

# Illinois Tollway Disadvantaged Business Enterprise Program Disparity Study 2022





# **ILLINOIS TOLLWAY DISADVANTAGED BUSINESS ENTERPRISE PROGRAM DISPARITY STUDY**

## **2022**

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## 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.

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# I. EXECUTIVE SUMMARY

The Illinois State Toll Highway Authority (“Tollway”) retained Colette Holt & Associates (“CHA”) to perform a disparity study to identify any statistically significant disparities between the opportunities and experiences of Disadvantaged Business Enterprises (“DBEs”) and their actual utilization by the Tollway compared to the Tollway’s utilization of non-DBEs.<sup>1</sup> In this Study, we determined the Tollway’s utilization of DBEs on construction and construction-related 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 DBEs and DBE 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 DBEs in obtaining Tollway contracts and associated subcontracts. Based on our findings, we evaluated whether the Tollway’s continued use of race- and gender-conscious measures is constitutionally permissible. by the results of this analysis.

The methodology for this disparity study is consistent with relevant embodies the constitutional principles of *City of Richmond v. J.A. Croson Co.*,<sup>2</sup> *Adarand Constructors, Inc. v. Peña*,<sup>3</sup> 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 developed for the National Academy of Sciences, which is the recommended standard for designing legally defensible disparity studies.

## A. Summary of Strict Constitutional Standards Applicable to the 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”.

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1. For our analysis, the term “DBE” 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. The term “non-DBE” includes firms that are owned by persons or entities other than minorities or women, including publicly traded and employee-owned firms.
  2. 488 U.S. 469 (1989).
  3. 515 U.S. 200 (1995).

Strict scrutiny is the highest level of judicial review. The Tollway must meet this test to ensure that any race- and gender-conscious program is in legal compliance. Strict scrutiny analysis has two prongs:

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.

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:

3. The necessity of relief;
4. The efficacy of race-neutral remedies at overcoming identified discrimination;
5. The flexibility and duration of the relief, including the availability of waiver provisions;
6. The relationship of numerical goals to the relevant market; and
7. 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". 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 projects or held that the results would be the same under strict scrutiny.

Proof of the negative effects of economic factors on DBEs and the unequal treatment of such firms by actors critical to their success will meet strict scrutiny. Stud-



ies 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 DBE firms and their actual utilization compared to White male-owned businesses. 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 DBEs. 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 Disadvantaged Business Enterprise Program**

### **1. Program History and Objectives**

The Tollway adopted a non-discrimination policy and its DBE Program in 2005.<sup>4</sup> Since that time, the Tollway's Board of Directors has repeatedly affirmed its commitment to augmenting and enhancing business opportunities for small, minority- and woman-owned business enterprises.

The primary objectives of the DBE program are to ensure non-discrimination in the award and administration of Tollway contracts and associated subcontracts; to remove barriers to DBE participation in such contracts; to create a level playing field on which DBEs can compete fairly for Tollway contracts; to ensure the program complies with applicable law; and to ensure that only firms that meet the eligibility standards are permitted to participate as DBEs.

### **2. Program Administration**

The administration of the DBE program is managed by two separate departments within the Tollway. 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. The routine administration of the program is managed by the Contract Compliance Team ("Contract Compliance") in the Department of Procurement. The Department of Diversity and Strategic Development ("Diversity Department") is responsible for developing, implementing, and managing strategic initiatives that facilitate DBE participation in the program.

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4. Colette Holt & Associates was retained to develop the policy.

In 2015, the Tollway established the Diversity Advisory Council to assist with the review of its inclusion programs. The Council is comprised of representatives from more than 20 advocacy agencies.

The Tollway's Board of Directors also 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 ensure that its program's eligibility criteria are narrowly tailored, the Tollway accepts certifications from:

- The Illinois Unified Certification Program: DBE certifications from the Illinois Department of Transportation ("IDOT"), the Chicago Transit Authority, Metra, Pace and the City of Chicago
- City of Chicago Minority Business Enterprise ("MBE") and Women-Owned Business Enterprise ("WBE") certifications
- Cook County MBE and WBE certifications
- U.S. Small Business Administration 8(a) certifications

Eligibility for certification follows the federal regulations that govern the U.S. Department of Transportation's Disadvantaged Business Program at in 49 C.F.R. Part 26.<sup>5</sup>

### **4. Race- and Gender-Neutral Measures**

The Tollway has implemented several race- and gender-neutral measures to assist small businesses to do business with the Tollway.

#### **a. Small Business Initiative**

The Small Business Initiative ("SBI") sets aside contracts for bidding only by small firms without consideration of the firm's minority or gender status. The goal of the Initiative is to increase opportunities for small construction companies to participate as prime contractors on Tollway construction contracts. Construction contracts valued at \$5M or less are eligible for inclusion using this procurement method. Contracts are subject to subcontractor utilization requirements specified in the Special Contract Provisions ("Special Provisions"). Prime contractors must document self-

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5. As discussed in Chapter II, every court that has considered a challenge has found the regulations to be constitutional. The Tollway's modeling of its DBE program on these regulations was a major factor in its successful defense of its DBE program.

performance; may only use SBI subcontractors and must submit a small business utilization plan at the time of bid. A DBE may count its self-performance up to 40% of the total contract award to encourage small and diverse firms to participate as prime contractors. There is a Small Business Exception process allowing for the use of non-SBI subcontractors after consideration of documented efforts to engage SBI firms.

To be eligible for the program, construction firms must be registered with State of Illinois Small Business Set-Aside Program<sup>6</sup>; have annual gross revenues of \$14M or less; and be enrolled in the Initiative. A small business is defined as being independently owned and operated and that is not dominant in its field of operation. Most recently, the Diversity Department has recommended expanding the program to include firms with revenues between \$14M and \$33M. The recommendation is still in review, as it will require a change in state law.

**b. Rolling Owner Controlled Insurance Program**

The Rolling Owner Controlled Insurance Program (“ROCIP”) for commercial general liability insurance, adopted in 2021, seeks to address the challenges small firms have in obtaining such coverage. Enrollment in the program is mandatory for all contractors on SBI contracts. To date, there are more than 60 unique firms that have worked on more than \$64M in ROCIP insured contracts.

**c. Modifications of Bidding Requirements and Contract Conditions**

The Tollway has implemented changes in bidding requirements and contract conditions to make contracts more accessible to small firms. These include:

- Reducing the total contract duration from the notice to proceed to the contract end date to less than two years.
- Waivers of IDOT prequalification where feasible.
- Reducing the self-performance requirement to less than the typical 35% on some contracts.
- Removing onerous and burdensome requirements that serve as a barrier to entry.
- Unbundling contracts to provide opportunities for all-sized firms.

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6. <https://www.illinoistollway.com/documents/20184/864007/20200915+State+of+Illinois+Small+Business+Set-Aside+Presentation+for+THA.pdf/0f993bf6-94b7-e5a5-fe62-debc889b94ac?t=1600862885145>.

**d. Technical Assistance Program.**

The Tollway offers a comprehensive Technical Assistance Program to assist new, small and diverse firms to participate in Tollway highway construction and professional services contracts. The program is administered separately through Inner-City Underwriting Agency, Inc. and the Illinois Hispanic Chamber of Commerce. Participation is limited to transportation-related firms that include heavy-highway and vertical construction or professional services. Assistance includes a wide range of business development services that focus on increasing the stability and capacity of the firm. The program is designed to accommodate varying levels of support. Firms can choose a self-paced program or a collaborative group learning environment.

**e. Partnering for Growth Program**

The Tollway has implemented a mentor-protégé program, Partnering for Growth, to assist small firms to develop capacity and to become more competitive through partnering with larger, more experienced firms. The duration of the partnership is typically one to five years. To encourage construction firms to become mentors and encourage participation in the program, the Tollway offers participating mentors and protégés the opportunity to earn up to \$100,000 per year in bid credits that may be applied toward future Tollway construction bids to lower the bid amount and increase the chances of winning the contract as the low bidder.

New emerging technology is a focus that was recently added to the Program. This new element encourages sharing the latest in construction equipment and technology through short-term relationships between large contractors and small/diverse firms. These short-term agreements are typically one year or less and are not tied to specific Tollway contracts or projects within the state of Illinois.

**5. DBE Program Policies and Procedures**

**a. Contract Goals**

The DBE program sets DBE participation goals for both construction and professional services contracts. Goals are set based on DBE availability to perform the scope of work of the contract by specific six-digit. Professional services contracts draw from available prequalified professional service firms.

**b. Counting DBE Participation Towards Contract Goals**

Only the work actually performed by a DBE in its certified scopes can be counted towards achievement of a contract goal. Firms must be certified at the time of bid. Work that the DBE subcontracts to a non-DBE does not count toward the DBE goal. Contractors can receive goal credit for the cost of supplies and materials, commissions and fees for professional and technical services. Bidders can meet contract goals by entering into a Joint Venture partnership with DBEs or by direct purchase of materials from DBEs.

**c. Pre-Award Bidding Procedures**

**i. Submission of DBE Utilization Plans**

The Tollway has developed Special Provisions which set forth the bidding procedures that must be followed in order to be considered responsive. For projects with a DBE utilization goal, bidders must submit, at bid time, a completed Disadvantaged Business DBE Utilization Plan (“Utilization Plan”), stating all proposed DBE subcontractors that will be used to meet the goal commitment. Certified DBE bidders meeting the goal through self-performance are 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.

A DBE Participation Commitment Statement supporting the Utilization Plan must be submitted at bid time. The Commitment Statement must be signed by the bidder and each DBE confirming availability and the intent to perform a commercially useful function (“CUF”).<sup>7</sup>

**ii. Good Faith Efforts to Meet Contract Goals**

A bidder unable to meet the contract goal must demonstrate it made Good Faith Efforts (“GFE”) to do so. A Good Faith Efforts Contact Log and Checklist must be submitted with the bid. The bidder must provide supporting documentation outlining its GFE to achieve the goal. The Tollway considers numerous factors in determining whether a bidder has made GFE, including the performance of other bidders in meeting the contract goal on contracts of a similar nature. Following an adverse determination, a bidder may file a request for administrative reconsideration of its Utilization Plan with the Tollway’s Chief of Contract Compliance.

**iii. Time Extensions for Low Apparent Bidders to Meet Contract Goals**

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7. A CUF is defined as the performance of a distinct element of work required for the procurement, with the requisite skill and expertise.

If the low apparent bidder's DBE commitment is below the DBE contract goal, the Tollway can extend the documentation period two business days from the time the contractor is notified of the extension. The extended period allows the bidder to supplement its initial Utilization Plan to add DBE participation to meet the DBE contract goal or to demonstrate additional GFE to do so. If additional DBE commitments are secured during this extension, the bidder must submit an amended Utilization Plan. A bidder unable to meet the goal must submit documentation of the GFE, along with a request for a waiver.

**d. Contract Performance Compliance**

The Tollway uses the B2Gnow<sup>®</sup> Diversity Payment Reporting System software to track real time payments to prime contractors and track and analyze prime payments to subcontractors.

Changes to commitments in the Utilization Plan, including DBE substitutions after contract award, must be approved in writing by the Tollway. Any unauthorized changes are considered a violation of the Special Provisions and can result in breach of contract.

The Contract Compliance Team is responsible for approving or denying requests for substitutions or other changes to the Utilization Plan. Where the contractor 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 DBE subcontractor. If the contract goal cannot be reached and GFE have been made, the contractor may substitute with a non-DBE.

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

**e. Sanctions for Non-Compliance**

The Tollway may impose sanctions if the prime contractor or DBE subcontractor is not complying with the Special Provisions or the Utilization Plan. A contractor is considered out of compliance if it fails to provide information requested by the Tollway or provides false or misleading information or statements concerning compliance, the certification status of DBEs, GFE or any other material fact. Noncompliance may result in damages, which may include declaration of a default, termination of the contract, imposi-

tion of liquidated damages or remedies provided for in the contract or by law, or sanctions, which may include but are not limited to monetary sanctions, such as non-release of retainage; the payment audits when the audit reveals noncompliance; damages in an amount up to the monetary difference between the amount committed to by the contract in its DBE Utilization Plan and the amount actually paid to DBEs; a restriction on future business with the Tollway, or other sanctions permitted by law.

When sanctions are imposed, the contractor may file an appeal with the Tollway's Sanctions Committee, consisting of representatives from Contract Compliance, Diversity, Legal and the user department. The contractor can supply additional documentation and request an oral presentation to the Committee. The contractor may appeal an adverse decision to the Tollway's Executive Director.

To date, no sanctions have been imposed on a prime contractor.

## **6. Outreach and Training**

### **a. Outreach**

The Tollway conducts extensive outreach to alert DBEs to contract opportunities and to encourage their participation on its contracts. From 2017 through 2019, the Tollway hosted, sponsored or participated in 745 outreach events, workshops, and conferences. Events ranged from pre-bid conferences to "meet-and-greets" designed to facilitate relationship building between prime contractors and DBEs and a series of educational seminars on business growth techniques.

The Tollway partners with assist agencies, DBE organizations and Chicago area governments to provide additional networking assistance, technical support and outreach. Services range include increasing small and diverse firm availability, providing certification assistance and supplementing the Tollway's technical training to build business skills and improve operations.

Outreach and networking opportunities are posted to the Diversity and Strategic Development webpages, along with other resources and assistance services available to small and diverse firms.

The Contract Compliance web pages provide access to contract administration, such as current and future solicitation opportunities, the bid letting schedule for future projects, downloadable bid documents, review of bids and proposal tabulations, as-read bid results, a bid calendar and change orders. The online plan room provides easy access to drawings and other important information about Tollway projects.

**b. Building for Success Webinar Series**

The Tollway has created a series of webinars– “Building for Success”– to identify and educate new, small and diverse firms on how to conduct business with the Tollway. The weekly series is designed to provide information about various Tollway programs and initiatives. Past webinar topics have included the ROCIP, Navigating “BidBuy” [the state of Illinois’ system], DBE Certification Program, Prequalification Assistance and the Construction Checklist. These webinars are available on the Tollway’s website to view at any time.

**7. 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.

**8. Experiences with the Tollway’s DBE Program**

To explore the impacts of the Tollway’s DBE Program, we interviewed 79 individuals about their experiences and solicited their suggestions for changes. We also collected written comments from 79 DBE and non-DBE businesses about their experiences with the Tollway’s program through an electronic survey.

**a. Business Owner and Stakeholder Interviews**

*Access to information and decisionmakers:* A few firms reported that it can be difficult to access accurate information on the Tollway’s program elements. Several complained about the difficulty and cost of obtaining bid information and documents. Some DBEs requested greater access to Tollway staff with contracting decision-making responsibilities.

*Obtaining work with the Tollway:* The great majority of DBEs reported that the Tollway’s program was important to the success of their firm. Concerns, however, were raised about how to manage task order contracts.

Further, while well intentioned, several DBEs asserted that the Tollway’s policy of encouraging new DBEs and as many DBEs as possible to work on a specific contract was counterproductive. The Tollway’s policy of strongly encouraging the use of new DBEs also negatively impacts the ability of DBEs to move into the role of prime consultant; there was also some confusion about what is meant by “new” DBEs. A relatively new firm owner stated the policy had helped her.



The race- and gender-neutral Small Business Initiative has helped DBEs to obtain prime contracts. However, firms reported that there are issues with this approach, such as contracts still being too large for many DBEs and smaller firms. Outside the SBI, “unbundling” contracts into smaller and/or fewer complex jobs was also recommended as one method to increase DBE prime participation.

Another race- and gender-neutral suggestion was to pay mobilization money to subcontractors.

*Supportive services to DBEs and small firms:* Several DBEs reported good experiences with the Tollway’s supportive services. The Partnering for Growth in particular was seen as instrumental in guiding DBEs to become successful bidders on Tollway contracts.

*Meeting DBE Contract Goals:* Most prime contractors and consultants were able to meet DBE contract goals. However, several stated that they did not believe documentation of their GFE would be accepted when they fell short.

The Tollway was described by some interviewees as creating disincentives to increase DBE participation, such as not reducing the contract goal when the scope of work has been decreased by the Tollway. One idea to align incentives would be permitting bidders to “bank” DBE participation in excess of the contract goal for a future contract where the goal was not met. Some prime contractors supported the concept.

A few non-DBE subcontractors who compete with DBE subcontractors reported that the program is a barrier and unfairly denies them opportunities.

*Contract performance compliance:* In general, the contract performance compliance was reported to work smoothly. However, confusion by Tollway staff about how to use the B2Gnow<sup>®</sup> compliance system was a problem for many firms. The Tollway decided to undertake complete audits of long closed out projects, to the frustration of many prime firms. Changes in the program’s structure and personnel have led to missed deadlines, unanswered questions and confusion for many prime contractors.

## **b. Electronic Survey Responses**

*Impact of the DBE program:* Minority and woman respondents widely supported the program. Many stated the program was essential to obtaining Tollway business. Several DBE respondents praised the program for providing more exposure and access to both prime contract and subcontracting opportunities.

A few White women DBEs felt that they received fewer opportunities than DBEs owned by racial and ethnic minorities.

*Access to Tollway contracting opportunities:* Some DBE respondents requested more opportunities to perform as prime contractors. One method to increase prime contracting opportunities would be to offer more small projects or “unbundle” contracts. Another approach would be to increase the number of SBI projects. However, some DBEs mentioned that the projects selected for the SBI are often too large.

*Tollway program compliance:* DBEs reported slow payments by both the Tollway and prime contractors. Several DBE and non-DBE respondents requested that the Tollway streamline its invoicing process to make it easier, more transparent and efficient to use.

DBEs requested more oversight to ensure prime contractors comply with DBE goal requirements. Another suggested that more oversight is needed for the SBI.

*Meeting contract goals:* Prime contractors indicated they were generally able to meet goals. However, meeting goals on specialty projects presented challenges for some prime bidders.

One DBE suggested that updating the DBE list on the Tollway’s website would make it easier for prime contractors to find firms in the right codes.

*Outreach and access to information:* Targeted outreach and more technical support were requested by several DBE respondents. Some DBE respondents requested greater access to Tollway staff.

*Experiences with business supportive services:* Owners who had participated in business support services generally found them helpful. Some respondents, however, suggested supportive services programs could offer more industry-specific or comprehensive instruction to develop concrete skills.

Many DBEs reported assistance with obtaining capital and bonding is critical to help them succeed.

*Experiences with mentor-protégé programs and teaming arrangements:* Mentor-protégé programs and joint ventures were often mentioned as approaches to help DBEs. A DBE firm that participated in the Tollway’s Partners for Growth found it helpful. However, more mentors and more monitoring were suggested.

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

We analyzed data for the Tollway's construction and construction-related 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 NAICS codes of prime contractors and sub-contractors; and DBE information, including payments, race, gender, etc.

The resulting Final Contract Data File ("FCDF") contained 1,092 prime contracts and 3,894 subcontracts. The net dollar value of the contracts to prime contractors and subcontractors was \$3,417,100,990.

Table 1-1 presents data on the 33 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
541330	Engineering Services	25.1%	25.1%
237310	Highway, Street, and Bridge Construction	16.7%	41.8%
238910	Site Preparation Contractors	10.5%	52.3%
238120	Structural Steel and Precast Concrete Contractors	9.7%	62.1%
237110	Water and Sewer Line and Related Structures Construction	8.7%	70.8%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.0%	78.8%
238990	All Other Specialty Trade Contractors	4.5%	83.3%
238110	Poured Concrete Foundation and Structure Contractors	4.3%	87.6%
561730	Landscaping Services	3.1%	90.6%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.0%	92.6%
541380	Testing Laboratories	1.4%	94.1%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
531320	Offices of Real Estate Appraisers	1.3%	95.4%
541370	Surveying and Mapping (except Geophysical) Services	0.9%	96.3%
238320	Painting and Wall Covering Contractors	0.6%	96.9%
238220	Plumbing, Heating, and Air-Conditioning Contractors	0.5%	97.4%
327390	Other Concrete Product Manufacturing	0.5%	97.8%
236220	Commercial and Institutional Building Construction	0.4%	98.2%
238290	Other Building Equipment Contractors	0.3%	98.5%
541620	Environmental Consulting Services	0.3%	98.8%
541820	Public Relations Agencies	0.2%	99.0%
238310	Drywall and Insulation Contractors	0.2%	99.2%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	0.2%	99.4%
238160	Roofing Contractors	0.1%	99.5%
238190	Other Foundation, Structure, and Building Exterior Contractors	0.1%	99.7%
541310	Architectural Services	0.1%	99.8%
238140	Masonry Contractors	0.1%	99.8%
238150	Glass and Glazing Contractors	0.1%	99.9%
238340	Tile and Terrazzo Contractors	0.03%	99.9%
238350	Finish Carpentry Contractors	0.03%	99.96%
238130	Framing Contractors	0.02%	99.98%
238330	Flooring Contractors	0.01%	99.99%
324121	Asphalt Paving Mixture and Block Manufacturing	0.01%	99.997%
327320	Ready-Mix Concrete Manufacturing	0.003%	100.000%
<b>TOTAL</b>		<b>100.0%</b>	

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.<sup>8</sup> Firm location was determined by zip code and aggregated

8. 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.

into counties as the geographic unit. Seven counties in Illinois – Cook, Dupage, Kane, Lake, McHenry, Will, and Winnebago – captured 91.0% of the FCDF. Therefore, we used these seven counties as the geographic market.

