a proof of his/her qualifications. I felt embarrassed but I did not say anything in the meeting. (Tollway DBE 2023, page 180)

If it's all people that I know, sure, that's not a problem. If it's at all a new crowd, it starts all over again.... I've got to do three times as much work as anybody else to get to that level of respect. (Tollway DBE 2023, page 165)

Client thinks all Black firms are small, have less quality, need financial help and as a result, not considered for larger projects as prime. (Tollway DBE 2023, page 181)

The construction community is a bunch of good old boys, that are multi-generational. (MWRD 2021, page 176)

I contacted a man in the beginning one time and asked him about doing kind of a joint deal.... And he informed me he would rather not bid a job than have to work with DBE[s]. (CMS, page 125)

It is very difficult to establish relationships with primes. MBE work is automatically looked at as subpar and we are held to a higher standard. (City of Chicago, page 131)

The assumption [was] that all of these White male guys in gray suits were the primes, and the DBEs weren't at the event and were some kind of outsiders. (RTA, page 121)

When you're on the job, the majority firm treats you like a sub instead of a partner or equal. (Tollway DBE 2023, page 182)

We were having problems when we first became an MBE, we used to hear MBE had a reputation of not performing like the outside market. It's just a stigma that MBEs can't perform like the market leaders. (CPD, page 179)

Primes and suppliers create obstacles once they find that I am a Black woman owned company. (Tollway DBE 2023, page 182)

As a black female, I am often condescended to and disregarded as a professional with a proven track record of excellence. (Cook County 2022, page 286)

I do [construction manager] work [as a D/WBE,] and most of the time I'm mistaken for the flagger. And then from all levels, whether it's the client, the contractor, or other CM firms, "Hey, are you here to do the flagging for us?" And I think the perception of women maybe I have double whammy on that, but women and minorities on contracts, especially in visible environments, we still have that perception that we couldn't possibly be the owners or the management with that firm.... When we're talking about solving a problem, they're looking at one of my construction inspectors instead of me. But as long as we stay in integrity with who we are, I think that we can rise above any prejudice that there is in the industry (Tollway DBE 2023, page 166)

They just give me all of these types of titles, but a lot of times, I don't really pay attention until you actually say something to me because I'm pretty much a straightforward woman. I have learned they're going to assume a lot of things about you, but you can't really get caught up with that. Because sometimes, it's a mindset. (City of Chicago, page 107)

As an MBE, there is a stereotype that we are not a competent firm which is why primes don't want to allow us the margin to operate our businesses because they think they have to do our work. I pride my company on the self-performed work we do. (Cook County 2022, page 287)

There is a mindset that's kind of like, hey, you guys should be happy to be in the program and sort of be happy with what we're giving you.... It is something that's specific to being a minority, or, in my case, being both, minority and woman. Because I know men who are White males who are friends of mine, who run firms, who run everything from a million dollar to multimillion-dollar, to hundreds of millions of dollar firms. They don't have these conversations. (CPD, page 179)

Small, minority, women, disadvantaged businesses are perceived to not always have all the qualifications, regardless of how long they've been in business. Sometimes, even in just the

way primes deal with you, they assume a certain amount of incompetence, even though they've been working with you for a while. (CMS, page 123)

Unfortunately, it is business as usual in Chicago. I have to fight to death for opportunities my non-diverse competitors take for granted. I doubt I will see this change in my lifetime. (Cook County 2022, page 285)

The other message that I got [at an outreach meeting for Illinois Tollway projects] was that this was a sacrifice on the part of the primes, that they needed to be thanked for coming on board in that way. I found it very offensive. (RTA, page 121)

[General contractors] do not rely on our expertise. They think we're just fronts or that we don't know our businesses and they don't trust us or that we know what we're doing. In the beginning, I know people don't believe at all that I knew what I was doing. (MWRD 2015, page 132)

As a Black contractor, there are assumptions made about our quality, capacity, etc., none of which are true. Fear of a large Black contractor in Chicago is REAL. (City of Chicago, page 129)

African American firms are limited in the work the client feels we can handle, yet smaller, less qualified non-Black firms get opportunities. (Tollway DBE 2023, page 182)

[State personnel] look down on us as some kind of beggars for percentages. (CMS, page 124)

Some people can't let go of some things from the past. Some think we can't do the work and will cause problems throughout the project. (City of Chicago, page 130)

[Large prime contractors] try one to two M's or W's, that may not be all that great, and they lump us all together as "second rate". When they may try 7-8 substandard White guy companies, and they don't think anything of it. They just keep looking for someone else. (MWRD 2021, pages 173-174)

Being a black woman owned business, I tend to only get conversions from those customers and clients that look like me. (Cook County 2022, page 285)

There's a huge disparity when it comes to minorities and women business owners. Being the only African American union [firm type] company in the state, I mean, I experience it

on a daily basis. I'm so busy fighting all over the place, like an octopus with tentacles. (State of Illinois 2022, pages 170-171)

When we are 60, 70 people still people ask, what capacity [do you have]? We could do as good as any bigger firm in the city, but they will still ask the same question. Even the state departments will ask the same question. (CMS, page 125)

My other big burr in my saddle is always about capacity. We're just like they are. I mean if we get a big job, we can hire people just like they can. Because you want to know why? The engineers all want to go to whoever's got the big fancy job. They're technical people. They want the juicy projects.... It's not difficult to build capacity. If you can continue to win big recognizable projects. (Tollway, page 112)

Sexism continues to constrict opportunities for many women entrepreneurs. Women's' authority and expertise are often questioned.

Stereotyping-yes. Often there is the assumption that there is a man, or husband that controls the business. Have had male engineers straight laugh in my face when I've said I'm the one who owns the company. (City of Chicago, page 132)

The MeToo movement has really helped [with sexist behaviors]. I think it's brought enough attention to it that people think about it twice before they do that. But honestly, I've experienced that for years. And for the longest time, I didn't even realize it was happening until my male employee pointed it out to me. And then it became very apparent that, wow. it's like really, they're talking to him before they're talking to me. They're assuming he knows more than I do. It's still there. It still happens, but it is definitely changing. You just hope that it changes, continues to change faster. (CPS 2022, page 195)

I have been mistaken for many different roles within my company. Oddly enough, no one 'mistakes' me for the owner (that is unless they know of me). I have had people tell me point blank (after we have met) that they thought I was a front at first and that there was no way I was running this company, and how now after we met their opinion changed and that they were wrong. Their only basis for their initial assumption was that I was a younger female. (City of Chicago, page 133)

Women are considered to be sub-standard business owners by some. We aren't considered "trustworthy" like their buddies.

They assume because we have a W/DBE designation that we are somehow promised to never lose money on a job. Some ethereal person just writes us a check if we have money problems. I guess the barrier is how we are perceived. (Tollway DBE 2023, page 183)

Many firms who could hire me don't like the "competition" created by a female DBE and refuse to partner with me to keep my profile low. (Tollway DBE 2023, page 182)

They're never outwardly abusive [in current times], but it's subtle. I'll show up with my field manager. I'm an African American woman. He's a White man. They always address him first and assume he's the owner of the company. And then when they realize that, okay, no, he's not the owner, I should be addressing her they still ask him the technical questions, even though I'm there to do the bid, he's just an add-on to hold the tape measure. You know? So, it's still hard to get taken seriously in this day and age. And especially as a women in the [construction].... And the biggest comment I get is, "My plumber doesn't look like you." And I'm like, "Well, I'm glad because I don't have a twin." It's still hard. It's still an initial hurdle to get over. (CPD, page 180)

At least yearly, one of the first questions asked to me is "What does your husband do?". Although benign, it implies that I certainly cannot be running a construction company. So right off the bat, they think I am unqualified. That is the assumption they are going in with. (MWRD 2021, page 174)

During interrogatories, very specific technical and legal (security) questions that were not posed to other vendors were posed to me [as a woman-owned company]. (State of Illinois 2022, page 191)

Yes, when on job sites with male-always assumes the male is in charge or the engineer and not me until I explain otherwise. (Tollway DBE 2023, page 183)