We next determined the dollar value of the Tollway’s utilization of DBEs, as measured by payments to prime firms and subcontractors and disaggregated by race and gender.<sup>9</sup> Table 1-2 presents the summary of distribution of contract dollars. Chapter IV provides detailed breakdowns of these results.

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

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
Total	4.1%	11.9%	5.9%	0.4%	9.3%	31.6%	68.4%	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 DBE Directory developed by CHA and other sources, we determined the unweighted availability of DBEs in the Tollway’s market area. Further explanation regarding the role of unweighted and weighted availability and how these are calculated is provided in Chapter IV and Appendix D.<sup>10</sup>

We next determined the aggregated unweighted availability of DBEs, and the availability of DBEs 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	DBE	Non-DBE	Total
6.0%	10.4%	4.4%	0.1%	8.9%	29.8%	70.2%	100.0%

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

We calculated disparity ratios for total DBE utilization compared to the total weighted availability of DBEs, measured in dollars paid.

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9. For our analysis, the term “DBE” includes firms that are certified by government agencies and minority- and woman-owned firms that are not certified.
  10. 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>.

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 result may be caused by the disparate impacts of discrimination.<sup>11</sup> 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.<sup>12</sup> 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 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 Women	DBE	Non-DBE
Disparity Ratio	68.7% <sup>‡***</sup>	114.2% <sup>***</sup>	133.4% <sup>***</sup>	292.8% <sup>***</sup>	105.0% <sup>***</sup>	106.0% <sup>***</sup>	97.4% <sup>***</sup>

*Source: CHA analysis of Illinois Tollway Highway Authority data*

*‡ Indicates substantive significance*

*\*\*\* Statistically significant at the 0.001 level*

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11. 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.”).
  12. 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.

## **D. Analysis of Disparities in Illinois Tollway's Marketplace**

Evidence of the experiences of DBE firms outside of DBE 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 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 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 DBE firms and non-DBE 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 DBEs face obstacles to achieving success on contracts outside of DBE 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**

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 DBEs 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 79 participants in four small group interviews. We also received 79 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.

- Several minority or woman business owners reported they still experience negative assumptions about their qualifications and competency. There can still be a stigma to being a DBE.
- Some women continue to suffer from sexism in the construction industry.
- Many new or small firms found it difficult to break into the market.
- More established firms sometimes reported that primes do not form long term relationships.
- There was close to unanimous agreement amongst DBEs that contract goals remain necessary to ensure equal opportunities to compete.
- Prime contracts were especially difficult to obtain.

### **2. Electronic Business Survey**

Results from the electronic survey were similar to those of the interviews. Among minority- and woman-owned firms, 59.4% reported that they still experience barriers to equal contracting opportunities; 24.4% said their competency was questioned because of their race or gender; and 25.0% 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.

- Many minority business owners reported that they continue to experience negative assumptions and perceptions about their competency and capabilities. Several believed reported that fair opportunities to compete for contracts were not available because of systemic racial barriers.
- Some minority and woman business owners reported there was often a stigma attached to being a certified firm.
- Many woman owners experienced sexism and stereotyping about their roles and authority. Several women business owners reported instances of demeaning comments and harassment.
- DBEs reported entrenched relationships and "good 'ole boy" networks impede access to contract opportunities.
- Many DBEs reported that primes use them only on projects with goals and that private sector and no-goal work is unavailable.
- Some DBEs reported discriminatory obstacles when trying to obtain financing, bonding and insurance that have reduced their ability to compete on an equal basis; obtaining surety bonding was especially challenging. Small and new firms face particularly large challenges.
- DBE firms reported barriers to equal contract terms. Some reported discriminatory supplier pricing.

## **F. Recommendations the Illinois Tollway's a Disadvantaged 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 construction and construction-related services contracts and associated subcontracts. The results provide the Tollway with the evidence necessary to narrowly tailor its DBE program as required by the federal courts.

The Tollway's DBE program is in compliance with strict constitutional scrutiny and national best practices. Several elements are outstanding, such as its supportive services offerings and commitment to leveling the playing field for DBEs. The following suggestions are addressed towards additional enhancements to support current efforts and activities to provide even greater opportunities for all firms to compete on a level playing field for Tollway contracts and subcontracts.

## **1. Enhance Race and Gender-Neutral Measures**

The courts require that governments use race- and gender-neutral<sup>13</sup> approaches to the maximum feasible extent to meet its DBE goal. This is a critical element of narrowly tailoring the program, so that the burden on non-DBEs is no more than necessary to achieve the Tollway's remedial purposes. Increased participation by DBEs through race-neutral measures will also reduce the need to set DBE contract goals.

### **a. Enhance the Small Business Initiative**

The SBI is an important race- and gender-neutral element of the Tollway's DBE efforts. It has provided opportunities to SBEs to serve as prime contractors, thereby increasing their capacities and supporting their growth and development. Most small firms supported this approach and reported it has been an important avenue for them to do work for the Tollway. We suggest the following enhancements to further the Initiative's objectives.

- Conduct regular introductory workshops on the program. Some DBEs were unfamiliar with the program and requested some training about how to benefit from its many elements.
- Raise the size standards for program eligibility. The Tollway currently relies on the State of Illinois' cap of revenues less than \$14M. Given the size of Tollway contracts, even smaller projects are still large by the standards of many agencies. We suggest that the Tollway follow the lead of the City of Chicago, which recently raised the size limits in its Minority- and Woman-owned Business Program for Construction contracts to 150% of the U.S. Small Business Administration's size standards. This will allow M/WBEs certified by the City that exceed the \$14M cap to benefit from the race- and gender-neutral SBI setaside. We recognize this will require a change in state law.
- Revise the SBI to remove the ceiling of 40% on prime self-performance so that small prime firms may participate as fully as possible in the job. This arbitrary limitation hinders the ability of small firms and DBEs to grow, and there are sufficient opportunities for smaller subcontractors on open market Tollway jobs.
- Consider additional types of contracts for inclusion in the SBI. For example, landscape architects suggested that the design of streetscape projects could be severed from the installation, allowing them to propose on these projects as prime consultants.

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13. The term race-neutral as used here includes gender-neutrality, as defined in 49 C.F.R. §5.

- Add a “quick pay” component for small contractors, where SBI prime contractors would be allowed to invoice every two weeks. Many DBEs reported that access to working capital is a hurdle to working on Tollway jobs, so smoothing out cash flow can help to support their participation.
- Do not set DBE contract goals on SBI solicitations. While it is always laudable to encourage DBEs to participate as subcontractors, this additional requirement for small contractors was reported to be a barrier to their participation.

**b. Expand Technical Assistance Offerings**

Many DBEs and non-DBEs requested additional training on specific aspects of doing business with the Tollway. For example, small firms seeking to bid as prime contractors requested targeted training on how to submit invoices to the Tollway. Another identified need was support with obtaining information technology required by the Tollway for large projects, such as special licenses and software.

The concentration analyses in Chapter IV suggest that DBEs could benefit from efforts to expand the subindustries in which they receive work. DBEs had received few to no dollars in some NAICS codes and utilization was highly concentrated in a handful of DBEs in the major subindustries in which the Tollway procures construction services. One suggestion is to survey DBEs to determine what would help them to expand their capacities into broader lines of work.

**c. Enhance Contract Data Collection and Reporting**

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

- Collect full information on all contacts regardless of size, procurement method or certification status for all firms, both prime contractors and subcontractors.
- Conduct ongoing and follow-up training on how to use the B2Gnow<sup>®</sup> system for Tollway personnel, prime contractors and subcontractors.
- Provide training to Tollway staff on how to assign NAICS codes for contract goal setting.

- Delineate reporting of DBE participation by whether the dollars were achieved using DBE contract goals or through race- and gender-neutral approaches (*i.e.*, SBI contracts, and DBE prime dollars on open market contracts). This will support review of the effectiveness of race-neutral measures.

**d. Integrate All DBE Program Aspects into One Department**

In late 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 that 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.

**2. Continue to Implement a Narrowly Tailored DBE Program**

The Tollway’s DBE program has been very successful in opening opportunities for minority and woman firms on its contracts. As reported in Chapter IV, overall, DBEs have reached parity with non-DBEs in receiving Tollway dollars. We note, however, that Black-owned firms still experienced disparities. Further, when we examined whether firms were concentrated within a subindustry, or between industries, on the basis of race or gender, a picture emerged of unequal outcomes for DBEs compared to non-DBEs. 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 DBEs do not yet enjoy full and fair access to opportunities to compete for construction and construction-related services contracts. Further, the results of numerous small business credit surveys reveal that D/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 DBE 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, the Tollway's constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. Defensible contract goal setting involves four steps.<sup>14</sup>

- Weight the estimated dollar value of the scopes of the contract NAICS codes, as determined during the process of creating the solicitation.
- Determine the unweighted availability of DBEs in those scopes, as estimated in the study.
- Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
- Adjust the resulting percentage based on current market conditions and past achievement on similar projects and any other relevant factors.

This constitutionally mandated methodology 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<sup>®</sup> system to support DBE program implementation. 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.

We further urge the Tollway to bid some contracts without goals that it determines have significant opportunities for DBE 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

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14. See [www.contractgoalsetting.com](http://www.contractgoalsetting.com), for instructions on correct contract goal setting. Our firm, in conjunction with B2Gnow<sup>®</sup>, developed this free site to provide the methodology and forms for contract goal setting.

upholding IDOT'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 DBE Program Policies and Procedures**

The DBE program 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 DBE contract goals are set would be helpful. 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 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.
- Reduce the current emphasis on the numbers of DBEs submitted on engineering projects in favor of the quality of the work that will be subcontracted. DBEs and non-DBEs reported that having many subconsultants reduces the value of the work DBEs receive and hampers their ability to grow through meaningful assignments. Similarly, while well intentioned, the emphasis on using "new" DBEs has the further consequences of sowing confusion about what counts as a "new" firm and then freezing out firms just as they get a foothold into Tollway opportunities. The Tollway should make it clear that it will take a holistic approach to evaluating teams rather than focus on these two factors.
- Clarify that bids or proposals will be accepted based on the bidder's submission of GFE. Too many prime firms reported that they did not believe that the Tollway would accept GFE and therefore they either crossed their fingers and hoped it would all work out in the end or did

not bid the project. 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 DBE participation of GFE (beyond any clarifying information) where it did not meet the contract goal. While well intentioned, this undercuts the concept that DBE 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 DBEs because the as-read low bidder now has a committed price and the DBEs can be shopped until one agrees to whatever the bidder presented for that item in its bid. This approach is a major deviation from the USDOT DBE program requirements, which in large part formed the basis for the Tollway's successful defense of its program. We recommend that the Tollway faithfully follow the DBE regulations and dispense with this after-the-fact, anti-DBE approach.
- To address the reported delays in project performance created by the lack of a definitive time by which a subcontractor sought to be substituted must respond, we suggest streamlining the DBE substitution process. A subcontractor that does not respond to the prime contractor's letter requesting the substitution within five business days should be deemed to not contest the substitution and the prime contractor will then be required to make GFE to substitute with another DBE. This refinement recognizes the need to only allow substitutions when necessary while balancing the Tollway's need to keep projects on schedule.
- Increased monitoring of DBE program compliance was urged by DBEs and Tollway staff. Examples include the requirement that prime contractors promptly pay all subcontractors (not only DBEs), meeting the DBE commitments in the bid submission and the contractual documents, and evaluating contractors' GFE throughout the life of the contract. Currently there is not an easy way to compare actual payments and the timelines with which they were received by subcontractors or the impact of change orders on goal attainment.

- Implement the Utilization Plan module in B2Gnow®. Automating the task of reviewing and logging Plans will reduce the burden on Tollway staff and support timely compliance reviews.

### **3. Develop Performance Measures for Program Success**

The Tollway should develop quantitative performance measures for the overall success of the DBE 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.

### **4. 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.



## 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”.<sup>15</sup> Strict scrutiny constitutes the highest level of judicial review.<sup>16</sup> The strict scrutiny analysis is comprised of two prongs or elements:

8. 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.
9. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.<sup>17</sup>

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

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

16. 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).

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

seeking contracts with the agency.<sup>18,19</sup> 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;<sup>20</sup>
2. The efficacy of race-neutral remedies at overcoming identified discrimination;<sup>21</sup>
3. The flexibility and duration of the relief, including the availability of waiver provisions;<sup>22</sup>
4. The relationship of numerical goals to the relevant labor market;<sup>23</sup> and
5. The impact of the relief on the rights of third parties.<sup>24</sup>

In *Adarand Constructors, Inc. v. Peña*,<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

Most federal courts, including the Seventh Circuit,<sup>28</sup> have subjected preferences for Woman-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny”.<sup>29</sup> Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.<sup>30</sup> The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to sat-

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18. *Id.* at 509.

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

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

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

22. *Id.*

23. *Id.*

24. *Crosby*, 488 U.S. at 506.

25. *Adarand III*, 515 U.S. 200.

26. 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.

27. See, for example, *Crosby*, 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).

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

isfy 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<sup>31</sup> or held that the results would be the same under strict scrutiny.<sup>32</sup>

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”.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

Unlike most legal challenges, the defendant bears the initial burden of producing “strong evidence” in support of its race-conscious program.<sup>37</sup> As held by the Seventh Circuit,<sup>38</sup> 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.<sup>39</sup> “[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.”<sup>40</sup>

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29. 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).
  30. Cf. *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).
  31. *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*”).
  32. *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).
  33. 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).
  34. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
  35. *Heller v. Doe*, 509 U.S. 312, 320 (1993).
  36. The standard applicable to status based on sexual orientation or gender identity has not yet been clarified by the courts.
  37. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).
  38. See generally *Dunnett Bay Construction Company v. Borggren*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7th Cir. 2015).
  39. *Scott*, 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*”).
  40. *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.”<sup>41</sup> 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.<sup>42</sup> 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.”<sup>43</sup> When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.<sup>44</sup> 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.<sup>45</sup>

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,<sup>46</sup> the Court, for the first time, extended the highest level of judicial exam-

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

42. *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233 (4<sup>th</sup> 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 (7<sup>th</sup> Cir. 2016) (“Midwest Fence II”).

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

44. *Coral Construction*, 941 F. 2d at 921; *Engineering Contractors II*, 122 F.3d at 916.

45. *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 (11<sup>th</sup> 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”<sup>47</sup> 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”).<sup>48</sup> 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

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46. U.S. Const. Amend. XIV, §1.

47. 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.

48. 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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

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49. 488 U.S. at 491-92.

50. 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.”).

51. 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.”<sup>52</sup>

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.”<sup>53</sup>

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.<sup>54</sup> 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.”<sup>55</sup>

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

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

53. *Id.*

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

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

appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup>

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*.<sup>59</sup>

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

57. *Id.* at 502.

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

59. *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 (2<sup>nd</sup> 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*."<sup>60</sup>

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 Program for Disadvantaged Business Enterprises**

The case law on the DBE program should guide the Illinois Tollway's ("Tollway's") program for locally 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.<sup>61</sup> 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.<sup>62</sup> Specific evidence of discrimination or its absence may be direct

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

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

or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs.<sup>63</sup>

*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."<sup>64</sup>

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."<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> This study employs long established economic principles to

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

63. *Id.*

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

65. *Id.* at 977.

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

empirically establish the Tollway's geographic and product market area to ensure that any program based on the study satisfies strict scrutiny.

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.<sup>68</sup> 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.<sup>69</sup> This produces the utilization results within the geographic market area.<sup>70</sup>

## **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:

1. Develop the initial contract data files. This involves first gathering the Tollway's records of its payments to prime contractors, and if available, the prime contractors' payments to associated subcontractors.
2. 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 the 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 the Tollway's con-

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

68. 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*").

69. *Id.* at 50-51.

70. For this Report, we found the Tollway's market area to be Cook, Dupage, Kane, Lake, McHenry and Will counties. Please see Chapter IV for additional details.

tracts as prime contractors and associated subcontractors. Based on the product and geographic utilization data, the study should calculate unweighted and 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 Master Directory. This methodology includes both certified firms and non-certified firms owned by minorities or women.<sup>71</sup> The Master Directory consists of all available government and private D/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.
  - The 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.<sup>72</sup> 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.

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

72. 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.

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 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 and the *National Disparity Study Guidelines*,<sup>73</sup> 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.<sup>74</sup> A broad methodology is also recommended by the Federal DBE Program, which has been upheld by every court.<sup>75</sup> A custom census

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

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

75. *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](https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf).

is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in the agency's market areas that have not been able to access its opportunities.

- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. 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.<sup>76</sup>
- 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 program<sup>77</sup> and most recently in the successful defense of the Tollway's DBE program.<sup>78</sup>

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 agency'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 agency 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).

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

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

78. *Midwest Fence II*, 840 F.3d at 932; see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7<sup>th</sup> 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.”<sup>79</sup> Significantly, *Croson* does not “require disparity studies that measure whether construction firms are able to perform a *particular contract*.”<sup>80</sup>

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.<sup>81</sup> “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.”<sup>82</sup> “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 con-

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

80. *Id.*

81. 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 932, 942 (upholding the Illinois Tollway’s program for state funded contracts modeled after Part 26 and based on CHA’s expert testimony).

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

trasting 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.”<sup>83</sup>

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.”<sup>84</sup> 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 judg-

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

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



ment about whether to adjust the initial goal that results from the study data based on current market conditions and current firm availability.

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

A disparity study for a 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.<sup>85</sup>

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.<sup>86</sup> 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.<sup>87</sup> Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical sig-

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

86. *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).

87. 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.

nificance, the smaller the probability that it resulted from random chance alone.<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup>

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.<sup>91</sup>

The Tollway 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

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88. 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.

89. *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”).

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

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

eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence.<sup>92</sup>

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.<sup>93</sup>

## **5. Analyze Economy-Wide Evidence of Race- and Gender-Based Disparities in the Chicago Area 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 program<sup>94</sup>. 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

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92. *Id.* at 971.

93. *Id.* at 973.

94. *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.<sup>95</sup>

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.”<sup>96</sup> 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”.<sup>97</sup>

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.<sup>98</sup> 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.<sup>99</sup>

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

96. *Id.*

97. *Concrete Works IV*, 321 F3d at 980.

98. *Id.*; *Western States Paving*, 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 Chicago Area 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.”<sup>100</sup> 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.<sup>101</sup> 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.”<sup>102</sup> “[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.”<sup>103</sup>

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.”<sup>104</sup> 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.”<sup>105</sup>

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99. *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.”).

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

101. *Adarand VII*, 228 F.3d at 1168-1172.

102. *Concrete Works II*, 36 F.3d at 1520,1530.

103. *Engineering Contractors II*, 122 F.3d at 926.

104. *Rowe*, 615 F.3d at 249.

105. *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."<sup>106</sup> In contrast, as discussed above, programs that closely mirror those of the Federal DBE Program<sup>107</sup> have been upheld using that framework.<sup>108</sup> 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;<sup>109</sup>
- The efficacy of race- and gender-neutral remedies at overcoming identified discrimination;<sup>110</sup>
- The relationship of numerical benchmarks for government spending to the availability of minority- and woman-owned firms and to subcontracting goal setting procedures;<sup>111</sup>
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;<sup>112</sup>
- The relationship of numerical goals to the relevant market;<sup>113</sup>
- The impact of the relief on third parties;<sup>114</sup> and
- The over inclusiveness of racial classifications.<sup>115</sup>

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

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

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

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

110. *Paradise* at 171.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Croson* at 506.

115. *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,<sup>116</sup> and the failure to seriously consider such remedies has proven fatal to several programs.<sup>117</sup> 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 Tollway 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.<sup>118</sup> Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> 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

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116. *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 (6<sup>th</sup> Cir. 2000) (“*Drabik II*”); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 609 (3<sup>rd</sup> 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).

117. *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.

118. *See* 49 C.F.R. §26.51; *Midwest Fence II*, 840 F. 3d at 973 (“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”).

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

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

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

subsumed in the exhaustion requirement.”<sup>122</sup> 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.”<sup>123</sup>

## 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.<sup>124</sup> 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.<sup>125</sup> “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*.”<sup>126</sup>

It is settled case law that goals for a particular solicitation should 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.<sup>127</sup> 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.<sup>128</sup> Not only is transparent, detailed contract goal setting legally mandated,<sup>129</sup> 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.

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

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

124. *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 at 613, 621.

125. 49 C.F.R. §26.45 (b).

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

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

128. *Midwest Fence I*, 84 F. Supp. 3d at 739.

129. *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.<sup>130</sup> 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,<sup>131</sup> 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 do 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].<sup>132</sup>

Chicago's program failed narrow tailoring by imposing a "rigid numerical quota" on prime bidders' utilization of MBEs and WBEs.<sup>133</sup> 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.<sup>134</sup>

130. 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").

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

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

133. *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.").