There is an old boys' network that is misogynistic. Let's just be honest with it.... You're a woman, you can't possibly do that. That's a ridiculous notion anymore, at least in my perspective. But I can tell you of all of the W[BE]s that I know, they have that problem working in a male-dominated situation where unless, and I hate to say it in these terms, unless you're related or have some inside track, you're not going to get selected unless they

absolutely have to use you for something.... There's a lot more women entering the [engineering] field. But that's going to take a while and overcoming that prejudice [won't be easy]. (Cook County 2015, page 131)

Let's just be honest. I'm a woman who's in construction so that just equals bullseye.... Other contractors who come in behind you and they call you [trade] chicks. Or they tell you, what has the world come to because you're [trade] chicks.... Men come out and they complain that a woman is running the crew.... Even the men I hire, I'm giving you a paycheck, struggle with taking orders from a woman.... Someone comes to the job and they go to one of the guys [I employ] and they say, are you the lead here? (CMS, page 125)

I've gone to a lot of women's networking events. I was a member of the [Federation of Women Contractors], a couple other networking things that are women-driven, and that's the only place that I filled that gap, because women might have the same feelings as me, but I've always felt like I don't fit in.... I've always worked well with men, but I find that the project management staff, all men, would be sitting there talking about sports stats. Their water cooler talk was not super interesting to me, so I didn't fit in there. (City of Chicago, page 112)

In negotiations, people think that women aren't savvy businesspeople and that I'll just do this for nothing. (CMS, page 125)

The [architecture and engineering], it's male dominated. The last couple of years, I've seen more women in the industry at conferences, workshops, working, seeing their names on the list of people with projects, that we're making a dent, but not a very big dent. (State of Illinois 2022, page 171)

You're mansplained away. You're just invisible. They say they want to work with you, but like you said, I think [name], that there's hostility. There's lack of trust. (City of Chicago, page 109)

It's a common occurrence for people [both general contractors and agency personnel] to assume that I'm an administrative person rather than the president.... They'll even go to the point of quizzing me about rudimentary questions about [trade]. (Pace, page 119)

My biggest problem is I can't walk in a room, or any women, I'm somebody's wife. I mean my husband has never worked for me in my whole life. He's a carpenter.... I've sat on executive boards and I've never been addressed as an [specialty trade] contractor on an executive board without oh, she's so-and-so's wife or other [specialty trade] contractor's wives, where they've sat back and said, do you know my wife? They don't want nothing to do with me. (Tollway, page 111)

My male colleagues will often get return phone calls or answers even when I am the appropriate one to receive this information. Sexism is very institutionalized and many men I interact with don't even appear to know that they are sexist with their verbal language, body language and/or voice tone. (Cook County 2022, page 290)

Half of the buildings that I've worked for, they think that the pumper truck driver is my husband because they can't wrap their heads around that a woman owns the company or knows the technical aspects of the job and would hold the license. The other half thinks that I'm married to my field manager because those are the guys, they see the most often, it's the pumper truck driver and the field manager, so they automatically assume that they're the real owner and they're propping me up. I'm not related to any of them. (City of Chicago, page 108)

This is very cultural and definitely our line of work is hostile towards us from one way or another. I haven't had any sexual harassment so far, but I can tell you from my clients, and even my painters, I get that look. You know, that you're a lady, what are you doing in the painting business? It has been hard. But I think, like I said, it's cultural because it's not only this work that we do, but in general. Whenever we go, we get some sort of mistreatment. They don't trust us completely. They don't think -that we know what we're doing. (City of Chicago, page 109)

I always feel that I have to do more than everyone else, maybe because I'm a woman. We have that thing that we always have to walk the extra mile, that 100 mile smarter than everyone else. (CTA, page 57)

I have been told [as a Black women] through a trade union that they would do "everything they [could] to make me fail, and if I told they would call me a liar." I have been told to "watch my tone" as a GC by an architect, and when I asked him to clarify, there was no reasoning. My family business has been

terminated for convenience on two award-winning projects. The list is exhaustive. (Cook County 2022, page 289)

As a woman-owned mechanic repair, males do not think I know what I am doing until we start talking, then they realize I do know repair work. (State of Illinois 2022, page 190)

Many women reported unfair treatment or sexual harassment in the business world.

I have experiences [sexual harassment] on job sites where the majority of staff are men. Cat calling and inappropriate comments and touching. Event labor is mostly male dominated sector which poses some of the issues especially for younger females in authority roles. (Cook County 2022, page 293)

I have on several occasions been offered jobs in exchange for sex. I've had guys order several drinks my way to try to get me drunk at a networking event. They pull me to the side because we've talked on other occasions about a specific job, and they'll say this job is coming up and they'll name one of my competitors. He's doing this and he's doing that and blah, blah, blah. A few drinks in, they want, okay, "what are you going to do" sort of thing. It's happened quite a bit. (CTA, page 59)

I was propositioned at a hotel room by my boss, the owner of the company. He was like, "Hey you're coming in, right?" When I said no, he was like, "Really? What exactly are you trying to say here?" And then he showed up half naked at my hotel room and was banging down my door to get in and come and have sex. (City of Chicago, page 110)

Many-the best one was when a customer told me that if I didn't wear a turtleneck, showed more cleavage that I would get more business. (Tollway DBE 2023, page 183)

A job was taken away because I had just had a baby. (State of Illinois 2022, page 190)

A federal program officer in charge of our contract made repeated comments about who I was dating and his right to have an affair, I was sitting next to him and he laid his head in my lap. (State of Illinois 2022, page 192)

There's an issue with disrespect.... I've had truck drivers call me sweetie. And I said, "I appreciate that you feel that way about me, but it's not very professional. And I would appreciate you

don't do it again." And so, I've learned the confidence over the years to just not put up with it and to also train my staff not to put up with it. (City of Chicago, page 107)

They call you sweetheart. Sweetheart, honey, just inappropriate comments. (Pace, page 119)

Sometimes, MBE/WBE companies are thought of as a necessary evil and not necessarily a true partner, and extra burdens are put on us so we don't bid on the projects. Like, long times to pay, getting beat upon material prices, waiting till the last minute to ask us to bid are the artificial barriers that are put in place, that seem neutral on the surface, but it's really because people don't want to work with us. (CPD, page 181)

The good old boy network still exists. And we have to work 50, a hundred times harder to keep proving ourselves, day in and day out. (CPS 2022, page 196)

2. Access to Business and Professional Networks and Mentoring Limit M/WBEs' Opportunities

Minority and woman respondents reported difficulty in accessing networks and fostering relationships necessary for professional success. These barriers extended to agency staff. Respondents were unable to gain access to and communicate with key agency decisionmakers.

The support system that small White businesses have in the United States is far greater than the support system that a Puerto Rican business has, or an African-American business has.... And not just networks as in who you know. Networks to money, the ease of cash flow.... The networks and gaining access to those is really the fundamental difference that I see [between M/WBEs and small White male-owned firms]. (Cook County 2015, page 13)

I see that primes get access to bids well before they hit the market. This is an unfair advantaged as they already know how to bid the job and usually have a way of negotiating the job well before. (Cook County 2022, page 294)

They claim to want to level the playing field. I don't even feel some days that I'm in the stadium. (State of Illinois 2022, page 170)

I don't know where to get networking information and some networking events are for members only. Membership fees for some organizations are too high for small and new business. (Tollway DBE 2023, page 184)

You're continually not in that network of individuals that they continuously give the contracts to.... You can put these programs together and even from the leadership perspective, they can believe in them and engage in these projects' programs. But if your staff doesn't bring support and bring in that culture of inclusion, then it becomes really difficult to manage through that process. And so, we've had challenges from the project management staffing perspective. Even if you get an opportunity, it becomes difficult when the support, internal support, isn't there to really promote inclusion. (CPS 2022, page 196)

There's certainly a lot of stuff that they do that we could do as a prime, but we don't get invited. (MWRD 2021, page 175)

There are systematic ways that they are keeping out younger minority- and women-owned firms. It's the same 15 firms in suburban school districts that keep getting the work over and over again. (CPD, page 181)

Being a woman of color and self-employed, financial institutions are reluctant to deal with you. They request things of us that are not requested of others. They make it as hard as possible. No matter our financial situation. (State of Illinois 2022, page 198)

[We are an African American firm and] many primes do not wish to work with us. Manufacturers choose not to work with us. Many procurement officers and contract officer representatives give us a harder time. (State of Illinois 2022, page 188)