134. *Midwest Fence I*, 84 F. Supp. 3d at 739.

#### 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 be included must be based upon evidence demonstrating disparities caused by discrimination.<sup>135</sup> 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".<sup>136</sup> 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."<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

The over-inclusiveness concern is mitigated by the requirement that the firm's owner(s) must be disadvantaged.<sup>140</sup> 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.<sup>141</sup> "[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively

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135. *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).

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

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

138. *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.").

139. *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.").

140. 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.”<sup>142</sup> 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).”<sup>143</sup>

## **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.<sup>144</sup> The trial court in the City of Chicago case noted that “there was little testimony about the effectiveness of race-neutral programs.”<sup>145</sup> However, “innocent” parties can be made to share some of the burden of the remedy for eradicating racial discrimination.<sup>146</sup>

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.<sup>147</sup>

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141. *Sherbrooke*, 345 F.3d at 973; *see also Grutter*, 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).

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

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

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

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

146. *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.”).

147. *Midwest Fence I*, 84 F. Supp. 3d at 739.

Burdens must be proven and cannot constitute mere speculation by a plaintiff.<sup>148</sup> “Implementation of the race-conscious contracting goals for which [the 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.”<sup>149</sup>

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 also is for discrimination against DBEs seeking prime contractor work,<sup>150</sup> and it does not limit the application of the program to only subcontracts.<sup>151</sup> 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.<sup>152</sup>

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148. *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).

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

150. 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.”).

151. 49 C.F.R. §26.45(a)(1).

152. *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.”<sup>153</sup> 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.<sup>154,155</sup> How old is too old is not definitively answered;<sup>156</sup> however, governments would be wise to analyze data at least once every five or six years.<sup>157</sup>

In contrast, the Federal DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.<sup>158,159</sup> 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.”<sup>160</sup>

## 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.

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

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

155. 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.

156. 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.”).

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

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

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

160. *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.<sup>161</sup> 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.<sup>162</sup>

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 *Croson*, 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-

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

162. 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.”<sup>163</sup>

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:

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163. *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.<sup>164</sup> 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.<sup>165</sup> It next examined the possible impact of discrimination on the formation of firms. As required by "step 2" of Part 26,

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

165. 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).<sup>166</sup> 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;<sup>167</sup> 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

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166. 49 C.F.R. §26.45(d)(3).

167. *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.<sup>168</sup>

### **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's<sup>169</sup> separate DBE program was rejected.<sup>170</sup>

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

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

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

170. *Midwest Fence I*, 84 F. Supp. 3d at 739.

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 program<sup>171</sup> 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.<sup>172</sup>

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."<sup>173</sup>

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.<sup>174</sup>

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

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 evidence of discrimination in the Illinois road construction industry, the Court finds the Tollway Program's burden on non-

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171. 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.

172. *Midwest Fence I*, 84 F. Supp. 3d at 739.

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

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

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.<sup>175</sup>

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175. *Midwest Fence I*, 84 F. Supp. 3d at 739.

# III. ILLINOIS TOLLWAYS’ DISADVANTAGED ENTERPRISE PROGRAM

## A. Program History and Objectives

The Tollway adopted a non-discrimination policy and its Disadvantaged Business Enterprise (“DBE”) Program in 2005<sup>176</sup>. Since that time, the Board of Directors has repeatedly affirmed its commitment to augmenting and enhancing business opportunities for small, minority- and woman-owned business enterprises. In 2006, the Tollway commissioned a study that found overall statistical evidence of disparities affecting minority- and woman-owned firms in all major construction and construction-related professional services procurement categories in Tollway contracts and associated subcontracts and throughout the wider economy. A later study commissioned in 20<sup>177</sup>15 also found that minority- and woman-owned business enterprises continue to experience discriminatory barriers to full and fair access to Tollway and private sector contracts and subcontracts.

The primary objectives of the DBE program are to ensure non-discrimination in the award and administration of Tollway contracts and associated subcontracts; to create a level playing field on which DBEs can compete fairly for its contracts; to ensure that the program is narrowly tailored in accordance with applicable law; to ensure that only firms that meet the eligibility standards are permitted to participate as DBEs; and to help to remove barriers to participation of DBEs in Tollway contracts and associated subcontracts.

## B. Program Administration

The administration of the DBE program is managed by two separate departments within the Tollway. This structure has been in place since the end of 2019, when the program’s contract compliance function was moved under the Department of Procurement. The routine administration of the program is managed by the Contract Compliance Team (“Contract Compliance”) in the Department of Procurement. The Department of Diversity and Strategic Development (“Diversity

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176. Colette Holt & Associates was retained to develop the policy.

177. Colette Holt & Associates conducted the 2015 study.

Department”) is a stand-alone department and is responsible for developing, implementing and managing strategic initiatives that facilitate D/M/WBE participation in the program.

With a staff of 16, the Contract Compliance team operates to ensure that DBE contracts comply with Tollway internal controls and procedures. The Contract Compliance team is responsible for the following:

- Developing and implementing department policies, procedures and processes.
- Reviewing and approving compliance language and goals in solicitations prior to advertisement.
- Performing goal-setting for construction and professional services contracts.
- Managing compliance responsiveness review process to ensure diversity goal commitments are met.
- Reviewing waiver requests and good faith efforts submissions for approval.
- Providing senior management with regular project status updates and program metrics.
- Performing routine audits of systems, processes and requirements.
- Developing and updating processes to maintain efficient workflows and internal controls.
- Attending pre-bid, pre-proposal, and pre-submittal meetings to ensure that compliance goals are communicated prior to the submission of bids, proposals, and statements of interest.
- Monitoring contractor payroll reporting to ensure that contractors and subcontractors are reporting payrolls in the IDOL certified payroll portal as required.
- Ensuring that employee work hours on capital construction projects are reported in the Tollway’s Diversity Capture system, and that Equal Employment Opportunity (“EEO”) minority and female goals are being met.
- Performing systems and internal control reviews of Tollway contract compliance administration and management functions to ensure that controls are in place to properly monitor diversity programs.
- Conducting meetings with contractors to address issues and resolve complaints.
- Reviewing utilization plans to verify goal commitments.

- Participating in evaluations of vendor responses to Requests for Proposals (“RFP”) and Professional Services Bulletins.
- Preparing spend, EEO and other contract compliance reports.

The Diversity Department is staffed with 15 job positions that report to the Chief of Diversity and Strategic Development. The Diversity Department is responsible for providing the following functions for the DBE program:

- Identifying and reducing any barriers to participation that may exist for small and diverse firms seeking to participate on Tollway contracts.
- Outreach and support services, including the Technical Assistance and Partnering for Growth programs.
- Training events, workshops, networking events to foster participation in the DBE program.
- Attending pre-bid and pre-construction meetings to ensure vendor awareness of resources and supportive services.
- Metrics and tracking for outreach and support services.
- Community outreach and dissemination of communications to facilitate participation in the DBE program.
- Developing strategic partnerships that provide access, ensure participation and expand advancement of small and diverse firms.
- Supporting small and diverse businesses to succeed by developing programs to assist with investments in infrastructure.
- Creating race- and gender-neutral remedies to address contract participation barriers for small and diverse firms.
- Administer the Small Business Initiative.
- Promoting incentive programming to encourage diverse firm growth and partnerships.
- Participating in evaluations of vendor responses to Requests for Proposals (“RFPs”) and Professional Services Bulletins.
- Assists firms with fulfilling EEO goal requirements.

The Tollway established the Diversity Advisory Council in 2015 to assist with the review of its inclusion programs. The Council is comprised of representatives from more than 20 advocacy agencies.<sup>178</sup> The Council is divided into two subcommittees: the Policy and Programs Subcommittee, which is responsible for reviewing the DBE program and recommending program improvements and initiatives, and

the Workforce Subcommittee, which is responsible for overseeing workforce development programs.

The Tollway's Board of Directors 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. The Committee is composed of members of the Tollway Board and strives to increase participation of African Americans, Hispanics, Asians, Native Americans, women, veterans and certified D/M/WBE firms and individuals on Tollway contracts.

## **C. Program Eligibility**

The Tollway is not a certifying agency. To ensure that its program's eligibility criteria are narrowly tailored, the Tollway DBE program accepts certification from the following agency programs:

- The Illinois Unified Certification Program – DBE Certifications from the Illinois Department of Transportation ("IDOT"), the Chicago Transit Authority ("CTA"), Metra, Pace and the City of Chicago
- City of Chicago Minority Business Enterprise ("MBE") and Women-Owned Business Enterprise ("WBE") Certification
- Cook County MBE and WBE
- U.S. Small Business Administration SBA 8(a) Certification

Eligibility for certification follows the federal regulations that govern the U.S. Department of Transportation's Disadvantaged Business Program at in 49 C.F.R. Part 26.<sup>179</sup>

## **D. Race- and Gender-Neutral Measures**

The Tollway has implemented several race- and gender-neutral measures to assist all small businesses to do business with the agency.

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178. Current member organizations include Arab American Association of Engineers and Architects (AAAEA), Association of Asian Construction Enterprise, Chicago Minority Supplier Diversity Council, Chicago Urban League, Chicago Women in Trades, Cosmopolitan Chamber of Commerce, Elite SDVOB Network, Federation of Women Contractors (FWC), Hispanic American Construction Industry Association, Harvey Area Chamber of Commerce, Illinois Black Chamber of Commerce, Illinois Hispanic Chamber of Commerce, National Latino Education Institute, US Minority Contractors Association (USMCA), Women Transportation Seminar, Women's Business Development Center, Women Construction Owners and Executives, Youth Build Lake County/Lake County Community Church.

179. As discussed in Chapter II, every court that has considered a challenge has found the regulations to be constitutional. The Tollway's modeling of its DBE program on these regulations was a major factor in its successful defense of its DBE program.



## **1. Small Business Initiative**

The Small Business Initiative (“SBI”) sets aside contracts for bidding only by small firms without consideration of the firm’s minority or gender status. The goal of the Initiative is to increase opportunities for small construction companies to participate as prime contractors on Tollway construction contracts.

Construction contracts valued at \$5M or less are eligible for inclusion under the program. Three contract tiers have been established based on the value of the contract:

- Small Business Initiative Tier 1 includes contracts with an estimated dollar value of \$1M or less.
- Small Business Initiative Tier 2 includes contracts with estimated dollar values between \$1,000,001 and \$3M.
- Small Business Initiative Tier 3 includes contracts with the estimated dollar values between \$3,000,001 and \$5M.

Diversity goals are set on Tier 2 and Tier 3 contracts but are not set on Tier 1 contracts. Contracts and contract bids under the SBI program are subject to subcontractor utilization requirements specified in the Special Contract Provisions (“Special Provisions”). Prime contractors must meet the self-performance requirement, only use SBI subcontractors and submit a small business utilization plan using SBE Form 2028-A at the time of bid. A Small Business Exception may be requested upon submission of SBE Form 2028-B demonstrating good efforts to obtain SBI subcontractors. Prime contractors must self-perform up to 40% of the total contract and may use the remaining amount as part of their DBE utilization plan to encourage small and diverse firms to participate as prime contractors.

To be eligible for the program, construction firms must be registered with State of Illinois’ Small Business Set-Aside Program<sup>180</sup>; have annual gross revenues of \$14M or less and be enrolled in the Tollway’s Small Business Initiative. Prequalification with either the Illinois Department of Transportation or the Illinois Capital Development Board may be required for some projects. A small business is defined as being independently owned and operated and that is not dominant in its field of operation. The program was expanded in 2021 to include categories outside of the more than 600 included in the state small business set-aside program.

Most recently the Diversity Department has recommended expanding the Initiative to implement the Tollway’s first certification program for mid-sized con-

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180. <https://www.illinoistollway.com/documents/20184/864007/20200915+State+of+Illinois+Small+Business+Set-Aside+Presentation+for+THA.pdf/0f993bf6-94b7-e5a5-fe62-debc889b94ac?t=1600862885145>.

struction firms. The program would include firms with revenues between \$14M and \$33M. The recommendation is still in review, as it will require a change in state law.

## **2. Rolling Owner Controlled Insurance Program**

The Rolling Owner Controlled Insurance Program (“ROCIP”) for commercial general liability insurances seeks to address the challenges small firms have in obtaining insurance. To alleviate this concern, the Tollway introduced ROCIP in 2021 to provide certain insurance coverage. Enrollment in ROCIP is mandatory for all contractors and subcontractors on SBI contracts. Extensive outreach is conducted to provide information to potential contractors about ROCIP and ROCIP Insurance manual is published online. To date, there are more than 60 unique firms working on ROCIP contracts covering more than \$64M in contracts.

## **3. Modifications of Bidding Requirements and Contract Conditions**

The Tollway has implemented changes in bidding requirements and contract conditions to make contracts more accessible to small firms. These changes include the following:

- Reduction in the total contract duration from the notice to proceed to the contract end date to less than two years to eliminate barriers to bidding.
- Waiver of IDOT prequalification where feasible to remove barriers to entry.
- Reduction of the self-performance requirement to less than the typical 35% on some contracts to increase the pool of available bidders for contracts.
- Unbundling to provide new opportunities for all-sized firms to participate on Tollway projects.
- Adjustment of retainage and bonding requirements on contracts with an extended maintenance and monitoring period.

## **4. Technical Assistance Program**

The Tollway offers a comprehensive Technical Assistance Program to assist new, small and diverse firms to participate in Tollway highway construction and professional services contracts. The program is administered through Inner-City Underwriting Agency, Inc. and the Illinois Hispanic Chamber of Commerce. The Program is designed to prepare emerging and established transportation-related construction and professional engineering services firms, including small, diverse

and veteran-owned businesses to participate on highway and vertical construction contracts. Assistance includes a wide range of business development services that focus on increasing the stability and capacity of participating firms. Services provided to construction firms include strategic planning, estimating, IDOT pre-qualification application assistance and post-award services. Services for professional engineering services firms include assistance with statement of interest preparation and post award services. The program is designed to accommodate varying levels of support. Firms can choose a self-paced program or a collaborative group learning environment.

## **5. Partnering for Growth Program**

The Tollway recently expanded its existing mentor-protégé program for engineering firms, Partnering for Growth, to include construction firms. The Program assists small construction firms to develop capacity and to become more competitive through partnering with larger, more experienced firms. The duration of the partnership is typically one to three years. The Tollway's Technical Assistance program supports both mentors and protégés in developing skills and fostering relationships. To encourage construction firms to become mentors and encourage participation in the program, the Tollway offers participating contractors the opportunity to earn up to \$100,000 per year in bid credits that may be applied toward future Tollway construction bids to lower the bid amount and increase the chances of winning the contract as the low bidder. To take advantage of earned bid credits, bid credit certificates displaying the contractor's name and bid accrual detail must be included in the bid submittal.

Emerging Technology is a focus that was recently added to the program. This new element encourages sharing the latest in construction equipment and technology through short-term relationships between large contractors and small/diverse firms. These short-term agreements are typically one year or less and are not tied to specific Tollway contracts or projects within the state of Illinois. Mentor and protégé firms are eligible to earn bid credits. The relationship is expected to provide small and diverse firms with the training and experience required to pursue prime and subcontracting opportunities in the future.

## **E. DBE Program Policies and Procedures**

### **1. Contract Goals**

The DBE program sets DBE participation goals for both construction and professional services contracts. The Tollway sets contract goals based on DBE availability to perform the scope of work in a specific six-digit North American Industry Classification System code. For construction and professional services

contracts, the Tollway has developed goal setting procedures that factor in the contract's scope of work for the prime and subcontractor, availability of DBEs and pay item estimates. Professional services contracts, however, draw from available prequalified professional service firms. These firms are listed in the professional service bulletin and applicable required Illinois Department of Transportation prequalification categories are specified by the Engineering Department.

## **2. Counting DBE Participation towards Contract Goals**

Only the work actually performed by DBEs in their certified scopes can be counted towards achievement of the contract goal. Firms must be certified at the time of bid. Work that the DBE subcontracts to a non-DBE does not count toward the DBE goal. Contractors can receive goal credit for the following:

- Cost of supplies and materials obtained by the DBE for the work of the contract, and supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE purchases or leases from the prime contractor or the prime contractor's affiliate).
- The entire amount of fees or commissions charged by a DBE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, as long as the fee is reasonable or not excessive in comparison to fees customarily charged for similar services.
- One hundred percent of the cost of trucking services utilized on the contract, provided the DBE is responsible for the management and supervision of the entire trucking operation for which it is responsible.
- If the prime contractor is a joint venture between a non-DBE and a DBE, the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the joint venture's contract that is performed by the DBE with its own forces and for which it is separately at risk.
- One hundred percent of the cost of the materials obtained from a DBE manufacturer.
- Sixty-percent of the cost of the materials or supplies obtained from a DBE regular dealer or supplier.
- One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site.

- One hundred percent for the value of fees and commissions for procuring materials and supplies if the DBE is not a regular dealer or manufacturer.

If the firm loses its certification during the contract period, only the dollar value of the work performed on a contract prior to a firm's decertification can be counted. However, goal credit is counted if a DBE becomes ineligible based upon exceeding the firm size or personal net worth limitations after contract award.

### **3. Pre-Award Bidding Procedures**

#### **a. Submission of DBE Utilization Plans**

The Tollway has developed Special Provisions which set forth the bidding procedures that must be followed in order to be considered responsive. For projects with a DBE utilization goal, bidders must submit a completed Disadvantaged Business DBE Utilization Plan (DBE Form 2026) stating all proposed DBE subcontractors that will be used to meet the goal commitment at the time of bid. The bidder must include a brief description of the scope of work and dollar amount assigned to each DBE subcontractor. Certified DBE bidders meeting the goal through self-performance must submit a Utilization Plan. When the bidder is a joint venture, each joint venture partner must provide an attestation to the DBE Utilization Plan.

A DBE Participation Commitment Statement (DBE Form 2025) supporting the DBE Participation Plan should be submitted at the time of bid. Bidders have until 5pm on the fifth calendar day to provide complete and accurate information after bids are due. The commitment statement must be signed by the bidder and each DBE confirming availability and the intent to perform a commercially useful function ("CUF").<sup>181</sup>

#### **b. Good Faith Efforts to Meet Contract Goals**

A bidder unable to meet the contract goal must demonstrate it made Good Faith Efforts ("GFE") to do so. The Good Faith Efforts Contact Log and Checklist (DBE Form 2023) must be submitted with the bid. The bidder must provide supporting documentation outlining its GFE to achieve the goal. The following are considered in determining whether a bidder has made GFE:

- Identified portions of the contract work that could be segmented into economically feasible units to facilitate DBE participation.

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181. A CUF is defined as the performance of a distinct element of work required for the procurement, with the requisite skill and expertise.

- Solicited DBEs through reasonable and available means, including attendance of pre-bid meetings, networking sessions, written notices and advertisements.
- Provided timely and adequate information about the plans, specifications and requirements of the contract and allowed sufficient time for DBEs to respond.
- Followed up on initial solicitations to answer questions and encourage DBEs to submit bids and did not reject DBE bids without thorough consideration.
- Negotiated with interested DBEs that submitted bids and thoroughly investigated their capabilities.
- Made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as may be required for performance of the contract (if applicable).
- Utilized resources available to identify available DBEs, such as DBE directories and assistance groups, local, state and federal minority or woman business assistance offices, and other organizations that provide support in the recruitment and placement of DBEs.
- Did not impose conditions on DBEs that are not similarly imposed on all other subcontractors.

In addition, the Tollway can consider the performance of other bidders in meeting the contract goal on contracts of a similar nature. The cost of finding and using DBEs is not a sufficient reason for not meeting the contract's DBE goal, as long as such costs are reasonable. DBE quotes rejected by the prime bidder based on price must be supported by submission of all quotes received for the scope of work, including those received from non-DBE firms.

Following an adverse determination, a bidder may file a request for administrative reconsideration of its DBE Utilization Plan with the Tollway's Chief of Contract Compliance. The request must be made within five working days after the bidder receives written notice of the determination. A request for reconsideration must include additional written documentation to support the bidder's assertion that GFEs were made to meet the contract goal. Upon review, the Chief may extend an opportunity to meet in person to review the request and supporting facts. A written decision is issued within ten working days after receipt of the request or the date of a meeting between the bidder and the Chief. Contractors must submit for the Tollway's review all signed subcontracts with DBEs listed in the Utilization Plan within 20 calendar days of award.

**c. Time Extensions for Low Apparent Bidders to Meet Contract Goals**

If the low apparent bidder's DBE commitment is below the DBE contract goal, the Tollway can extend the documentation period two business days from the time the contractor is notified of the extension. The extended period allows the bidder to supplement its initial Utilization Plan to add DBE participation to meet the DBE contract goal or to demonstrate additional GFEs to do so. If additional DBE commitments are secured during this extension, the bidder must submit an amended Utilization Plan. A bidder unable to meet the goal must submit documentation of the GFEs, along with a request for a waiver.

**4. Contract Performance Compliance**

The Tollway uses B2Gnow® Diversity Payment Reporting System software to track real time payments to prime contractors and track and analyze prime payments to subcontractors. All subcontractors must verify payments reported by the prime. Changes to commitments in the Utilization Plan, including DBE substitutions after contract award, must be approved in writing by the Tollway. Any unauthorized changes are considered a violation of the Special Provisions and can result in breach of contract.