Suppliers tend to favor the larger non-minority firms with the new and improved methods of doing business as well as provide preferred pricing information. (City of Chicago, page 134)

The informal networking is what counts most. It is very hard to come by and can take years to develop. In some cases, you just have to last long enough to get noticed on someone else's terms. (State of Illinois 2022, pages 192-193)

[Construction] is still a relationship business. It's establishing relationship with your client and with who you're going to do business with. What I struggle with is that I can't have the same relationship with my client, who are primarily men, as men can have with them.... They're going to give projects to people that they like, people that they know, people that they have a solid relationship with. And that's a struggle that I have as a woman is that I can't establish the same relationship. It's not a good scene for me to be out in a bar until two in the morning with my male clients. (Tollway, page 110)

I have found it very difficult to penetrate the long, legacy relationships established by prime contractors, and others, in the materials supply chain. They simply do not interact/interface with honest intentions to do business. (Cook County 2022, page 293)

Large General Contractors have their favorites. We may have access to the same general public knowledge, but not the knowledge of the current contractors working for engineers, general contractors, etc. currently working for the Tollway. We are pretty much selected solely on price. (Tollway DBE 2023, page 184)

There are so many organizations where membership would be beneficial but we just don't have access to them. (Tollway DBE 2023, page 184)

No, we are not part of the old boys' network, so we miss out on fraternization between the client and vendors. (City of Chicago, page 131)

It's eliminating you from a meeting. It's not inviting you to outings, when you could be making relationships with people. It's leaving you out of things. I cannot tell you how many times I've been told, "[name], it wasn't intentional." That's the exact point. It needs to be intentional. ... It might be a strip club, or it might be a casino. It's generally not going to get your nails done. We're all clear on that. But the whole point is, we just don't get invited to these things because number one, they decide that we wouldn't want to go. I golf. I golfed in college. I golfed in high school. Nobody, despite working 22 years in my industry knows that I golf, despite how many times I've told them that I golf. When I go and golf, they're blown away because they're like, "Holy shit, that's right down the middle of fairway." The whole point is people make assumptions about us

women. You wouldn't want to go. You wouldn't feel comfortable. Or they make assumptions about the people that are on these outings. They wouldn't feel comfortable with you there. Because the reality is in a lot of these outings, these men are doing things that they shouldn't be doing. (City of Chicago, page 111)

It always goes back to relationships.... We're all in the trust business. (MWRD 2015, page 134)

There are certain "circles" where information and opportunities are shared, and those circles typically do not include minorities and rarely include women. I know this from decades of working in the professional environmental/engineering/sustainability consulting world and having personal relationships with Senior C-Suite white males who were kind enough to give me a glimpse into their world, and occasionally brought me to a meeting so I could observe and see what happens at this higher level of private groups and deal making. (State of Illinois 2022, page 193)

Yes, I have been informed that my competitors were colluding on price to ensure they were within a certain range and lower than me. We also are discriminated against by limiting the number of direct distributor agreements we have. (Cook County 2022, page 299)

We do not have access to network with public sector decision makers within the state government. State-wide networking symposiums are not available. Whereas with our local government, the City of Chicago, we do have access to public sector vendors. (State of Illinois 2022, page 194)

If I was going to counsel anyone on starting a business, the first thing I would tell them is to join their trade association for their particular ethnicity or female, male, whatever. I mean, you really need to have that behind you. (City of Chicago, page 112)

Legacy partnerships that well-established contractors have with manufacturers, suppliers, and customers. We have a major challenge in getting opportunities due to these relationships and are constantly undermined. (Cook County 2022, page 294)

We are "used" to just check a box for the big boys who don't want us in the circle of friends – so they waste our time

dangling a carrot in front of us, when they are most often projects already “let”. (Cook County 2022, page 297)

Thus far, it has seemed more like something larger companies do to just meet a quota. We haven’t found firms that are actually willing to help move the revenue meter. (Cook County 2022, page 296)

3. Obtaining Work on an Equal Basis

Respondents reported that institutional and discriminatory barriers continue to exist in the Illinois and Chicago area marketplaces. They were in almost unanimous agreement that M/W/DBE contract goals remain necessary to level the playing field and equalize opportunities. Race- and gender-neutral approaches alone are viewed as inadequate and unlikely to ensure equal opportunity.

I remember when the Tollway had no goals, and it was absolutely abysmal. There was never a minority or a female that worked on a Tollway job, ever. And we would tell them, DOT has goals. They find women and minorities to do work. It’s the same type of work that the Tollway and the DOT does. And it wasn’t until the Tollway started to have some goals that we started, we all started to get work on Tollway projects. (Tollway, page 113)

The program has been critical for our growth [as an MBE]. I think, without the program, there’s not a doubt in my head that we would be who we are today. I think the program gets you in the door. The program gives you opportunities earlier on in your career. The program opens doors for you. (City of Chicago, page 114)

[Our] only opportunities to be used is on state projects that require BEP goals. We do not get contacted or invited to negotiate any contracts or non-competitive contracting opportunities. (State of Illinois 2022, page 195)

The reality is that we’re competing against, you know, companies that have been around for generations and minorities, disadvantaged people, women have not had the opportunity to grow. Just for example, us being a startup, even getting credit just for our materials is impossible and we have to pay cash right from the beginning. So yeah, the [D/B/SBE] certifications cannot go away and they actually should be enforced. (Tollway DBE 2023, page 167)

I have reached out to primes, but most give me the cold shoulder. When a prime does put me on a bid (we didn't win it) they've told me, that they are only putting me on for the M/WBE credit. (Cook County 2022, page 296)

Most of the [G]eneral C[ontractor]s out there that are non-minorities would rather this program go away. (City of Chicago, page 115)

We knew we were going to have a loss of business [when we "graduated" from the M/WBE program] which we did. We had a 30% loss of revenue because we no longer fulfilled those goals for the prime contractors in the MBE veteran program.... There's not a contract that we weren't on that they continued to use us once we graduated from the program. (CPS 2022, page 197)

We only receive opportunities on public projects requiring MBE/DBE participation. Opportunities at all other projects are almost not available for us. (Tollway DBE 2023, page 185)

There's been jobs where as soon as the goal's met, then they just call up whoever they normally call... we do get more work when there is a goal involved. (Tollway 2015, page 114)

We've never done any private work with these same GCs. And I know they're doing it. They never ask us. (CPS 2022, page 197)

The majority of our work is only due to mandated DBE percentages. We are highly rated self performers on projects but will be passed over unless DBE is required. (Tollway DBE 2023, page 185)

If you asked me what the detriment is to minorities is we've only been doing this for some people have been doing it for two years, five years, 10 years. Just the knowledge itself takes five to 10 years to get. Capital, the access to capital takes another five or 10 years. So, that's why these companies are multi-generational. It is a situation that we want to boost up our DBE firms. We've got to start giving them projects for them, that they can get experience on, that they can start showing the bonding companies, that they have the ability to do a project. (MWRD 2021, page 176)

The minute there's not a goal, those primes walk away, and they go back to the old boys' network. (Pace, page 121)

By being certified with the City of Chicago as an MBE and a DBE I get to work as a subcontractor on many city projects. Without these certifications, I would not get many contracts. (City of Chicago, page 136)

Always denied because I do not have backing from a majority company that wants to use minorities [sic] as a pass through. (City of Chicago, page 140)

As a WBE, the only time that we have negotiating power before the subcontract is awarded, when our general is sending us a subcontract, is when they know that they have to use us because they wrote our name in their letter of intent paperwork that they submitted to their group. And so that gives us, if we know that, which we always try to find out, were we the one that they named, then that gives you a little bit of negotiating room with them, even on items that are outside of their own subcontract where they're trying to get you to do something that the client requires of them. (City of Chicago, pages 114-115)

It may not be intentional, but there is still a prevalent feeling I feel in the industry, particularly engineering, that we've got to use them because we got to, if we don't use them, we're not going to get the job. (CMS, page 123)

I don't think that [a totally race- and gender-neutral program would] be good enough.... Everybody's got somebody that knows somebody that has a cousin that owns a small business that will do work. So, if you don't force it, it won't happen. (RTA, page 120)