Before requesting a substitution or change, the contractor is required to negotiate in good faith with the subcontractor. A letter from the DBE to be substituted or affected by the change stating that it cannot perform on the contract or that it agrees with the change in its scope of work must be submitted with the request. If the prime contractor can provide evidence of repeated requests/follow-ups to obtain a letter from the DBE without success, and after Contract Compliance confirms the refusal or unwillingness of the DBE to provide a letter, Contract Compliance may approve the substitution without the letter. Contract Compliance verification/review will also involve seeking help from the using department to get the letter from the DBE before final decision. The Contract Compliance Team will approve or deny a request for substitution or other change in the DBE Utilization Plan in writing within five working days of receipt of the request. Where the contractor has established the basis for the substitution to the Tollway's satisfaction, it must follow the GFEs procedures to meet the contract goal by substituting another DBE subcontractor. If the contract goal cannot be reached and GFEs have been made, the contractor may substitute a non-DBE.

Substitutions are allowed under the following circumstances:

- Unavailability after receipt of reasonable notice to proceed;
- Failure of performance;

- Financial incapacity;
- Refusal by the subcontractor to honor the bid or bid price or scope or schedule;
- Material mistake of fact or law about the elements of the scope of work of a solicitation where a reasonable price cannot be agreed;
- Failure of the subcontractor to meet insurance, licensing or bonding requirements;
- The subcontractor's withdrawal of its bid; or
- Decertification of the subcontractor as a DBE, for reasons other than exceeding firm size or personal net worth limits.

The prime contractor must also obtain the Tollway's approval to hire a subcontractor for any scope of work that was not previously disclosed. The contractor must make GFEs to ensure that DBEs have a fair opportunity to bid on the new scope of work.

A new subcontract, a new Form 2025 for the substituted DBE (if applicable) and an amended DBE Utilization Plan must be executed and submitted to the Tollway within five working days of the contractor's receipt of the Tollway's approval for substitutions, addition of a subcontractor or any other changes.

## **5. Sanctions for Non-Compliance**

If the contractor or DBE subcontractor is not complying with the Special Provisions or the DBE Utilization Plan, the Tollway may impose sanctions. A contractor is considered out of compliance if it fails to provide information regarding its compliance with the Special Provisions or its DBE Utilization Plan or provides false or misleading information or statements concerning compliance, the certification status of DBEs, GFE or any other material facts. Damages may include declaration of a default, termination of the contract, imposition of liquidated damages or remedies provided for in the contract or by law. Sanctions may include but are not limited to monetary sanctions, such as non-release of retainage; the payment for audits when the audit reveals noncompliance; damages in an amount up to the monetary difference between the amount committed to by the contract in its DBE Utilization Plan and the amount actually paid to DBEs; restriction on future business with the Tollway; and any other sanctions permitted by law.

When sanctions are imposed, the contractor may file an appeal with the Tollway's Sanctions Committee, consisting of Contract Compliance, Diversity, Legal and the contract owner using department within five working days of receipt of the written decision. The contractor can supply additional documen-



tation and request an oral presentation to the Committee. The Sanctions Committee must notify the contractor within ten working days after receiving the appeal or after the oral presentation date, whichever is later. The contractor may appeal this decision to the Tollway's Executive Director within five working days of receiving the final determination. The Executive Director has 30 calendar days to consult with various Tollway departments to issue a final decision.

To date, no sanctions have been imposed on a prime contractor.

## **F. Outreach and Training**

### **1. Outreach**

The Tollway offers extensive outreach to alert M/WBEs of contract opportunities and to encourage their participation on Tollway contracts. From 2017 through 2019, the Tollway hosted, sponsored or participated in 745 outreach events, workshops, and conferences. Events included pre-bid conferences, "meet-and-greets" and networking events designed to facilitate relationship building between prime contractors and DBEs and a series of educational seminars on business growth techniques.

The Tollway continued to support and do outreach to the vendor community during the COVID-19 pandemic with the Building for Success webinar series. Firms learned about programs and assistance offered at the Tollway and other sister agencies, from business technical and prequalification assistance to workforce development initiatives and more. In 2021, the Series transitioned into a bi-weekly presentation. The series continues to be recorded and posted for viewing at any time on the website. A collection of past webinars is available on the Tollway's website. In 2023, Diversity will continue the virtual bi-weekly webinar series with new topics with the goal to engage and educate the vendor community.

The Tollway has added larger networking sessions using platforms where subcontractors are able to hop from table to table and introduce their firm. The website now features capability statements to encourage firms to continue to find different ways to connect in this new space we were all adapting to.

The Tollway partners with assist agencies, DBE organizations and Chicago area governments to provide additional networking assistance, technical support and outreach. Services provided range from increasing small and diverse firm availability, providing certification assistance and supplementing the Tollway's program in providing technical training to build business skills and improve operations.

The Tollway's website provides access to many resources. Outreach and networking opportunities are posted to the Diversity and Strategic Development webpages, along with other resources and assistance services available to small and diverse firms.

The Contract Compliance web pages provide access to contract compliance reporting and monitoring systems and compliance forms. The Construction and Engineering web pages provide access to contract administration, such as current and future solicitation opportunities, the bid letting schedule for future projects, downloadable bid documents, review of bids and proposal tabulations, as-read bid results, a bid calendar and change orders. The online plan room provides easy access to drawings and other important information about Tollway projects. The fee to download plans is \$300/project. Free plans are available through advocacy and support organizations. For professional services firms, a special professional services bulletin that includes tentative selection results is made available.

## **2. Building for Success Webinar Series**

The Tollway has created the "Building for Success" webinar series to identify and educate new, small and diverse firms on how to conduct business with the Tollway. The series is designed to provide information about various Tollway programs and initiatives. Past webinar topics have included the ROCIP, Navigating "BidBuy", DBE Certification Program, B2Gnow compliance, Prequalification Assistance and the Construction Checklist.

## **G. Staff Training**

Tollway 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 M/W/DBE programs. Staff also attend the annual B2Gnow<sup>®</sup> User Training Conference and participate in B2Gnow<sup>®</sup> online training.

## **H. Experiences with the Tollway's DBE Program**

To explore the impacts of race- and gender-neutral contracting policies and procedures and the implementation of the Tollway's DBE program, we interviewed 79 individuals about their experiences and solicited their suggestions for changes. We also collected written comments from 79 DBE and non-DBE businesses about their experiences with the Tollway's program through an electronic survey. We also received written comments throughout the study period.

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**

A few firms reported that it can be difficult to access accurate information on Tollways program elements.

[It is hard to know] what certifications the Tollway accepts because it is very, very confusing. When someone says like, "[name], it's a DBE," then sometimes the M's and the W's think this is not a program for me. Whereas the Tollway in reality accepts a whole lot of certifications. And it is maybe a better marketing plan that they need because everybody's got too much going on to be able to distinguish continually where they belong.

Several complained about the difficulty and cost of obtaining bid information and documents.

Everything was through their portal, which didn't really work very well, that I saw. Actually prior to that, after all this information, I went to go try and download the bid documents, which are electronic, and they wanted \$300 to download them. On the small business set aside program, you had to do that and I didn't even know if we were going to bid it or not, I just wanted to look at them. I did end up getting them through one of the assist people.

We also had a hard time getting the actual plans and the documents. That's always a challenge for us as well, because they want you to put a plan deposit of, they started a hundred dollars and it absolutely can go up to \$300. So, we've been frustrated.

Just give us the drawings for free. Don't charge us. I mean, we can get them through the plan holders, which are a lot of times the assist agencies, like [the Hispanic American Contracting Industry Association], [the U.S. Minority Contractors Association], stuff like that. So, everyone, if you're members of that, you could get them from there. But I got to reach out to them. "Hey, I need to get these

drawings." It's just more work. Why not just make it free right from the very beginning?

They had two separate sites because they led you to the bid doc people, the copying company.... Their bid takeout list didn't match, who was actually at the things. And if you try to send it [to the] contact [person] here for information, it went to a generic mailbox that bounced back that said no more questions can be taken. I just wanted to find a person. And after all those zoom calls, there was no follow-up after that, that go here's the slides that we showed, nothing like that.

It's a hassle. I had to talk to three different [assist] agencies just to get the plans.

Some DBEs requested easier access to Tollway staff with contracting decision-making responsibilities.

Meet with the [Tollway staff] that we got to educate what we tell them what we do, what my firm does, and that will be helpful.

**b. Obtaining work with the Tollway**

The great majority of DBEs reported that the Tollway's DBE program was important to the success of their firm.

[Because of the program, the] Tollway is one of my favorite places to work. Good group to work for, you perform out there and they pay you. The only downfall that you'll find is if you guys do a lot of material with them, they don't have the subcontractor's mobilization payment process like IDOT does. They're missing that. If they had that they would be golden. That would help a lot. Now I'm moving into a new type of work out there. I'm expanding and it's very material intensive and that's all out of pocket. And so, the growth is going to go backwards while I grow, while I do this to grow it, but Tollway's the best place to be at on all of them, hands down.

Concerns were raised about how to manage task order contracts.

The catch is when you get [a task order contract], there's actually no real discussion on tentative start dates, so you basically can't... We have limited capacity to begin with and you can't plan for when the contract is going to start, how

many people you're going to need, until you get a task, right? When you get a task, is maybe due right away and you are scrambling to figure out how you're going to staff that.

One DBE felt that the Tollway did not treat her fairly.

There was an accelerated schedule, we bought the material immediately upon getting our contract, which is standard procedure for [item]. We didn't fabricate it. They then canceled that scope of work, but then they didn't want to pay us for the material we bought, even though it was part of the original contract.... I think [this result] was both [because we are] a DBE, and also that we were a new player in that industry. I felt that there was some sort of allegiance to the other companies that were doing that work and they didn't want to let us in the door.... We'd never worked for the Tollway before. And in this scope of work, they seemed to have some sort of proprietary relationship with certain vendors and they did everything they could, it was from our perspective, to try to get us bounced from doing that sort of work.... We got a call from the deputy director of the Tollway, apologizing for his consultant's actions. However, at the end of the day, the amount of scrutiny and the amount of waiting time and the amount of meetings we had, we still ended up going in the red on that project.

While well intentioned, several DBEs asserted that the Tollway's policy of encouraging new DBEs and as many DBEs as possible to work on a specific contract was counterproductive.

For many years, the Tollway has always said at all their meetings publicly, "We want many DBEs on projects and we want new DBEs on projects," which people here are saying that having too many DBEs cuts into the pie tremendously, and two, you can't develop long term relationships if the prime feels that if he uses the same DBEs again, he may not be awarded the projects. And I'm telling you, I've heard this for at least 10 years, publicly.

I've seen that marketing out of the Tollway, new DBEs, more DBEs, and it's counterproductive. And I just wanted to let you guys know that it really is counterproductive and I've seen it, how it's counterproductive, especially in contract negotiations.

The Tollway wants to have all these DBEs and say that they're helping these DBEs, but I could tell you, giving me 200 hours on a contract is really hard to do. Especially for some of the smaller DBEs that are just starting out, it goes back to also the negotiated rates on some of us. We're all efficient people because we're smaller companies, and the dollar amounts that are given to us when we're splitting the 30% between six of us, or three of us, are four of us, it's really hard to continue and trying to get subs and you're getting one percent of the contract.... I need a hundred subcontracts.

There was also some confusion about what is meant by “new” DBEs.

The Tollway frequently at any event, they encourage either traditional or DBE firms, anyone submitting on a Tollway project, to include a new firm. However, they haven't given any real criteria or guidelines on what they mean by a new firm. Is it a firm that has never done work for the Tollway, or is it a firm that is newly formed? And I think sometimes this actually does a disservice to the new DBE firms because then the traditional firms don't really understand whether you meet that criteria. Because let's say I am deciding to go after a project and I include a firm that hasn't done any work for the Tollway, if we should get selected and this firm has now gotten one project for the Tollway, and like many people have said, you also need to have as big a team as possible. So, this new firm that you've included, and because they haven't done work with the Tollway, primes are reluctant to give them a decent percentage so you may get one or two percent of work. So now you have been selected by the Tollway, you have one or two percent of work, and now everybody else thinks, well, you are no longer new so guess what? You're not really being considered.... If they want to encourage firms to include a new DBE partner or the new BE minority partner, they should at least give some clarification on what they mean. Is it a firm that has been on two, three, four, five Tollway projects? A firm that has been around for X number of years? What does it mean? Those are some of the things that actually end up hurting the newer firms after they get formed, and you get one job and that's it, you're done.

The Tollway's policy of strongly encouraging the use of new DBEs also negatively impacts the ability of DBEs to move into the role of prime consultant.

Every sub wants to be a prime. All the DBEs around me right now, they all want to be a prime one day. I mean, if you don't get more work, there's no way we can become a prime. It's work that leads to more qualifications, more staffing and eventually, growth. Otherwise, we'll stay DBE all our lives, just chasing small work.

When we put teams together [as a prime DBE] to try to win as a prime, we listen to what they're saying, we put everything, lots of DBEs on the team. But they're right. What everyone's been saying is right, you get a very small part then, and you don't get a very meaningful role on projects. And this is something we fight in every program that's out there, but [name] right that the Tollway is definitely unique in that, where our [business development] people know that that's what the Tollway expects, that's what the Tollway rewards. Put everybody on the team that you can possibly find, put new people on the team, and that has its problems.

A relatively new firm owner stated the policy had helped her.

We've been relatively successful with the Tollway in getting both prime and subcontract work. I'm not sure how many newer firms like myself that is just now approaching five years since establishment, and I think the Tollway's approach to encouraging primes to utilize newer firms certainly benefited me. When I came on board, I didn't necessarily know a lot of the bigger firms, the key players out there. And within my first year of networking and introducing myself and our firm's capabilities, that kind of encouraged firms to say, "Okay, yeah, let's take a look at you."... if there's no incentive or a reason for a firm to add a new firm into their mix, just like the DBE Program, they won't do it. So, a little encouragement, maybe not to the level that it is now, or some criteria on how long the firm has been performing the same work, or an opportunity to do Tollway work certainly opens the door. And here, I think we're all looking for opportunity to expand and have the doors open. Once you do get the contract, it's up to you on how you perform that contract.

"Unbundling" contracts into smaller and/or less complex jobs was recommended as one method to increase DBE prime participation.

Break some of the bigger contracts a little bit up, so that we can realistically bite on some of those without having to have a big firm take 40% up front.

Break it up a little bit on the bigger contracts that are coming up. If it makes sense to have smaller standalone contracts, I think that will help us a lot and it will help us address resource and capacity concerns that we have.

They should go and break a little small tasks for small firms, because sometimes meeting a prime is a little hard. They already have their own team.

The race- and gender-neutral Small Business Initiative, which sets aside smaller contracts for bidding only by small firms, has helped DBEs to obtain prime contracts. However, firms reported that there are issues with this approach.

If you're going to go and look for MBE, DBE participation, but then turn around and say, you have to be able to prime an \$8M job with \$3M bonding capacity, two and half million dollars' worth of materials, to me, that's not including the small business set aside. And then it actually was rebid for lack of proposals and they took it out of the small business set side.

They rebid every project that we ever bid on, they rebid it because they found out that it was bigger than what a small business initiative could do.

They'll say SBI work is, say \$2-3M. By the time we're done estimating it's four, six, eight million and then it goes to re-bid again, because now it's not a Small Business Initiative anymore.

Another suggestion that was race- and gender-neutral was to pay mobilization money to subcontractors.

Pay mobilization to subs for materials.... That would help them mobilize on the job for services or services and material like [the Illinois Department of Transportation] does.

**c. Supportive services to DBEs and small firms**

The Tollway was the catalyst for our business. Our very first contract came out of the Illinois Tollway and I think it's full



circle to now where we just won our first prime contract with the Tollway in the last bulletin. So, with what they're doing with the Partner For Growth program, it's helped us tremendously.

After I got the [SBI] job, I got a call from supportive service company and they say, anytime we need any help, we can call them, help us out. So, we are going to take advantage of that and see whether we can go through all the procedure for the Tollway.

**d. Meeting DBE Contract Goals**

Most prime contractors and consultants were able to meet DBE contract goals. However, several stated that they did not believe documentation of their GFE when they fell short would be accepted.

It was very frustrating where they had a very high DBE goal on one project. We normally meet the goals or exceed the goals, but in this one in particular, the trades, it was a specialty. So, the trades were very minimal to meet the goal. And we went with a very small waiver. And I was called twice from Tollway, and they asked me to add more trucking so I could meet the goal because we won the job. We won the job. And they said, "You need to put more trucking." And it was like, I'm now overstating trucking because I know we don't have enough trucking in that job.... I had the [DBE] list. I had the good-faith efforts. I show my direct communication with ... and all the companies that were available didn't want to bid, or it was too far away. And so, I had to do my research and I told her, "If you give it to the next one, there are only two [scope] companies. One of them is not real. And I will show you why." And I had to show her why it wasn't real.... [The Tollway] decided to [rebid the job].... It was super frustrating because I followed the book. I followed the regs, I follow everything. I show every single thing and they still did what they wanted to do. And that one for me, it was like I lost respect for that team. Because I do understand that we are here, this program is to empower and to attract more DBEs so they can be exposed to GCs like us. And we ended up using them regardless of having goals or not because we have wonderful relationship with tons of DBEs, but the way they wanted to do it, it was wrong. And so, for us to bid Tollway work right now, we think twice on that.

The waiver process is unworkable. I won't comment on the goals that are out there, but it's pretty close to a quota in that we've gone through it. First of all, as a general contractor, you don't know if you need a waiver until the night of or the morning of the bid. You have no idea how the numbers are going to fall out. So, to do the requirements on every single bid, regardless of whether you're going to need a waiver that has to be done weeks in advance, is impossible. And then even, as was stated earlier, it probably isn't going to be enough. And that was our experience. We went through the process.... We made the goal on 19 of the 20 contracts. I don't go around looking for trouble. If I could have made it, we would've made it. And we weren't doing this for fun. It's just the numbers didn't work on that one. It was very obvious. But it was just, well, I believe the mind was made up. So, it's become a quota. I mean, for our company, it's a quota. We're going to make the goal. That's the way it is. Because I don't believe I would get granted a waiver.

We just can't trust that the tollways waiver modification program actually is legit and has legs.

I have a huge program for DBE participation in small business. So, we follow it. We set up the program from the beginning for every single job that we bid, from the posting ads, networking event, talking directly to DBEs. We have a team that makes the phone calls. So, I'm telling you that we make three, four hundred phone calls and ask, "Are you bidding or not? And if you're bidding, when are you planning it? If you are not bidding, why you are not bidding?" So, I had a log of calls with the people. We talked to the reasons why they were not bidding. So, I had everything by the book and they still told me the GFE were insufficient.

The Tollway was described by some interviewees as creating disincentives to increase DBE participation.

If I go over the goal, let's say, was a 25% goal and I submitted my bid and my utilization plan had 29% because I brought extra DBE. If the amount of the contract goes higher than that, let's say, is half a million dollars more, then they want us to increase the amount and meet, not the original goal that they stipulated, but the one that I came as

a good faith, best practice, I want to have more, my 29%. So, it doesn't matter how much you can explain that to him. Listen, the goal on this job was 25. Originally, I came 29 because I wanted to bring more DBE voluntarily but now, you're going to punish me because the contract now is higher and you want me to meet that extra goal that originally, I did it because I wanted to. So, what happen is that works now the opposite on behalf of the DBEs because I would rather just go with my 25, don't use anymore DBEs. So, my life is easier.... it is not related to the scope of the DBE but it was a change order.... Now I have to figure it out how I give more money to the rest of the DBEs or I bring additional DBEs. Normally you add more trucking because it's where you can add if it's available. That's wrong.... They removed [DBE's] scope [but] they want you to still meet that goal.

If they reduce the scope of work, they should accept your good faith efforts.

Again, does somebody think we go around looking for problems? We all have enough problems as it is. If I have a sewer subcontractor, that's a DB and you add a big sewer change order, that DB, 99% of the time, is going to do that work. On the other hand, if I have a non-DB sewer contractor and you add sewer work, the non-DB sewer contractor is going to do that work. That's the contracting business.... If somebody wrote in a DB landscaper and then halfway through changed their mind without telling the Tollway and use a non-DB, absolutely, that's wrong.... Yes, maybe we argue through it and I write five letters and everybody eventually figures it out. There's got to be some common sense there, to get through those things.... The changes, the closeout process, and all that, in my opinion, creates a lot of problems, animosity that is not necessary to be there.

One idea to align incentives would be permitting bidders to “bank” DBE participation in excess of the contract goal for a future contract where the goal was not met. Some prime contractors supported the concept.

I think it's a good idea. I just feel like the Tollway has a lot of leeway, right, with its program because it's not governed by the federal regulations. They could do so many things and

at least try it out. And if it doesn't work, it doesn't work. Maybe pilot it.