If it had not been for the WBE requirement, we would not be doing the work that we are doing. When I launched my firm, what put my firm in large scale projects was the [agency] requirement for WBE participation on projects and we were awarded a [project] contract. With the [project] in our portfolio, I was not relegated to tiny local projects. WBE allows us to compete, what keeps us successful is that once we have proven our talent, we are asked back. But we still need to be allowed to compete and the WBE does invite us at least to the game. (CPD, page 181)

If there isn't a program somewhere, there is no incentive for anybody to use me. And the fact that there are minority- and women- and veteran-owned options, that is the only reason I'm

even going to get the experience to be able to become the prime.... In the engineering world, the larger firms are just getting larger, so it's very hard to just even have entry. (MWRD 2015, page 134)

If there's no goal and unless you have a very specific specialty, nobody's going to call you. I mean, this is consistent for me in many states. (CTA, page 62)

In the past two years, Metra has eliminated the DBE goals on [certain entire categories of] purchases. So, we used to be subcontractor on those contracts and once they eliminated those goals there was no prime that wanted to partner with us.... The [DBE contract] goal was reduced to zero. And so, we were really disappointed and inquired why that happened and were never able to get a response. (Metra, page 124)

Our competition pushes us out of the [industry] competition because they are not required to have WBE or MBE diversity. (CPD, page 181)

Where there have been goals and I've been on teams and they took away goals for whatever reason, I was denied the opportunity. Flat out. Taken off the team. (Cook County 2015, page 133)

I lost my certification, and I was not able to do any business. I got no opportunities. (CTA, page 62)

Prime contracts were especially difficult to obtain on an equal basis.

Perception is a huge issue. There's a constant perception that if you have the certification, how could you be prime? Why should you be prime? Why are you prime, you're disadvantaged? (CTA, page 59)

Only want us to fulfill percent. Client rarely chooses MBE Primes. (Tollway DBE 2023, page 185)

[It's the] perception on the part of the primes, which is also on part of the agencies, that is keeping a lot of us outside of being able to be that capacity. (CPS 2022, page 198)

The general contractors are the only ones that get to the size of graduation and they generally go out of business once they graduate. Our subcontractors don't ever get to that size because of the fact that they don't have private work to grow

off of. They only have this MBE, WBE work. (Cook County 2015, page 133)

The [DBE program] forces the primes to throw a broad net and bring in capable partners to participate. And that's how ultimately you get the exposure and with the exposure you get the credibility so that as a minority or small business you can prime yourself. (Metra, page 124)

We have graduated from the DBE program before and we reentered it. And the year that we graduated, the following year our revenues dropped by about 30 to 40%.... As a DBE firm or MBE firm, it is our responsibility to look down the road and to prepare ourselves for graduation... If we had more prime relationships with the clients, we probably would have been more sustainable. (Tollway, page 114)

Don't ever start to compete against your primes, it's a different ball game. And it's interesting because [name] and [name] will fight tooth and nail on a project in the morning, and then partner with each other on the afternoon on a different project like nothing ever happened. But you got a minority firm competing against you in the morning, they will be shunned for years and will never want to do any work with you again. I've learned that personally. I have one client come to one of my teammates, I mean, one of my employees and say, "Oh, I heard you're going after this big project as a prime and we're going on the other side." He expected them to say, good luck. He said, "You just remember you work for me over here." So, I told him, "You tell the client, he remembers that he works for me over here. And he works for me over here," since we're going to play that game. But that's what's literally been told. So, once you decide that you're going to come out on your own and actually be a big boy, the prejudice, it gets significantly worse because as long as you're a small minority firm that we can keep in a box, and we can keep you where we want you to be, and you do what we say do, and you don't ask us to see the client, and we'll just give you the work, and you just be happy taking this 20%, you're fine. When you start to compete, they bring out the big guns. He'll fight the client, because the client still thinks you're little and the clients think they too big, so you literally in this limbo area of how do I reposition the firm to get work? (MWRD 2021, page 175)

Because you don't have that one person who has 15 years or some sort of CTA experience, they move on to somebody else, which some of the work that we do doesn't necessarily require.... We do it for all the other agencies in the city and the state or whatever, but then we're kind of bounced out of there because we don't have that CTA experience.... When they come out with smaller RFQs that seemingly would be a perfect entre for smaller businesses, there may be 500, half million-dollar contracts, million-dollar contracts, which many of the companies in here are more than capable of doing, it still goes to the largest large firm in the area. It's almost like, "We want you to come after these contracts," but then at the end of the day, do they really? (CTA, page 64)

There's the expectation that minority firms are never supposed to grow beyond a certain level that you're put in that box, you stay there comfortably and everything is good. The minute you start to spread your wings, there are issues and biases you have to be confronted with. I mean, too often, when we decided to go after a much bigger project than say, one of our goals this year, is that we want to go after a \$10 million feed project. And as we've started to assemble teams, everybody's whispering, oh, what does he think he's doing? Where does he think he's going to go with this? But the expectation is that you're not supposed to strive to do anything bigger than what has been offered to you in an MBE or DBE program. So yeah, the stigma is still very prevalent. How dare you want to grow your firm big? What are you doing? (MWRD 2021, pages 175-176)

Most primes will only use minority vendors, to fill quotas. Once quota is met, they will not talk to us for bids. (Tollway DBE 2023, page 185)

With governmental entities, we're exhausted trying to get in because they dismiss us (as professional services firms) immediately, send us to a big company who gives us quotes like, they'll throw us a bone to work with them. (CPS 2022, page 198)

Many respondents indicated that M/WBEs who could access public contracts and subcontracts through M/WBE programs found it difficult to obtain private sector opportunities.

We do not get [private sector opportunities] and we've been in business quite some time. We have really good relationships with all these contractors, but we've actually even sat down

with a few of them and talked about doing private work. They were in shock like, “I didn’t realize you’d want to do private work.” Why wouldn’t I want to? (CTA, page 62)

We’ve got to talk about that private sector project goals and make certain that these contractors adhere to the guidelines. Otherwise, we’re going to see \$65, \$80B fly through this community and we’re still on food stamps. (City of Chicago, page 116)

The program is still much needed. As we all know it takes a long time to bid these jobs. Manhours which converged to dollars. And I’ve had two contractors while I’ve walked in, I’ve made phone calls prior to COVID try to stop by and talk about the upcoming bid. And to my surprise, both were exactly the same. They said, “[Name], we’re all set on the MBE for this job.” and I say, “well, I’m still a contractor. I still put a lot of time and money into this bid. I have some serious questions and I need to bid this job and I want it to be successful.” “But we’re all set. We’re good.” (City of Chicago, page 114)

It’s been a very difficult task tapping into the Chicago market. Almost makes you want to just shut down and leave. I understand why a lot of businesses do at this point. (MWRD 2021, page 176)

We only get calls because we are [a] black minority firm and do not get considered to work on projects that are privately funded. (City of Chicago, page 140)

You go through the motion of then looking on a job, almost like you’re doing them a favor last minute, and you put together a proposal only for them to come back to you and say, “Well, I’ve only got this amount. Can you do it?” You get the feeling with an experience like that, that it’s a one and done. They’ll go back to whoever they previously had been inviting or getting numbers from. (State of Illinois 2022, page 172)

When it comes to receiving race-neutral contract opportunities, there are times when we [as an African American-owned firm] are not considered because we do not help with minority goals despite competitive pricing. (Tollway DBE 2023, page 185)

Several M/WBE report they are often not paid on equal terms.

Not paid on time, haggling with pricing, not treated with respect from some vendors. (Tollway DBE 2023, page 187)

With the way that the program is set up there is no way to have good cash flow which makes it more difficult to have what banks and bonding are looking for. (Tollway DBE 2023, page 187)

Most often the problem for our firm is getting financing and operation loans. Government work does not pay quickly and often we have a difficult time waiting for the payments and have to turn down work until it is paid. We essentially have to fund the work until it is paid and being a smaller firm that makes day to day operations difficult. Larger more established firms have larger pockets. (State of Illinois 2022, page 197)

Being a small Minority Company I have ALWAYS experienced barriers in this industry including governmental with PPE loans and grants that are extremely hard for small businesses to obtain. It's not a fair playing field not by far. (State of Illinois 2022, page 196)