Banking it is not a bad idea. Again, you're still giving those opportunities. And if you did have some bank on a job, you would be able to be more aggressive, maybe, and hire those non-DBEs because you've already made your goal.

Another was skeptical.

Things are complicated enough, with all the paperwork and all that. I'd rather just see some common sense involved in all the other parts of it.

A few non-DBE subcontractors who compete with DBE subcontractors reported that the program is a barrier.

The high DBE goals are a detriment for us.... As a specialty sub, road construction has a high self-contractor retention factor so we have to live between the middle, where subcontractor retention ends and where the DBE goals stop too. Oftentimes, there's no room in the middle of that for a company like ours.... General contractors have been conditioned over the years to not ask for waivers for price differences. And I think it should be made easier for them to ask for price differences and they need not, they should not be afraid to do so. There's a lot of legacy DBEs out there, and in my strong opinion, they don't deserve a price advantage. And also, the lack of waivers for price differences are a red flag that the program is, in fact, an illegal quota system.... We experienced low bid rejection and that's really an affront. When you spend time and effort and resources to put out a bid and it's the low bid and it gets rejected for the superficial reason of your characteristics, that's an affront and that doesn't get attention but doesn't it. It should be on people's minds and it just isn't. To come and be a little bidder and not get a job, that's not good.... After 40 years, DBEs programs should be decelerating, not getting more aggressive.... In highway construction, [name] has competed against the same five DBE companies for 25 to 40 years. DBE [name] is third generation owned. These legacy DBEs have had and continue to have selection preference and unspecified price advantage over us. For the last forty years it has been us and not them that have faced discrimination in the marketplace.

Lower the DBE percentage.... You hear all these stories about them getting more money than the job is worth just to meet the goal and here I am bidding under what I should be bidding just to try to get it and not getting it.... It's all we hear, is how can we get more minorities? How do we do that? How do we just keep on up with this stuff and just keep on worrying about them? What about us? Are we just thrown to the side?

**e. Contract performance compliance**

In general, the contract performance compliance was reported to work smoothly. However, confusion by Tollway staff about how to use the B2Gnow<sup>®</sup> compliance system was a problem for many firms.

I don't know if they didn't know how to work with B2G or they didn't know how B2G was run by the other department. I can see [name] nodding. So, you had the same issue.

The Tollway decided to undertake complete audits of long closed out projects, to the frustration of many prime firms.

So, they decided to audit the jobs. But instead of going through what was on B2G and compare payments and change orders, they deleted everything on B2G and asked us to go back and enter payments for jobs that happened two, three years, four years ago. So, you can imagine the burden that they put in our departments and the project accountants. I was sitting with CFOs and controllers calling DBEs to tell them, "Hey, three years ago, I going to set up, I going to post a payment that I did three years ago.".... I still think that they don't have a good handle of B2G the way they're doing it. Tons of duplicated information, tons of no clicking the right DBE. So, it is not reliable. Like I work for [the Chicago Transit Authority] and that system with CTA is amazingly reliable. With Tollway, is not reliable at all. So, it's that if you can put in your notes, they need to really get a good handle of B2G in order for them to use it as it is used for prompt payment.... They do audits in such a disorganized way that they open bigger doors, so then I have to have a bigger team. And the good part is that they send you an email on Monday and they tell you, "We want all these by Friday." And they are auditing jobs three years old.

We had the same experience with going back to report old payments all over again. It was ridiculous. And we are a small prime.

On those old audits, not only were they, "Hey, we need this in three days." And then it seemed like we would talk to somebody and say, "Oh no, no, that's not what we need. Don't worry about that." They kind of push it aside for a month. And then, all of a sudden you get another letter. "Well, where is everything? You need it."... There was just a mass amount of confusion, and it certainly didn't seem necessary.

Changes in the program's structure and personnel have led to missed deadlines, unanswered questions and confusion for many prime contractors.

It's hard to get an answer on anything.

If the DBE or compliance is just more of a networking, that's wonderful and we always welcome the opportunity to meet more subs, but we need to know who to go to get answers from today. Not next week, not the following week. So, I think that is of major importance.

It got very, very confusing in the last year or two.... Sometimes conflicting or confusing instructions, things like that.

There have been a lot of new faces over at Tollway and it's, for us, been a little difficult to navigate who to contact for certain things. We have a fair amount of just changes to our utilization plans and I know, at least on two jobs, we've sent requests in to change the approved DBE subs and we've not heard anything back and it's been months and months so it's kind of hard to know who to contact.

We have a DBE trucker who's asked for our assistance with talking to the Tollway about increasing fuel prices. And, again, I was like, "Well, I don't even know who to go to." So, we actually pointed her in the direction of, if she's a member of [advocacy group], to maybe get that conversation going that way.

We had a full diversity compliance department and it was so easy to go straight to the right person, depending of the problem that you had. And all of a sudden, when they dismantled the whole thing, they still had a diversity

department. But the diversity department that they have right now, and it took time for me to understand and for many, many people, is that they are just there to network. It's networking for small businesses trying to attract more GCs, connect them with the small businesses, but they don't do anything related to DBE utilization plans, compliance during the life of the project, desk audits with B2G[now]. And it was very frustrating for a GC like us, where you were having issues. And you go to the head of the diversity department, where you used to do before, and they would be like, "Oh, I'm sorry. I have nothing to do with that. My apologies." So, it took time because then they will send that diversity person to all the events. And you're thinking that you are connecting with the right crowd, but when you had all the questions in your project, they knew nothing or they couldn't help you.... There were so many changes that even for them to implement those changes was difficult because they came with a different culture, from a different entity. And when they came to tollway, it was a clash, right? Because [name] works with tons of public agencies. And, and I had to say that it was the most frustrating experience when they started the new diversity compliance department, or I should say diversity and compliance [departments].

Have these meetings where they gather seven to eight of their people, just to introduce themselves. "Here we are. If you have any questions, this is how our program runs." That would just be so nice to have a group like that, just to be able to reach out to, or just that type of communication.

## **2. Electronic Survey Responses**

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 DBE Program**

Minority and woman respondents widely supported the program. Many stated the program was essential to obtaining Tollway business.

The Tollway does have a very progressive DBE program. While there are issues with it, I am pleased with their goals.

The Tollway and other public agencies are the backbone of our business. Without the DBE/MBE participations we would not be on the level of work we now do.

Opportunity to get work. If the goals were not in place, all the work would go to one or two companies. At least we get a chance to get work.

Gives our company a better chance to obtain work and keeping our work force employed.

Yes, we have benefited from Tollway work.

Yes. General contractors are looking for us to expand our capabilities in order to meet DBE goals.

[The program has helped my business because I am] able to get on teams with prime consultants.

The volume of work they have contracted has provided work for many, many of us. The fact that the ISTHA expects DBE participation helps a great deal.

Helped us learn different aspects of the business.

We are able to sustain the size company we desire from the revenues that come from the Tollway.

It has given us access to contract work.

Being IDOT DBE certified we have qualified for set-a-side without needing a bid bond.

Gave us opportunity to work on Tollway [projects] with a larger firm getting experience to qualify for more work.

We have been able to secure good contracts and subcontracts with ISTHA.

It will give us the opportunity to pursue work that requires DBE participation as a Qualified-Based Selection [QBS].

Keeping me busy, thank you.

[The goal] percentages are good.

It has helped us to get work.

Several DBE respondents praised the program for providing more exposure and access to both prime contract and subcontracting opportunities.



We have had the opportunity for large prime projects.

Yes, they [the Tollway] have given us several Prime jobs.

Helped [us in being] selected for projects as a prime and sub.

It's provided goals that allow for teaming opportunities with larger companies.

The M/WBE category helps primes identify us for specific partnerships.

A few White women DBEs felt that they received fewer opportunities than DBEs owned by racial and ethnic minorities.

I do think that there is more of an effort to provide minority companies with additional support and opportunities that is not offered to the women in our industry.

The DBE office discriminates against white woman-owned businesses, delaying our paperwork renewals and ... enforcing unwritten/undocumented rules.

**b. Access to Tollway Contracting Opportunities**

Some DBE respondents requested more opportunities to perform as prime contractors.

The Tollway being more open to selecting DBE firms more often as the prime consultant.

Given more Prime opportunities.

Access to prime opportunities [would be helpful].

Contracts as a prime. Smaller to start and to give us a chance to prove ourselves.

Getting direct contracts from the government.

One method to increase prime contracting opportunities would be to offer more smaller projects or “unbundle” contracts.

More construction work broken up in smaller bid packages in order to give the minority contractors a chance to prove themselves.

Another approach would be to increase the number of SBI projects.

More Small Business set aside projects.

Set aside consulting contracts as prime and appropriate sized joint ventures.

However, some DBEs mentioned that the projects selected for the SBI are often too large.

The contracts that come out for SBI are too large. They need to do a better job of getting project sizes that can accommodate small businesses.

**c. Tollway DBE Program Compliance**

DBEs reported slow payments by both the Tollway and prime contractors.

Prompt payment [would be helpful.]

If the Tollway paid their bills.

Prompt payment to ease cash flow constraints. As a subcontractor we rely on the Construction Manager to capture our quantities on a pay estimate. Not always is the general contractor aware of our quantities or how to quantify them. Often times our quantities are missed for an estimate or two, and then once the quantities are captured, it is usually another 90 days or so before we receive payment. Guidelines on helping DBEs with these cash flow issues [would be helpful]. When doing 80% public work and having normal pay cycles clocking 150 days, it really squeezes cash and puts subcontractors into very tight cash positions.

More accountability from primes and consultants on prompt payment because suppliers and unions do not wait.

Get [implement] a prompt payment agreement from the General Contractor [GC] and the Tollway.

Direct pay to subcontractors would be extremely helpful. Also, if the Tollway would pay subcontractors based on Bills of Lading for quantities of materials delivered to their jobs instead of some mythical calculation made up by their resident engineers that would help everyone and payments could be made more promptly.

DBE and non-DBE respondents requested that the Tollway streamline its invoicing process to make it easier, more transparent and efficient to use.

If we only had to upload the invoices one time in EBuilder instead of having to upload it three times and do it

individually for each sub and combined. The number of layers that the invoice has to go through to get approvals causes a lot of delays. Clear direction and more training on the invoicing process would help. We get conflicting information from different people at the Tollway.

Better transparency on payment. The Tollway has a website that is available publicly. First, it was not working for an extended period of time and there was no urgency to fix it. Second, the website has incomplete information. None of the extra items on the contract are included in the details of the pay estimate. It is almost impossible as a sub to know what payments have been made and what money is owed on a contract from the prime.

Several DBEs requested more oversight to ensure prime contractors comply with DBE goal requirements.

Ensure that once a firm is selected as part of a team that they are utilized and be flexible and accommodating.

Program administrators should follow-up and make sure that the work submitted by prime for the minority contractor is actually completed by the minority or a minority contractor after award.

Another suggested that more oversight is needed for the SBI.

The DBE set aside programs are bid by a handful of DBE contractors that barely self-perform work and just say they are doing mobilization and project management. The Tollway does not appear to be vetting these DBEs on the work they are actually performing. The Tollway needs to do a better job canvassing DBE's capabilities relative to the work the Tollway performs and police the DBE set-aside contracts that they award.

**d. Meeting DBE Contract Goals**

Prime contractors in the business owner interviews indicated they were generally able to meet goals. However, meeting goals on specialty projects presented challenges for some prime bidders.

Lower DBE percentages on "Specialty Projects". For example, a noise wall contract that has very little subcontractor work besides installation of the noise wall. In this situation there will be little opportunity for DBE

contractors, and therefore making the DBE goals difficult to achieve. It also puts pressure on the bidders to use an unqualified DBE company who are put into a position to fail causing project delays and challenges.

One DBE suggested that updating the DBE list on the Tollway's website will make it easier for prime contractors to find firms in the right codes.

The DBE list on the Tollway's site needs to be updated. Many of the DBE firms that are listed are in the Tollway's do not perform the type of work that the Tollway solicits work for. For example, a DBE firm may be listed for concrete, but they only do curb and sidewalk and not the more technical concrete barrier walls that the Tollway has on their projects. They may be listed as electricians, but they cannot do electrical maintenance or street lighting on Tollway jobs.

**e. Outreach and Access to Information**

Targeted outreach and more technical support were requested by several DBE respondents.

I would like to be invited to bid the jobs related to my services instead for me to look through all project to see what is applicable to our business.

Someone to reach out directly and work to help our business align with the right opportunities.

More programming regarding Tollway-specific policies, like how to submit for RFPs, CRF forms, invoicing for professional services, etc. for firms that have not yet primed with the Tollway would be much more beneficial.

Some DBE respondents requested greater access to Tollway staff.

Would like to talk with someone in person.

Excess [sic] to contract specialists.

One on one meetings with Tollway support services to help DBEs navigate the system.

**f. Experiences with business supportive services**

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

The program was good, I went at least seven years ago, just for an introduction, and the support that I received was great.

[Our experience with supportive services programs has been] positive.

These [supportive services] have been good experiences for us.

[We have found supportive services] valuable.

Some respondents, however, suggested supportive services programs could offer more industry-specific or comprehensive instruction to develop concrete skills.

For firms that are already established and have DBE certification, these programs are unhelpful. Programming related to Tollway procurement and paperwork (for professional services) would be much more helpful.

Good information, but sometimes lacks the ability to follow through with real results.

Insightful as they may be, my newly formed LLC has yet to see the fruits of my time spent attending these meetings.

It's [sic] not always meaningful.

My experience in these programs is that I perceive them as a numbers game.

They often cater directly to construction and dump truck companies and don't make an effort to find ways to find work for all types of businesses.

Many DBEs reported assistance with obtaining capital and bonding is critical to help them succeed.

We had a hard time at first getting bonding and lost one of our contracts due to lack of bonding. So, helping DBEs get bonded will help them before bidding.

Bond guarantee assistance [would be helpful].

Bonding cap. Devise a solution that most DBE firms face insofar as funding and growing the business.

[Our firm needs] help with bonding.

Access to capital [would help my business grow].

Bonding capacity and line of credit [would help my business grow].

Finance [financing would be helpful].

**g. Experiences with mentor-protégé programs and teaming arrangements**

Mentor-protégé programs and joint ventures were often mentioned as approaches to help DBEs.

A mentor [would help our business].

Joint Venture or Mentor/Protégé [would help our business].

Mentoring type program.

More firms willing to team with downstate firms to help them establish an upstate presence.

JVs are needed to provide credibility to Agency. Even if you can do it alone.

More firms willing to team with downstate firms to help them establish an upstate presence.

A DBE firm that participated in the Tollway's Partners for Growth found it helpful.

Partners For Growth ("P4G") was helpful.

However, more mentors and more monitoring were suggested.

Needs more mentors to walk the new contractors through the process.

Monitor implementation of Mentor/Protege plans.

Some DBE respondents did not find these types of efforts to be helpful.

The majority partners want to control the minority partner so the minority partner gets treated like a sub and not like a partner.

We have not received a true benefit of the mentor/protege program.

Many firms are not willing to do the Mentor Protege - one firm told me they did not want to help us become bigger and more competition against them.

Currently in a mentor protege program. Still coordinating to get a positive outcome.

## **I. Conclusion**

The Illinois Tollway DBE Program has many of the elements of national best program practices. Overall, DBE firms obtained work as prime vendors and subcontractors. Prime contractors were generally able to comply with Program requirements. The Program was supported by participants and was viewed as important to the growth and development of DBEs. However, there are some challenges to address, including overcoming difficulties in accessing accurate information and decision-makers; modifying policies and the administrative structure that hamper DBE participation; removing hurdles that make it difficult for subcontractors to move into the role of prime vendors; managing the features of the B2G system to ensure efficient program oversight and establish a more efficient invoicing process; facilitating timely payments; creating more targeted outreach; and increasing access capital.





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

## A. Contract Data Overview

We analyzed data from Illinois Tollway's ("Tollway") construction and construction-related 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 Disadvantaged Business Enterprise ("DBE") 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. Figures throughout this Report have been rounded for readability.

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

Contract Type	Total Contracts	Share of Total Contracts
Prime Contracts	1,092	21.9%
Subcontractor	3,894	78.1%
<b>TOTAL</b>	<b>4,986</b>	<b>100.0%</b>

*Source: CHA analysis of Illinois Tollway data*

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

Business Type	Total Contract Dollars	Share of Total Contract Dollars
Prime Contracts	\$1,848,766,122	54.1%
Subcontractor	\$1,568,334,868	45.9%
<b>TOTAL</b>	<b>\$3,417,100,990</b>	<b>100.0%</b>

*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 DBEs by the Tollway.
3. The calculation of the DBE unweighted and weighted availability in the Tollway's marketplace.
4. The examination of concentration of contract dollars among DBE and non-DBE firms.
5. The presentation of the DBE disparity analysis.

## **B. The Geographic and Product Market for Illinois Tollway Contracts**

As discussed in Chapter II, the federal courts<sup>182</sup> require that a local government narrowly tailor its DBE program elements to its geographic market area. This element of the analysis must be empirically established.<sup>183</sup> The accepted approach is to analyze those detailed industries, as defined by six-digit NAICS codes,<sup>184</sup> that make up at least 75% of the prime contract and subcontract payments for the study period.<sup>185</sup> The determination of the Tollway's geographic and product market required three steps:

- 
182. *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.").
  183. *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").
  184. [www.census.gov/eos/www/naics](http://www.census.gov/eos/www/naics).
  185. 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.
4. Table 4-4 presents these results.

## 1. Final Contract Data File for Illinois Tollway Contracts

The FCDF, which establishes the Tollway's product market, consisted of 33 NAICS codes, with a total contract dollar value of \$3,417,100,990. 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
541330	Engineering Services	25.1%	25.1%
237310	Highway, Street, and Bridge Construction	16.7%	41.8%
238910	Site Preparation Contractors	10.5%	52.3%
238120	Structural Steel and Precast Concrete Contractors	9.7%	62.1%
237110	Water and Sewer Line and Related Structures Construction	8.7%	70.8%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.0%	78.8%
238990	All Other Specialty Trade Contractors	4.5%	83.3%
238110	Poured Concrete Foundation and Structure Contractors	4.3%	87.6%
561730	Landscaping Services	3.1%	90.6%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.0%	92.6%
541380	Testing Laboratories	1.4%	94.1%
531320	Offices of Real Estate Appraisers	1.3%	95.4%
541370	Surveying and Mapping (except Geophysical) Services	0.9%	96.3%
238320	Painting and Wall Covering Contractors	0.6%	96.9%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
238220	Plumbing, Heating, and Air-Conditioning Contractors	0.5%	97.4%
327390	Other Concrete Product Manufacturing	0.5%	97.8%
236220	Commercial and Institutional Building Construction	0.4%	98.2%
238290	Other Building Equipment Contractors	0.3%	98.5%
541620	Environmental Consulting Services	0.3%	98.8%
541820	Public Relations Agencies	0.2%	99.0%
238310	Drywall and Insulation Contractors	0.2%	99.2%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	0.2%	99.4%
238160	Roofing Contractors	0.1%	99.5%
238190	Other Foundation, Structure, and Building Exterior Contractors	0.1%	99.7%
541310	Architectural Services	0.1%	99.8%
238140	Masonry Contractors	0.1%	99.8%
238150	Glass and Glazing Contractors	0.1%	99.9%
238340	Tile and Terrazzo Contractors	0.03%	99.9%
238350	Finish Carpentry Contractors	0.03%	99.96%
238130	Framing Contractors	0.02%	99.98%
238330	Flooring Contractors	0.01%	99.99%
324121	Asphalt Paving Mixture and Block Manufacturing	0.01%	99.997%
327320	Ready-Mix Concrete Manufacturing	0.003%	100.000%
<b>TOTAL</b>		<b>100.0%</b>	

Source: CHA analysis of Illinois Tollway data

Table 4-4 presents the utilization percentages grouped into construction and professional services contracts.

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

NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
Construction	2.5%	13.4%	0.6%	0.6%	9.3%	26.4%	73.6%	100.0%
Professional Services	8.7%	7.7%	20.6%	0.0%	9.2%	46.2%	53.8%	100.0%
<b>Total</b>	<b>4.1%</b>	<b>11.9%</b>	<b>5.9%</b>	<b>0.4%</b>	<b>9.3%</b>	<b>31.6%</b>	<b>68.4%</b>	<b>100.0%</b>

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.<sup>186</sup> Firm location was determined by zip code and aggregated into counties as the geographic unit. Seven counties in Illinois – Cook, Dupage, Kane, Lake, McHenry, Will, and Winnebago – captured 91.0% of the FCDF. Therefore, we used these seven counties as the geographic market.

**Table 4-5: County Distribution of Contract Data Utilization Dollars**

County	Share of Contract Data Utilization Dollars
Cook County	59.1%
Dupage County	18.5%
Lake County	5.7%
McHenry County	5.5%
Kane County	4.2%
Will County	3.6%
Winnebago County	3.5%
<b>TOTAL</b>	<b>100.0%</b>

Source: CHA analysis of Illinois Tollway Highway Authority data

186. National Disparity Study Guidelines, at p. 29.

## C. Utilization of DBEs 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 DBEs<sup>187</sup> as measured by net payments to prime firms and subcontractors and disaggregated by race and gender. There were 33 NAICS codes after constraining the FCDF by the geographic market; the dollar value of the contracts in these codes was \$3,108,760,268.

Table 4-6 presents these data. We note that the contract dollar shares in Table 4-6 are equivalent to the weight of spending in each NAICS code. These data were used to calculate weighted availability<sup>188</sup> from unweighted availability, as discussed below.

**Table 4-6: NAICS Code Distribution of Contract Dollars in the Constrained Product Market**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541330	Engineering Services	\$709,340,864	22.8%
237310	Highway, Street, and Bridge Construction	\$538,348,544	17.3%
238910	Site Preparation Contractors	\$341,492,736	11.0%
238120	Structural Steel and Precast Concrete Contractors	\$320,835,456	10.3%
237110	Water and Sewer Line and Related Structures Construction	\$288,218,656	9.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$259,554,448	8.3%
238990	All Other Specialty Trade Contractors	\$152,285,360	4.9%
238110	Poured Concrete Foundation and Structure Contractors	\$143,578,992	4.6%

187. For our analysis, the term "DBE" 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.").

188. 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
561730	Landscaping Services	\$102,812,552	3.3%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$55,568,396	1.8%
541380	Testing Laboratories	\$48,343,012	1.6%
531320	Offices of Real Estate Appraisers	\$29,205,834	0.9%
541370	Surveying and Mapping (except Geophysical) Services	\$17,391,636	0.6%
238320	Painting and Wall Covering Contractors	\$16,448,530	0.5%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$14,423,032	0.5%
541620	Environmental Consulting Services	\$10,053,017	0.3%
236220	Commercial and Institutional Building Construction	\$9,156,388	0.3%
327390	Other Concrete Product Manufacturing	\$9,120,557	0.3%
238290	Other Building Equipment Contractors	\$9,043,874	0.3%
238310	Drywall and Insulation Contractors	\$6,310,735	0.2%
541820	Public Relations Agencies	\$5,047,584	0.2%
238160	Roofing Contractors	\$4,432,096	0.1%
541310	Architectural Services	\$4,087,332	0.1%
238190	Other Foundation, Structure, and Building Exterior Contractors	\$4,003,561	0.1%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	\$2,669,266	0.1%
238140	Masonry Contractors	\$2,495,117	0.1%
238150	Glass and Glazing Contractors	\$1,819,579	0.1%
238340	Tile and Terrazzo Contractors	\$1,088,210	0.0%
238350	Finish Carpentry Contractors	\$1,042,964	0.0%
324121	Asphalt Paving Mixture and Block Manufacturing	\$269,988	0.0%
238330	Flooring Contractors	\$168,873	0.0%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
327320	Ready-Mix Concrete Manufacturing	\$92,851	0.0%
238130	Framing Contractors	\$10,229	0.0%
<b>TOTAL</b>		<b>\$3,108,760,268</b>	<b>100.0%</b>

Source: CHA analysis of Illinois Tollway data

Tables 4-7 and 4-8 present data on the Tollway's DBE utilization, measured in contract dollars and percentage of contract dollars.

**Table 4-7: Distribution of Contract Dollars by Race and Gender**  
(total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
236220	\$992,373	\$250,150	\$524,279	\$0	\$128,026	\$1,894,827	\$7,261,560	\$9,156,388
237110	\$0	\$93,775,366	\$603,736	\$0	\$40,009,592	\$134,388,694	\$153,829,968	\$288,218,663
237310	\$3,505,358	\$35,022,664	\$2,021,170	\$0	\$18,448,901	\$58,998,093	\$479,350,432	\$538,348,525
238110	\$1,140,431	\$12,681,782	\$137,498	\$0	\$6,082,178	\$20,041,888	\$123,537,110	\$143,578,999
238120	\$8,048,212	\$26,208,113	\$400,613	\$135,065	\$66,717,315	\$101,509,317	\$219,326,147	\$320,835,465
238130	\$0	\$0	\$0	\$0	\$0	\$0	\$10,229	\$10,229
238140	\$14,568	\$67,251	\$0	\$0	\$0	\$81,819	\$2,413,298	\$2,495,117
238150	\$0	\$167,168	\$0	\$0	\$1,475	\$168,643	\$1,650,936	\$1,819,579
238160	\$2,905,527	\$0	\$0	\$0	\$687,742	\$3,593,270	\$838,826	\$4,432,096
238190	\$0	\$751,951	\$358,671	\$0	\$322,135	\$1,432,758	\$2,570,804	\$4,003,561
238210	\$29,839,861	\$19,217,195	\$3,824,000	\$449,813	\$10,101,223	\$63,432,091	\$196,122,353	\$259,554,444
238220	\$352,455	\$2,342,974	\$0	\$0	\$6,332,365	\$9,027,795	\$5,395,238	\$14,423,032
238290	\$54,559	\$574,352	\$0	\$0	\$424,230	\$1,053,141	\$7,990,734	\$9,043,874



NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
238310	\$107,102	\$55,749	\$0	\$0	\$3,011,502	\$3,174,353	\$3,136,382	\$6,310,735
238320	\$0	\$8,367,633	\$0	\$0	\$7,670,336	\$16,037,969	\$410,561	\$16,448,530
238330	\$0	\$6,969	\$0	\$0	\$0	\$6,969	\$161,904	\$168,873
238340	\$0	\$0	\$0	\$0	\$0	\$0	\$1,088,210	\$1,088,210
238350	\$143,297	\$617,447	\$50,942	\$0	\$0	\$811,687	\$231,277	\$1,042,964
238910	\$3,086,275	\$4,612,089	\$382,534	\$0	\$20,760,640	\$28,841,538	\$312,651,187	\$341,492,725
238990	\$31,007	\$32,126,654	\$1,163,064	\$12,086,666	\$17,360,745	\$62,768,135	\$89,517,225	\$152,285,359
324121	\$0	\$0	\$0	\$0	\$269,988	\$269,988	\$0	\$269,988
327320	\$0	\$0	\$0	\$0	\$0	\$0	\$92,851	\$92,851
327390	\$5,540,598	\$0	\$1,045,804	\$0	\$44,527	\$6,630,930	\$2,489,627	\$9,120,557
331110	\$0	\$0	\$0	\$0	\$0	\$0	\$2,669,266	\$2,669,266
484220	\$1,404,187	\$39,465,670	\$1,307,414	\$0	\$11,103,705	\$53,280,976	\$2,287,418	\$55,568,394
531320	\$446,278	\$205,541	\$8,253,365	\$0	\$774,714	\$9,679,899	\$19,525,936	\$29,205,835
541310	\$0	\$0	\$0	\$0	\$731,143	\$731,143	\$3,356,189	\$4,087,332
541330	\$68,829,468	\$40,466,223	\$126,432,659	\$254,000	\$63,614,414	\$299,596,764	\$409,744,097	\$709,340,861
541370	\$2,209,181	\$3,525,776	\$9,074,537	\$0	\$1,791,046	\$16,600,540	\$791,097	\$17,391,637
541380	\$64,894	\$13,651,342	\$25,057,585	\$0	\$2,080,675	\$40,854,496	\$7,488,517	\$48,343,013
541620	\$0	\$5,500,167	\$497,944	\$0	\$2,084,074	\$8,082,186	\$1,970,831	\$10,053,017
541820	\$0	\$0	\$0	\$0	\$5,047,584	\$5,047,584	\$0	\$5,047,584
561730	\$0	\$29,714,084	\$1,361,954	\$0	\$4,053,806	\$35,129,844	\$67,682,708	\$102,812,552
<b>Total</b>	<b>\$128,715,633</b>	<b>\$369,374,310</b>	<b>\$182,497,769</b>	<b>\$12,925,543</b>	<b>\$289,654,083</b>	<b>\$983,167,337</b>	<b>\$2,125,592,917</b>	<b>\$3,108,760,268</b>

Source: CHA analysis of Illinois Tollway data

**Table 4-8: Percentage Distribution of Contract Dollars by Race and Gender**  
**(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
236220	10.8%	2.7%	5.7%	0.0%	1.4%	20.7%	79.3%	100.0%
237110	0.0%	32.5%	0.2%	0.0%	13.9%	46.6%	53.4%	100.0%
237310	0.7%	6.5%	0.4%	0.0%	3.4%	11.0%	89.0%	100.0%
238110	0.8%	8.8%	0.1%	0.0%	4.2%	14.0%	86.0%	100.0%
238120	2.5%	8.2%	0.1%	0.0%	20.8%	31.6%	68.4%	100.0%
238130	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238140	0.6%	2.7%	0.0%	0.0%	0.0%	3.3%	96.7%	100.0%
238150	0.0%	9.2%	0.0%	0.0%	0.1%	9.3%	90.7%	100.0%
238160	65.6%	0.0%	0.0%	0.0%	15.5%	81.1%	18.9%	100.0%
238190	0.0%	18.8%	9.0%	0.0%	8.0%	35.8%	64.2%	100.0%
238210	11.5%	7.4%	1.5%	0.2%	3.9%	24.4%	75.6%	100.0%
238220	2.4%	16.2%	0.0%	0.0%	43.9%	62.6%	37.4%	100.0%
238290	0.6%	6.4%	0.0%	0.0%	4.7%	11.6%	88.4%	100.0%
238310	1.7%	0.9%	0.0%	0.0%	47.7%	50.3%	49.7%	100.0%
238320	0.0%	50.9%	0.0%	0.0%	46.6%	97.5%	2.5%	100.0%
238330	0.0%	4.1%	0.0%	0.0%	0.0%	4.1%	95.9%	100.0%
238340	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238350	13.7%	59.2%	4.9%	0.0%	0.0%	77.8%	22.2%	100.0%
238910	0.9%	1.4%	0.1%	0.0%	6.1%	8.4%	91.6%	100.0%
238990	0.0%	21.1%	0.8%	7.9%	11.4%	41.2%	58.8%	100.0%
324121	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
327320	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
327390	60.7%	0.0%	11.5%	0.0%	0.5%	72.7%	27.3%	100.0%
331110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
484220	2.5%	71.0%	2.4%	0.0%	20.0%	95.9%	4.1%	100.0%
531320	1.5%	0.7%	28.3%	0.0%	2.7%	33.1%	66.9%	100.0%
541310	0.0%	0.0%	0.0%	0.0%	17.9%	17.9%	82.1%	100.0%
541330	9.7%	5.7%	17.8%	0.0%	9.0%	42.2%	57.8%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
541370	12.7%	20.3%	52.2%	0.0%	10.3%	95.5%	4.5%	100.0%
541380	0.1%	28.2%	51.8%	0.0%	4.3%	84.5%	15.5%	100.0%
541620	0.0%	54.7%	5.0%	0.0%	20.7%	80.4%	19.6%	100.0%
541820	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
561730	0.0%	28.9%	1.3%	0.0%	3.9%	34.2%	65.8%	100.0%
<b>Total</b>	<b>4.1%</b>	<b>11.9%</b>	<b>5.9%</b>	<b>0.4%</b>	<b>9.3%</b>	<b>31.6%</b>	<b>68.4%</b>	<b>100.0%</b>

Source: CHA analysis of Illinois Tollway data

## D. The Availability of DBEs for Illinois Tollway Contracts in its Geographic and Product Markets

### 1. The Methodological Framework

Estimates of the availability of DBEs 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.<sup>189</sup>

We applied the “custom census” approach, with refinements, to estimate availability. The courts and the National Model Disparity Study Guidelines<sup>190</sup> 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 DBEs or firms that respond to a survey) and the denominator (e.g., registered vendors or the Census Bureau’s County Business Patterns data).

189. 49 C.F.R. §25.45(c).

190. *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.

- 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 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-DBEs 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.<sup>191</sup>
- Fourth, it has been upheld by every court that has reviewed it, including most recently in the successful defense of the Illinois Tollway’s DBE program, for which we served as testifying experts.<sup>192</sup>

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

1. The Final Contract Data File
2. The Master 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 Illinois Unified Certification Program Directory, the City of Chicago’s Minority- and Woman Business Enter-

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

192. *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 (7<sup>th</sup> Cir. 2007), cert. denied, 137 S.Ct. 2292 (2017).

prise Directory; Cook County, Illinois' Minority- and Woman Business Enterprise Directory; the State of Illinois' Business Enterprise Program Directory; and the Tollway Contract Data File to compile the Master Directory. 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-DBEs. 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 information 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.<sup>193</sup> 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 contracts.

## **2. The Availability Data and Results**

Tables 4-9 through 4-11 present data on:

1. The unweighted availability percentages by race and gender and by NAICS codes for the Tollway's product market;
2. The weights used to adjust the unweighted numbers;<sup>194</sup> and
3. The final estimates of the weighted averages of the individual six-digit level NAICS availability estimates in the Tollway's market area.

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

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

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.<sup>195</sup> For example, in a hypothetical NAICS Code 123456, the total available firms are 100 and 60 of these firms are DBEs; hence, DBE 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 4-9. In the previous example, the unweighted availability for DBEs 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 4-10. This share is the *weight*. Using the previous example, where the Tollway spending in NAICS Code 123456 was one percent, the component of DBE weighted availability for NAICS Code 123456 would be 0.006: 60% multiplied by one percent. We say “the component of DBE 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 4-11.

**Table 4-9: Unweighted DBE Availability for Illinois Tollway Contracts**

NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
236220	8.2%	7.1%	3.6%	0.5%	7.8%	27.2%	72.8%	100.0%
237110	2.9%	19.7%	7.4%	0.0%	10.3%	40.2%	59.8%	100.0%
237310	8.4%	15.3%	5.9%	0.2%	7.3%	37.0%	63.0%	100.0%
238110	4.7%	7.1%	0.8%	0.0%	6.2%	18.8%	81.2%	100.0%
238120	9.5%	22.6%	3.2%	0.5%	20.0%	55.8%	44.2%	100.0%
238130	3.3%	3.5%	0.6%	0.0%	3.2%	10.6%	89.4%	100.0%

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

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NAICS	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE	Total
238140	3.8%	4.5%	0.2%	0.0%	5.2%	13.8%	86.2%	100.0%
238150	3.8%	7.3%	0.0%	0.0%	10.3%	21.4%	78.6%	100.0%
238160	2.3%	1.5%	0.2%	0.0%	3.8%	7.9%	92.1%	100.0%
238190	10.2%	25.1%	1.8%	0.0%	16.2%	53.3%	46.7%	100.0%
238210	3.7%	2.7%	0.9%	0.1%	7.6%	15.0%	85.0%	100.0%
238220	2.4%	2.2%	0.6%	0.0%	3.7%	8.9%	91.1%	100.0%
238290	5.8%	11.0%	1.7%	0.0%	19.8%	38.4%	61.6%	100.0%
238310	10.4%	15.1%	0.7%	0.0%	6.1%	32.3%	67.7%	100.0%
238320	3.5%	1.7%	0.2%	0.1%	4.0%	9.6%	90.4%	100.0%
238330	10.3%	9.1%	1.4%	0.0%	5.8%	26.6%	73.4%	100.0%
238340	4.7%	3.3%	1.4%	0.0%	4.7%	14.0%	86.0%	100.0%
238350	16.9%	15.0%	3.7%	0.0%	7.2%	42.9%	57.1%	100.0%
238910	9.3%	11.3%	2.3%	0.0%	11.2%	34.1%	65.9%	100.0%
238990	2.3%	2.9%	0.6%	0.1%	3.9%	9.7%	90.3%	100.0%
324121	0.0%	0.0%	7.1%	0.0%	14.3%	21.4%	78.6%	100.0%
327320	16.7%	22.2%	0.0%	0.0%	0.0%	38.9%	61.1%	100.0%
327390	7.4%	0.0%	7.4%	0.0%	3.7%	18.5%	81.5%	100.0%
331110	0.0%	5.0%	0.0%	0.0%	5.0%	10.0%	90.0%	100.0%
484220	9.5%	33.1%	2.7%	0.0%	15.8%	61.1%	38.9%	100.0%
531320	2.8%	0.3%	0.3%	0.0%	5.2%	8.7%	91.3%	100.0%
541310	3.4%	3.6%	2.6%	0.1%	9.0%	18.7%	81.3%	100.0%
541330	4.9%	3.3%	7.7%	0.2%	6.0%	22.0%	78.0%	100.0%
541370	3.6%	4.0%	9.4%	0.0%	10.1%	27.2%	72.8%	100.0%
541380	1.3%	1.1%	4.1%	0.1%	5.0%	11.5%	88.5%	100.0%
541620	4.0%	4.8%	3.6%	0.3%	12.5%	25.2%	74.8%	100.0%
541820	5.3%	2.3%	0.7%	0.0%	15.6%	23.9%	76.1%	100.0%
561730	2.9%	3.4%	0.3%	0.1%	4.5%	11.1%	88.9%	100.0%
<b>Total</b>	<b>4.2%</b>	<b>4.8%</b>	<b>1.8%</b>	<b>0.1%</b>	<b>6.0%</b>	<b>17.0%</b>	<b>83.0%</b>	<b>100.0%</b>

*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 DBE contract goals.

**Table 4-10: Distribution of the Illinois Tollway Spending by NAICS Code (the Weights)**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	0.3%
237110	Water and Sewer Line and Related Structures Construction	9.3%
237310	Highway, Street, and Bridge Construction	17.3%
238110	Poured Concrete Foundation and Structure Contractors	4.6%
238120	Structural Steel and Precast Concrete Contractors	10.3%
238130	Framing Contractors	0.0003%
238140	Masonry Contractors	0.1%
238150	Glass and Glazing Contractors	0.1%
238160	Roofing Contractors	0.1%
238190	Other Foundation, Structure, and Building Exterior Contractors	0.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.3%
238220	Plumbing, Heating, and Air-Conditioning Contractors	0.5%
238290	Other Building Equipment Contractors	0.3%
238310	Drywall and Insulation Contractors	0.2%
238320	Painting and Wall Covering Contractors	0.5%
238330	Flooring Contractors	0.01%
238340	Tile and Terrazzo Contractors	0.04%
238350	Finish Carpentry Contractors	0.03%
238910	Site Preparation Contractors	11.0%
238990	All Other Specialty Trade Contractors	4.9%
324121	Asphalt Paving Mixture and Block Manufacturing	0.01%
327320	Ready-Mix Concrete Manufacturing	0.003%
327390	Other Concrete Product Manufacturing	0.3%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	0.1%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.8%
531320	Offices of Real Estate Appraisers	0.9%



NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
541310	Architectural Services	0.1%
541330	Engineering Services	22.8%
541370	Surveying and Mapping (except Geophysical) Services	0.6%
541380	Testing Laboratories	1.6%
541620	Environmental Consulting Services	0.3%
541820	Public Relations Agencies	0.2%
561730	Landscaping Services	3.3%
<b>TOTAL</b>		<b>100.0%</b>

Source: CHA analysis of Illinois Tollway data

Table 4-11 presents the weighted availability results for each of the racial and gender categories. The aggregated availability of DBE, weighted by the Tollway's spending in its geographic and industry markets, is 29.8%.

**Table 4-11: Aggregated Weighted Availability for the Tollway Contracts**

Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
6.0%	10.4%	4.4%	0.1%	8.9%	29.8%	70.2%	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 DBE and non-DBE 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 DBEs' and non-DBEs' 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-DBE earnings AND these NAICS codes are different from the codes that provide large shares of DBE earnings, this indicates that DBEs do not enjoy the same position in the agency's marketplace as non-DBEs. Second, if an asymmetry exists between agency spending and DBE 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 three important findings: 1) with the exception of Hispanics, the three NAICS codes that provide the most contract dollars to each DBE group 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 spend; 2) only one NAICS code – Engineering Services – was among the top three codes for the Tollway's overall spend and among the top three codes that provided the most contract dollars to DBEs; however, the distribution of these funds across firms was far different for DBEs compared to non-DBEs; 3) the other two NAICS codes that provided the most contract dollars to DBEs were different from the other two NAICS codes that represented large area of Tollway spend; and 4) when examining the leading NAICS codes for DBEs, their share of the overall earnings exceeded the share of non-DBEs' overall earnings.

With respect to the first finding, Table 4-12 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 4-7 and 4-8. The three NAICS codes where the Tollway spent most of its contract dollars captured 51.1% of all Tollway spending. For each DBE group, the corresponding figure for the share of spending captured by the top three codes ranged between 99.0% (Native American) and 47.0% (Hispanic) and only the share for Hispanics was less than the share of all Tollway spending – and that difference was small (51.1% for Tollway; 47.0% for Hispanics).

**Table 4-12: 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	51.1%
Black	82.9%
Hispanic	47.0%
Asian	88.0%
Native American	99.0%
White Woman	58.8%
Non-DBE	56.5%

*Source: CHA analysis of Illinois Tollway data*

With respect to the second finding, Table 4-13 provides additional details on the distribution of contracts and contract dollars in Engineering Services across DBEs and non-DBEs. The Table indicates that while the number of contracts going to each group varies from 329 (non-DBE) to 1 (Native American), the

average number of contracts the firms in each group received was very similar. Excluding Native Americans where only one firm received one contract, the average number of contracts per firm ranges from 5.6 (White women) to 4.4 (Black); this range is very close to the average of 5.5 contracts per non-DBE firm. However, this parity is not reflected in how the contract dollars were distributed. The Table indicates that contract dollars were much more concentrated within DBEs compared to the level of concentration within non-DBEs. The largest non-DBE receiving contract dollars in this NAICS code received 14.9% of all contract dollars received by non-DBEs. For DBEs, the share of contract dollars received by the largest firm in each group ranged from 27.7% (Asian) to 22.5% (White women). Thus, the data indicate that while Engineering Services provided contracting opportunities to DBEs in much the same way it does for non-DBEs, the contract dollars from these opportunities were much more concentrated in a few DBE firms compared to the level of concentration among non-DBE firms.

**Table 4-13: Comparison of the Distribution of Contracts and Contract Dollars Across DBEs and Non-DBEs in NAICS Code 541330 – Engineering Services**

	Black	Hispanic	Asian	Native American	White Women	Non-DBE
Number of Contracts	141	72	173	1	112	329
Number of Firms	32	14	33	1	20	60
Contracts per Firm	4.4	5.1	5.2	1.0	5.6	5.5
Dollar Share of the largest firm	26.9%	27.3%	27.6%	100.0%	22.5%	14.9%
Dollar Share of the second largest firm	14.7%	20.8%	9.6%	0.0%	16.2%	8.8%
Dollar Share of the third largest firm	11.0%	14.9%	6.7%	0.0%	13.0%	8.0%
Dollar Share of Top 3	52.7%	62.9%	44.0%	100.0%	51.8%	31.7%

*Source: CHA analysis of Illinois Tollway data*

With respect to the third finding, Table 4-14 provides more detail on the data presented in Table 4-12. Table 4-14 lists the top three codes for each group and their corresponding share of the group's total spending. The code with the largest amount of Tollway spending – NAICS code 541330 (Engineering Services) – was among the top three codes for all DBEs, but the relative importance of that code with respect to all contract dollars received varied widely. The Tollway spent 22.8% of its dollars in that code; however, for DBEs, the share of all a groups' dollars ranged from 69.3% (Asian) to 2.0% (Native American). The two primary codes of Tollway spending (Highway, Street, and Bridge

Construction; Site Preparation Contractors) did not appear among the top three codes for any DBE.

**Table 4-14: The Top Three Tollway Spending NAICS Codes for Each Demographic Group**

NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
All			
541330	Engineering Services	22.8%	51.1%
237310	Highway, Street, and Bridge Construction	17.3%	
238910	Site Preparation Contractors	11.0%	
Black			
541330	Engineering Services	53.5%	82.9%
238210	Electrical Contractors and Other Wiring Installation Contractors	23.2%	
238120	Structural Steel and Precast Concrete Contractors	6.3%	
Hispanic			
237110	Water and Sewer Line and Related Structures Construction	25.4%	47.0%
541330	Engineering Services	11.0%	
484220	Specialized Freight (except Used Goods) Trucking, Local	10.7%	
Asian			
541330	Engineering Services	69.3%	88.0%
541380	Testing Laboratories	13.7%	
541370	Surveying and Mapping (except Geophysical) Services	5.0%	
Native American			
238990	All Other Specialty Trade Contractors	93.5%	99.0%
238210	Electrical Contractors and Other Wiring Installation Contractors	3.5%	
541330	Engineering Services	2.0%	

NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
White Woman			
238120	Structural Steel and Precast Concrete Contractors	23.0%	58.8%
541330	Engineering Services	22.0%	
237110	Water and Sewer Line and Related Structures Construction	13.8%	
Non-DBE			
237310	Highway, Street, and Bridge Construction	22.6%	56.5%
541330	Engineering Services	19.3%	
238910	Site Preparation Contractors	14.7%	

*Source: CHA analysis of Illinois Tollway data*

Tables 4-15 through 4-19 present data on the fourth finding: how Tollway spending varies across groups. These results illustrate the different levels of concentration of contract dollars among DBEs compared to non-DBEs. 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 4-14). 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-DBEs.

Table 4-15 presents the three NAICS codes where Black firms received the largest share of their contract dollars. While these codes captured 82.9% of all Black contract dollars, the corresponding figure for non-DBEs was 38.8%.

**Table 4-15: 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-DBE Dollars
541330	Engineering Services	22.8%	53.5%	19.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.3%	23.2%	9.2%
238120	Structural Steel and Precast Concrete Contractors	10.3%	6.3%	10.3%
Total 3-code Share of Total Group Dollars			82.9%	38.8%

*Source: CHA analysis of Illinois Tollway data*

Table 4-16 presents the three NAICS codes where Hispanic firms received the largest share of their contract dollars. While these codes comprised 47.0% of all Hispanic contract dollars, the corresponding figure for non-DBEs was 26.6%.

**Table 4-16: 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-DBE Dollars
237110	Water and Sewer Line and Related Structures Construction	9.3%	25.4%	7.2%
541330	Engineering Services	22.8%	11.0%	19.3%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.8%	10.7%	0.1%
Total 3-code Share of Total Group Dollars			47.0%	26.6%

*Source: CHA analysis of Illinois Tollway data*

Table 4-17 presents the three NAICS codes where Asian firms received the largest share of their contract dollars. While these codes captured 88.0% of all Asian contract dollars, the corresponding figure for non-DBEs was 19.7%.

**Table 4-17: 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-DBE Dollars
541330	Engineering Services	22.8%	69.3%	19.3%
541380	Testing Laboratories	1.6%	13.7%	0.4%
541370	Surveying and Mapping (except Geophysical) Services	0.6%	5.0%	0.0%
Total 3-code Share of Total Group Dollars			88.0%	19.7%

*Source: CHA analysis of Illinois Tollway data*

Table 4-18 presents the three NAICS codes where Native American firms received the largest share of their contract dollars. While these codes captured 99.0% of all Native American contract dollars, the corresponding figure for non-DBEs was 32.7%.

**Table 4-18: Three NAICS Codes where Native American Firms Received the Most Spending**

NAICS Code	NAICS Code Label	Weight	Share of Total Native American Dollars	Share of Total Non-DBE Dollars
238990	All Other Specialty Trade Contractors	93.5%	93.5%	4.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	3.5%	3.5%	9.2%
541330	Engineering Services	2.0%	2.0%	19.3%
Total 3-code Share of Total Group Dollars			99.0%	32.7%

Source: CHA analysis of Illinois Tollway Highway Authority data

Table 4-19 presents the three NAICS codes where White woman firms received the largest share of their contract dollars. These codes comprise 58.8% of all White woman contract dollars; the corresponding figure for non-DBEs was 36.8%.

**Table 4-19: 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-DBE Dollars
238120	Structural Steel and Precast Concrete Contractors	10.3%	23.0%	10.3%
541330	Engineering Services	22.8%	22.0%	19.3%
237110	Water and Sewer Line and Related Structures Construction	9.3%	13.8%	7.2%
Total 3-code Share of Total Group Dollars			58.8%	36.8%

Source: CHA analysis of Illinois Tollway data

The data presented in Tables 4-12 through 4-19 support the inference that regardless of any statistical disparities between contract utilization and weighted availability, the experiences of DBEs with respect to participation in Tollway procurements were significantly different than the experiences of non-DBEs. 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 DBE groups. In addition, when examining the three most important NAICS codes for DBEs, we found that for each group, the DBE share of all group earnings exceeded the non-DBE share of all group earnings.

## E. Disparity Analysis of DBEs 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.<sup>196</sup> 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.<sup>197</sup> 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 196 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.)

196. 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.").

197. 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 4-20 presents the disparity ratios for each demographic group. The disparity ratio for Blacks is substantively significant. All of the disparity ratios are statistically significant at the 0.001 level.

**Table 4-20: Disparity Ratios by Demographic Group**

	Black	Hispanic	Asian	Native American	White Woman	DBE	Non-DBE
Disparity Ratio	68.7% <sup>‡***</sup>	114.2% <sup>***</sup>	133.4% <sup>***</sup>	292.8% <sup>***</sup>	105.0% <sup>***</sup>	106.0% <sup>***</sup>	97.4% <sup>***</sup>

*Source: CHA analysis of Illinois Tollway data*

*‡ Indicates substantive significance*

*\*\*\* Statistically significant at the 0.001 level*

## F. Conclusion

This Chapter examines the Tollway’s utilization of DBEs compared to non-DBEs; provides estimates of the availability of DBEs and non-DBEs 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 DBEs compared to non-DBEs on Tollway contracts.

These results support the conclusion that while overall, DBEs 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.<sup>198</sup>

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 contract opportunities. Because the Tollway's Disadvantaged Business Enterprise ("DBE") Program covers the construction and construction-related services industries, we limit our discussion to those two industries. First, we analyze the rates at which Minority- and Woman-Owned Business Enterprises ("M/WBEs") in the Chicago area 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.

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

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, disparities 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.<sup>199</sup> Similar analyses supported the successful legal defense of the Tollway's DBE program from constitutional challenge in 2016.<sup>200</sup>

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.<sup>201</sup>

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

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

200. *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 840 F.3d 942 (7<sup>th</sup> 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); *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).

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

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.<sup>202</sup> 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 construction contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”<sup>203</sup>

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.<sup>204</sup> 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

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

203. *Id.*

204. Data from 2016 - 2020 American Community Survey are the most recent for a five-year period.

examining wages instead of business earnings. It is important because economic research indicates that wage levels can impact the future business formation behavior of individual.

We used the Chicago metropolitan area (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.<sup>205</sup>

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.<sup>206</sup> 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 will examine these data in two ways: First, we will calculate the minority- and woman-owned business share of each variable. Second, we will calculate 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:

- Ratio of sales and receipts share for all firms over the share of total number of all 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

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205. 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).

206. 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 explore 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 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 2016 - 2020 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 use 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.<sup>207</sup> With this rich data

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207. Initially, the Census Bureau contacted approximately 3.5M households. For the analysis reported in this Chapter, we examined over 175,000 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 employ a multiple regression statistical technique to process this data. This methodology allows us to perform two analyses: an estimation of how variations in certain characteristics (called independent variables) will impact the level of some particular outcome (called a dependent variable), and a determination of how confident we are that the estimated variation is statistically different from zero. We have provided a more detailed explanation of this technique in Appendix A.

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



gender and in the same industry; or we compare individuals of different genders, but of the same race and the same industry; or we compare individuals in different industries, but of the same race and gender. We 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.<sup>208</sup>

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 six-County Chicago metropolitan area plus Winnebago County. These counties correspond to the geographic market determined in Chapter IV.

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

## 1. The Construction Industry in the Chicago Metro Area and Winnebago County

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 8.2% of Blacks form businesses; this is less than the 17.4% business formation rate for White men. There were low numbers of 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 “-----”.<sup>209</sup> Overall, this table indicates that White men have higher business formation rates compared to Blacks, Hispanics, 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.<sup>210</sup> 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 9.1% to 3.2%. The coefficients were statistically significant at the 0.05 level (for Blacks) or 0.001 level (for Hispanics).

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 5-2 indicates that the probability that Hispanics form businesses is 9.1% less than the probability that White men form businesses, 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% 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 there is not a statistically significant level of confidence in the result.

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.<sup>211</sup> Tables 5-3 and 5-4 present these

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

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

data on wage and salary incomes and business earnings respectively. Table 5-3 indicates that Blacks, Hispanics, Asians, Others and White women earn less than White men. Once again, these coefficients were statistically significant at the 0.001 level or 0.05 level. Table 5-4 indicates that only the White Woman coefficient was statistically significant.

**Table 5-1: Business Formation Rates  
Construction, 2016 - 2020**

Demographic Group	Business Formation Rates
Black	8.2%
Hispanic	6.0%
Native American	-----
Asian/Pacific Islander	17.8%
Other	-----
White Women	12.4%
M/WBE	7.6%
White Male	17.4%

Source: CHA calculations from the American Community Survey

**Table 5-2: Business Formation Probability Differentials for Selected Groups  
Relative to White Men, Construction, 2016 - 2020**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-8.6%*
Hispanic	-9.1%***
Native American	-----
Asian/Pacific Islander	2.2%
Other	-----
White Women	-3.2%

Source: CHA calculations from the American Community Survey

\*\*\* Indicates statistical significance at the 0.001 level

\* Indicates statistical significance at the 0.05 level

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

**Table 5-3: Wage Differentials for Selected Groups  
Relative to White Men, Construction, 2016 - 2020**

Demographic Group	Wages Relative to White Men (% Change)
Black	-49.6%***
Hispanic	-23.9%***
Native American	20.6%
Asian/Pacific Islander	-34.2%***
Other	-43.1%*
White Women	-40.7%***

Source: CHA calculations from the American Community Survey

\*\*\* Indicates statistical significance at the 0.001 level

\* Indicates statistical significance at the 0.05 level

**Table 5-4: Business Earnings Differentials for Selected Groups  
Relative to White Men, Construction, 2016 - 2020**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-25.1%
Hispanic	-64.5%
Native American	-----
Asian/Pacific Islander	80.1%
Other	-----
White Women	-145.0%** <sup>a</sup>

a. The proper way to interpret a coefficient that is less than negative 100% (e.g., the value of the coefficient White Women in Table 5-8), is the percentage amount non-M/WBEs earn that is more than the group in question. In this case, White Men receive business earnings 145% more than White Women in Construction-Related Services.

Source: CHA calculations from the American Community Survey

\*\* Indicates statistical significance at the 0.01 level

## 2. The Construction-Related Services Industry in the Chicago Metro Area and Winnebago County

Tables 5-5 through 5-8 present the analysis of data in the construction-related services industries. The sample of firms in the construction-related services industry contained too few numbers of Black, Hispanic, Native American, Asian, and Other firms to produce reliable estimates of these groups' business outcomes. White women formed businesses in this industry at a lower rate than White men. Examining the business formation probabilities – once again controlling for age education and gender – White women were 1.3% less likely to form businesses compared to White men, but this result was not statistically significant. The coefficients for the wages for Blacks, Hispanics, and White women were statistically significant and they ranged from -25.5% to -15.1%. Business earnings for White women were 46.3% less than White men; however, this result was not statistically significant.

**Table 5-5: Business Formation Rates  
Construction-Related Services, 2016 - 2020**

Demographic Group	Business Formation Rates
Black	-----
Hispanic	-----
Native American	-----
Asian/Pacific Islander	-----
Other	-----
White Women	4.3%
M/WBE	4.2%
White Male	8.9%

Source: CHA calculations from the American Community Survey

**Table 5-6: Business Formation Probability Differentials for Selected Groups  
Relative to White Men, Construction-related Services, 2016 - 2020**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-----
Hispanic	-----
Native American	-----

Demographic Group	Probability of Forming a Business Relative to White Men
Asian/Pacific Islander	-----
Other	-----
White Women	-1.3%

Source: CHA calculations from the American Community Survey

**Table 5-7: Wage Differentials for Selected Groups  
Relative to White Men, Construction-Related Services, 2016 - 2020**

Demographic Group	Wages Relative to White Men (% Change)
Black	-23.2%**
Hispanic	-15.1%**
Native American	82.0%
Asian/Pacific Islander	-4.8%
Other	-6.5%
White Women	-25.5%***

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, Construction-related Services, 2016 - 2020**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-----
Hispanic	-----
Native American	-----
Asian/Pacific Islander	-----
Other	-----
White Women	-46.3%

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 busi-

ness 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 Chicago area marketplace, which we determined to be the State of Illinois, as explained in Chapter IV. 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 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.<sup>212</sup> 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:<sup>213,214</sup>

- 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

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

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

214. 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.

- Firms that were either publicly-owned or where the ownership could not be classified

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.

We analyzed the ABS data on the construction and professional, scientific and technical sectors.

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 Tollway 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.

Table 5-9 presents information on which NAICS codes were used to define each sector.

**Table 5-9: Two-Digit NAICS Code Definition of Sector**

ABS Sector Label	Two-Digit NAICS Codes
Construction	23
Professional, Scientific, and Technical Services <sup>a</sup>	54

*a. This sector includes (but is broader than just) construction-related services. It is impossible to narrow this category to construction-related services without losing the capacity to conduct race and gender specific analyses.*

The balance of this Chapter reports the findings of the ABS analysis.



## 1. Construction Industry

Table 5-10 presents data on the percentage share that each group has of the total of each of the following four business outcomes:

- The number of firms with employees (employer firms)
- The sales and receipts of all employer firms
- The number of paid employees
- The annual payroll of employer firms

Panel A of Table 5-10 presents data for the four basic non-White racial groups:

- Black
- Hispanic
- Native American
- Asian

Panel B of Table 5-10 presents data for the following types of firm ownership:

- Non-White
- White women
- Not non-White/non-White women<sup>215</sup>

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 5-11:

- 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.

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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.

- 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 69.5% (as shown in Table 5-11). This is derived by taking the Black share of sales and receipts for all employer firms (0.7%) and dividing it by the Black share of total number of all employer firms (0.9%) that are presented in Table 5-10.<sup>216</sup> If Black-owned 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.<sup>217</sup> All of the 18 disparity ratios for non-White firms and White woman firms (presented in Table 5-11) 11 are below this threshold.<sup>218</sup>

**Table 5-10: Demographic Distribution of Sales and Payroll Data – Aggregated Groups**  
**Construction, 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)
<b>Panel A: Distribution of Non-White Firms</b>				
Black	0.9%	0.7%	0.8%	0.9%
Hispanic	6.6%	2.4%	3.6%	2.9%
Asian	1.2%	0.5%	0.7%	0.6%
Native American	0.0%	0.0%	0.1%	0.1%
<b>Panel B: Distribution of All Firms</b>				
Non-White	8.8%	3.6%	5.2%	4.5%

216. Please note that while the numbers presented in Table 5-10 are rounded to the first decimal place, the calculations resulting in the numbers presented in Table 5-11 are based on the actual (non-rounded) figures. Therefore, the Black ratio presented in Table 5-11 of 69.5% is not the same figure as that which would be derived when you divided 0.7 by 0.9 (the numbers presented in Table 5-10).

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.

	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	10.1%	7.1%	10.7%	9.9%
Not Non-White/Not White Women	81.1%	89.3%	84.1%	85.7%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CHA calculations from American Business Survey

Of the 18 disparity ratios for non-White firms and White woman firms presented in Table 5-11, 11 fall under the 80% threshold.

**Table 5-11: Disparity Ratios – Aggregated Groups  
Construction, 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
<b>Panel A: Disparity Ratios for Non-White Firms</b>			
Black	69.5%	85.0%	94.3%
Hispanic	36.4%	54.8%	43.5%
Asian	44.1%	60.5%	51.3%
Native American	136.8%	213.6%	234.2%
<b>Panel B: Disparity Ratios for All Firms</b>			
Non-White	41.4%	59.4%	50.7%
White Women	70.7%	106.6%	98.2%
Not Non-White/Not White Women	110.0%	103.6%	105.6%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CHA calculations from American Business Survey

## 2. Professional, Scientific and Technical Services Industry

Tables 5-12 and 5-13 present the same analysis for the professional, scientific, and technical industry. Of the 18 disparity ratios for non-White firms and White woman firms presented in Table 5-13, all 18 fall under the 80% threshold.

**Table 5-12: Demographic Distribution of Sales and Payroll Data – Aggregated Groups**  
**Professional, Scientific and Technical 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)
<b>Panel A: Distribution of Non-White Firms</b>				
Black	1.6%	0.5%	0.9%	0.6%
Hispanic	2.4%	0.8%	1.3%	0.8%
Asian	8.7%	3.9%	4.4%	3.8%
Native American	0.3%	0.0%	0.1%	0.0%
<b>Panel B: Distribution of All Firms</b>				
Non-White	13.0%	5.2%	6.7%	5.2%
White Women	18.8%	5.2%	6.9%	4.5%
Not Non-White/Not White Women	68.1%	89.6%	86.4%	90.2%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

*Source: CHA calculations from American Business Survey*

**Table 5-13: Disparity Ratios – Aggregated Groups**  
**Professional, Scientific and Technical 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
<b>Panel A: Disparity Ratios for Non-White Firms</b>			
Black	30.8%	55.2%	35.6%
Hispanic	31.7%	52.7%	33.3%
Asian	44.6%	51.1%	43.7%
Native American	16.1%	33.5%	13.8%
<b>Panel B: Disparity Ratios for All Firms</b>			
Non-White	39.9%	51.5%	40.1%

	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
White Women	27.4%	36.8%	24.1%
Not Non-White/Not White Women	131.5%	126.7%	132.4%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

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 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 the Tollway 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.<sup>219</sup> The most recent research highlights the magnitude of the COVID-19 pandemic's disproportionate impact on minority-owned firms.

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.

## 1. Federal Reserve Board Small Business Credit Surveys<sup>220</sup>

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*,<sup>221</sup> 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.<sup>222</sup>

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.<sup>223</sup>

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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.

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”)<sup>224</sup> gathered insights about the COVID-19 pandemic’s continuing impact on small businesses, 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

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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>.

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*<sup>225</sup> compiles results from the 2020 SBCS. The SBCS provides data on small business performance, financing needs, and decisions and borrowing outcomes.<sup>226,227</sup> The Report provides results by four race/ethnicity categories: 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,

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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.

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.



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 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- and 91% of Hispanic-owned firms are non-employer firms, compared to 78% of White-owned and 75% of Asian-owned firms.<sup>228</sup>

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.

**d. 2021 Small Business Credit Survey**

The 2021 SBCS<sup>229</sup> 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

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228. The Report notes that a future report will describe findings from the 2020 SBCS for non-employers in greater detail.

229. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report>.

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.

**e. 2018 Small Business Credit Survey**

The 2018 SBCS<sup>230</sup> 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.<sup>231</sup>

Among the findings for employer firms relevant to discriminatory barriers were the following:

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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.

- Not controlling for other firm characteristics, fewer minority-owned firms were profitable compared to non-minority-owned firms during the past two years.<sup>232</sup> 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.<sup>233</sup>
- 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 firms.<sup>234</sup>
- 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.<sup>235</sup>
- Black-owned firms reported more attempts to access credit than White-owned firms but sought lower amounts of financing. Forty percent of Black-owned firms did not apply because they were discouraged, compared to 14% of White-owned firms.<sup>236</sup>
- Low credit score and lack of collateral were the top reported reasons for denial of applications by Black- and Hispanic-owned firms.<sup>237</sup>

## **ii. Non-employer firms<sup>238</sup>**

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.<sup>239</sup>

Among the findings for non-employer firms relevant to discriminatory barriers were the following:

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232. *Id.* at 3.

233. *Id.* at 4.

234. *Id.* at 5.

235. *Id.* at 6.

236. *Id.* at 9.

237. *Id.* at 15.

238. *Id.* at 18.

239. *Id.* at 18.

- Black-owned firms were more likely to operate at a loss than other firms.<sup>240</sup>
- Black-owned firms reported greater financial challenges, such as obtaining funds for expansion, accessing credit and paying operating expenses than other businesses.<sup>241</sup>
- Black- and Hispanic-owned firms submitted more credit applications than White-owned firms.<sup>242</sup>

**f. 2016 Small Business Credit Survey**

The 2016 Small Business Credit Survey<sup>243</sup> 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.<sup>244</sup> It also reported results from woman-owned small employer firms, defined as firms where 51% or more of the 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 Firms<sup>245</sup>**

The 2016 SBCS Report on Minority-Owned Firms provided results for White-, Black- or African American-, Hispanic-, and Asian- or Pacific Islander-owned firms.

***Demographics<sup>246</sup>***

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 construction (27%). White-owned firms were more evenly distrib-

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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.

245. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

246. 2016 SBCS, at 2.

uted 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%).<sup>247</sup>

#### ***Profitability Performance Index<sup>248</sup>***

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/Demands<sup>249</sup>***

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 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.

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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.

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.<sup>250</sup>

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.

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 Impact<sup>251</sup>***

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.

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250. The share of minority-owned firms receiving at least some financing was lower across all financing products, compared with non-minority firms.

251. *Id.* at 17.



### *Non-employer Firms*<sup>252</sup>

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 Firms**<sup>253</sup>

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.

### *Firm Characteristics: Woman-Owned Firms Start Small and Remain Small and Concentrate in Less Capital-Intensive Industries*<sup>254</sup>

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.<sup>255</sup>

### *Profitability Challenges and Credit Risk Disparities*<sup>256</sup>

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

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252. *Id.* at 21.

253. <https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-WomenOwnedFirms-2016.pdf>.

254. 2016 SBCS, at 1-5.

255. Non-manufacturing goods production and associated services refers to firms engaged in Agriculture, Forestry, Fishing, and Hunting; Mining, Quarrying, and Oil and Gas Extraction; Utilities; Construction; Wholesale Trade; Transportation and Warehousing (NAICS codes: 11, 21, 22, 23, 42, 48-49).

256. *Id.* at 6-7.

older than five years, credit risk was indistinguishable by the owner's gender.

***Financial Challenges During the Prior Twelve Months***<sup>257</sup>

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 Differences***<sup>258</sup>

Sixty-eight percent of woman-owned firms had outstanding debt, similar to that of male-owned firms. However, woman-owned firms tended to have smaller amounts of debt, even when controlled for the revenue size of the firm.

***Demands for Financing***<sup>259</sup>

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 Financing***<sup>260</sup>

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 credit 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.

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257. *Id.* at 8.

258. *Id.* at 10.

259. *Id.* at 16.

260. *Id.* at 14.

### *Lender Satisfaction*<sup>261</sup>

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*,<sup>262</sup> the number of loans to Black businesses through the SBA's 7(a) program<sup>263</sup> decreased 35% in 2020.<sup>264</sup> 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.<sup>265</sup>

Bankers, lobbyists, and other financial professionals attributed the 2020 decline to the impact of the PPP pandemic relief effort.<sup>266</sup> 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.<sup>267</sup> 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 data<sup>268</sup> reveal that the number of SBA loans made annually to Black

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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).

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.

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.<sup>269</sup>

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 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.<sup>270</sup> 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.<sup>271</sup> 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 Report<sup>272</sup>**

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 addi-

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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.

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>).

tional 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.<sup>273</sup>

It also found, "the largest single factor explaining racial disparities in business creation rates are differences in asset levels."<sup>274</sup>

Some additional key findings of the Report include:

- 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.<sup>275</sup>
- 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.<sup>276</sup>
- 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.<sup>277</sup>
- 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.<sup>278</sup>

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273. *Id.* at 17.

274. *Id.* at 22.

275. *Id.* at 5.

276. *Id.*

277. *Id.*

278. *Id.*

#### 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.<sup>279</sup> 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 score and wealth. Blacks and Hispanics were also more likely to pay higher interest rates on the loans they did receive.<sup>280</sup>

#### 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.<sup>281</sup>
- 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.<sup>282</sup>
- 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.<sup>283</sup>

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279. <https://www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm>. These Surveys have been discontinued. They are referenced to provide some historical context.

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.*

## 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.<sup>284</sup> 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.<sup>285</sup>

Intergenerational links are also critical to the success of the businesses that do form.<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup> The U.S. Department of Commerce has reported that the ability to form strategic alliances with other firms is important for success.<sup>289</sup> 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

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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.

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).

have full and fair access to Tollway 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.



## VI. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN THE ILLINOIS TOLLWAY'S MARKET

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 Disadvantaged Business Enterprise ("DBE") Program for construction and construction-related services, DBEs 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 DBE 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 DBE 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."<sup>290</sup> 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.<sup>291</sup> 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."<sup>292</sup> "[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;

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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 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 1994).

indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”<sup>293</sup>

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]lain-tiff 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.”<sup>294</sup> 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.”<sup>295</sup>

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 79 participants. We also received written comments. We met with a broad cross section of business owners from the Tollway’s 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 DBE 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 DBE Program. One-hundred and twenty-nine recipients responded to the survey. The results were similar to those of the interviews. Among minority- and woman-owned firms, 59.4% reported that they still experience barriers to equal contracting opportunities; 24.4% said their competency was questioned

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

294. *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233, 249 (4<sup>th</sup> Cir. 2010).

295. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989 (10<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

because of their race or gender; and 25.0% 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.<sup>296</sup>

### **1. Biased assumptions and negative perceptions of competency**

Several minority and/or woman business owners reported they still experience negative assumptions about their qualifications and competency. There can still be a stigma to being a certified firm.

There's a lot of stigma with MBE DBE companies from bigger primes, and clients, agencies that they don't want to work with us because we're not competent and maybe can't execute on our projects. I know for me, we started out small, we're still a smaller company, but we are growing and it's been a struggle because to self-perform and be a commercially useful function, you have to take on small jobs but you got to take on so many and then you got to support your staff, your manpower, everything. And so, it just makes it harder. Then, you have to prove that to the bonding companies, to the insurance companies, to the banks, and they're like, "Well, you're not doing big revenue." Well, how am I supposed to do big revenue if you got all these barriers as a small company?

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.

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.

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296. Appendix E: Qualitative Evidence from Illinois Disparity Studies.

Some women continue to experience sexism in the construction industry.

My father was the face of the company, but me and my mother were behind the scenes doing everything. So, if my father's not with me going to meetings, they kind of just throw you to the side. And I'm just like, I know the job, I've been doing it for so many years.... We've been just going back and forth with a lot of general contractors, because you walk in and they see you as a female and a Hispanic, and they kind of just throw you to the side because they already know who they're going to go towards instead of trying to hear me out and see my bids and see everything that I'm capable of and it's kind of hard. So that's why we did apply for DBE because you do get discriminated against, especially with big companies and it's hard. It's hard out here.... We got discriminated against when [my father] was around, now even more, now that it's just two women walking in, so they just don't pay us any mind.

I do CM 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 just stay in integrity with who we are, I think that we can rise above any prejudice that there is in the industry.

Another woman owner agreed that WBEs have to learn to move past sexism in the construction industry.

We just have to rise above it.... Once folks get to know you, it's a different story. It's just the first impressions that usually raise those questions.

## **2. Obtaining Work**

Many new or small firms found it difficult to break into the market.

Lots of big companies, general contractors, do pick and choose, so it is very hard for us to basically try to compete with everyone else, especially coming in as a new company.

More established firms sometimes reported that primes don't form long term relationships.

The primes don't want to keep the same teams. They keep changing the players and sometimes that could be frustrating because you want to make sure that you're able to have some relationship with the primes.... We would like to have a long term relationship so that we are assured that, okay, after this contract, if we perform successfully, we will be able to land another contract. So, then the staffing [up] makes sense.

There was close to unanimous agreement amongst DBEs that contract goals remain necessary to ensure equal opportunities to compete.

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/M/SBE] certifications cannot go away and they actually should continue to be enforced.

If the race and gender piece were taken out of it, and it was truly just small business based on revenue, it would absolutely hurt my business.... If we didn't have that diversity piece to offer to our customers, none of them would have been interested. I mean, once we got the certification, it was an absolute game changer. I saw doors open up because of that. We have worked with the Chicago Public Schools, Chicago Housing Authority, Chicago Park District, and we have utilized and we've had that flexibility on either the M or the W to help the customer meet their goals.... I'm starting to see that we're getting solicited to bid based on the relationships that we are building, but we would have never gotten our foot in the door and built those relationships and those GCs would not have given us the time of day if we couldn't add that value to them. Because even if it was just all smaller White men, it's smaller White men that they know already. And they've worked with already and here we are with no kind of incentive for them to give us a shot. So, it would absolutely be detrimental to us.

Relationships we have with the firms, I'll say is mostly very strong. Now, we still are a DBE so will they include us if we are no longer a DBE? I don't know. Have we been included on contracts that do not require a DBE goal? Mostly no. Most of

the contracts that we've been on, IDOT Tollway require a DBE goal. And yes, we have those strong relationships. They reach out to us, they put us on their team. We have discussions about probably us pursuing as prime and having them also, but then I'll say the relationship is maintained primarily because we are a DBE. So, I'll say the program is still very beneficial.... The Tollway has been, as someone said earlier, very progressive on the DBE front and minority front, they've been very supportive to our firms and will like to request that they keep it that way.

Once you establish yourself, they know you know what you're doing, it's just that in some cases they feel like they can do the whole job themselves, and participating in the program is a bit of a nuisance. And then there are very progressive firms with the right attitude, they know the program is there so they want to develop a relationship with you so that they can depend on you to reliably fulfill your end of the task.

The program's very important and when I graduate, I want there to be DBEs behind me that I can use.

Prime contracts were especially difficult to obtain.

We were asked to consider priming a project and I called one of our larger teaming partners that we usually are a sub to and I said, "Hey, we've been asked to consider priming something. I know you're probably going after it, I just wanted to have an open and honest conversation about it." And the feedback we got on that was literally, I was told to stay in my lane. They didn't directly say, but very strongly implied that if we went after this, that we would no longer be on their team in the future. So, we actually decided to stand down on it because it just wasn't worth it to us to take the long shot on a priming position when we need the lifeblood of our sub roles to continue to stay in business. So that's really the first time I've considered priming anything in a long time, and it didn't feel real good to be shut down that hard.

I think that I've gotten to the level of industry respect, but I still see us falling into the category of a woman-owned firm and not necessarily competing for the prime work in the same way that other firms compete for the prime work. So, it's hard to tell sometimes, just because of the way firms are selected for things, but it does feel like, if we don't really keep up our relentless [business development], that we keep falling back into the sub role. And to be honest, we're fighting that

internally, that how do we give up that sub role work? Because it is dollars that are helping the company, and how do we only go after prime work without alienating some of those good relationships we have with the bigger firms? So, it's a struggle.

## B. Anecdotal Survey of Tollway Market Area Firms

To supplement the in-person interviews, we also conducted an anecdotal, electronic survey of firms on our Master DBE 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 DBE program.

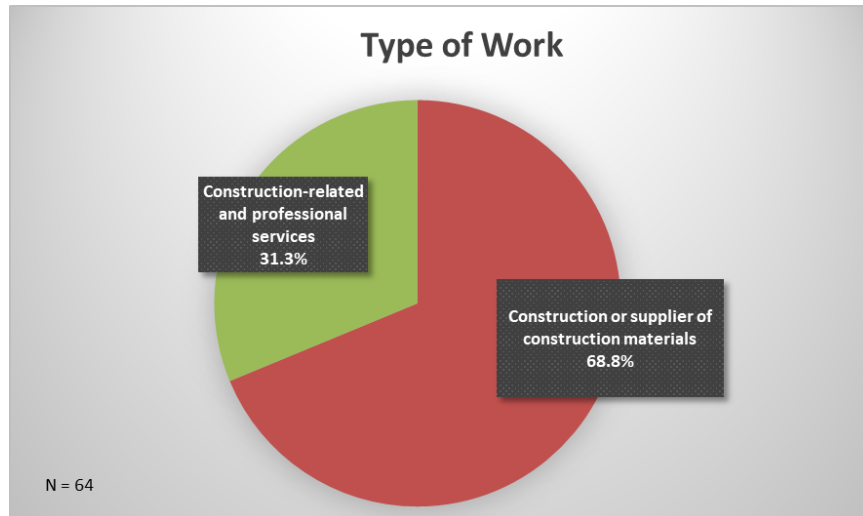
One-hundred and twenty-nine gross responses were received. After accounting for incomplete and non-relevant responses, there were 79 useable responses. Percentage results have been rounded to one decimal place to increase readability.

### 1. Respondents' Profiles

Table 6-1 and Chart 6-1: The race and gender distribution of the 64 minority and woman survey respondents is listed below. Construction and suppliers of construction materials accounted for 68.8% and architecture, engineering, surveying and construction-related professional services firms accounted for 31.8% of the responses.

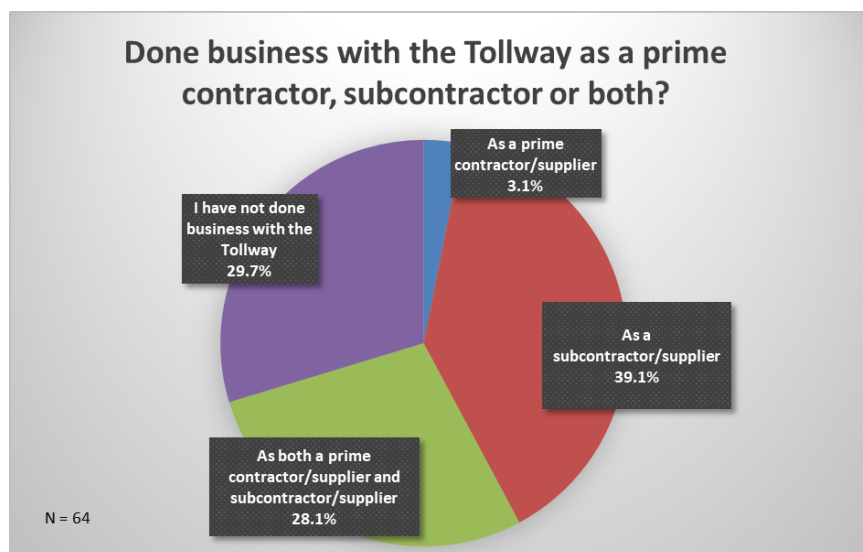
Firm Ownership	#	%
African American	20	25.3%
Hispanic	16	20.3%
Asian Pacific/ Subcontinent Asian American	6	7.6%
Native American/ Alaska Native	1	1.3%
Non-Minority Women	21	26.6%
Non-DBE	15	19.0%
<b>DBE Total</b>	<b>64</b>	<b>100.0%</b>

**Chart 6-1: DBE Respondents Type of Work**



*Chart 6-2:* Among DBEs, 3.1% of the firms had worked on Tollway projects only as a prime contractor or supplier; 39.1% had worked only as a subcontractor or supplier; 28.1% had worked as both a prime contractor or supplier and as a subcontractor; and 29.7% had not done business with the Tollway. More than ninety percent (93.8%) were certified as a D/M/WBE with the ILUCP, City of Chicago or Cook County, Illinois. Over eighty percent (81.3%) were certified as a minority, woman or disadvantaged business with additional government agencies.

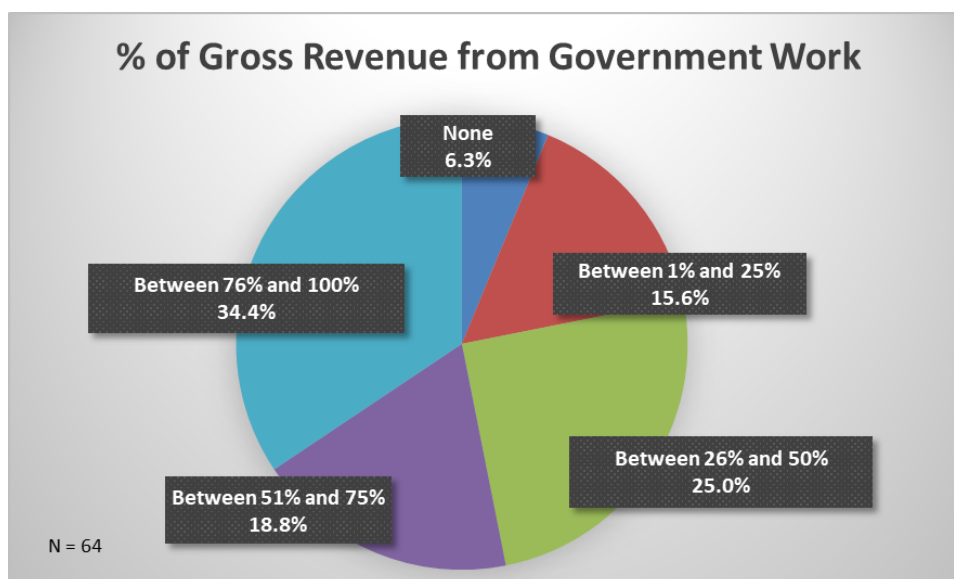
**Chart 6-2: DBE Respondent Contractor Status with the Tollway**





*Chart 6.3:* Almost 95% (93.7%) of DBE respondents reported that some of their revenue was derived from government work. 15.6% of the firms reported that up to twenty-five percent was from government contracts; 25.0% reported between twenty-five and fifty percent; 18.1% reported between fifty-one and seventy-five percent and 34.4% reported between seventy-six and one hundred percent. Government work did not contribute to the gross revenue of 6.3% of the firms.

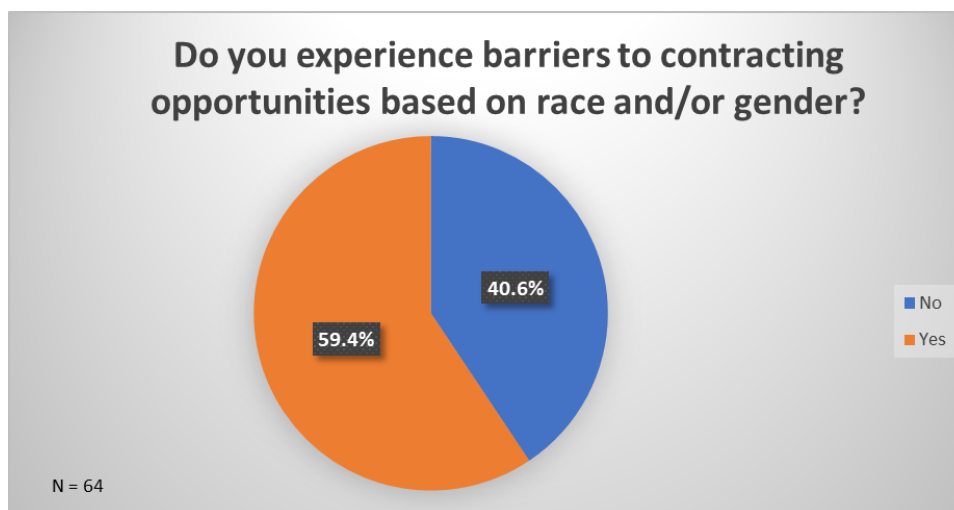
**Chart 6-3: DBE Respondent Contractor Revenue from Government Work**



## 2. Discriminatory Barriers and Perceptions

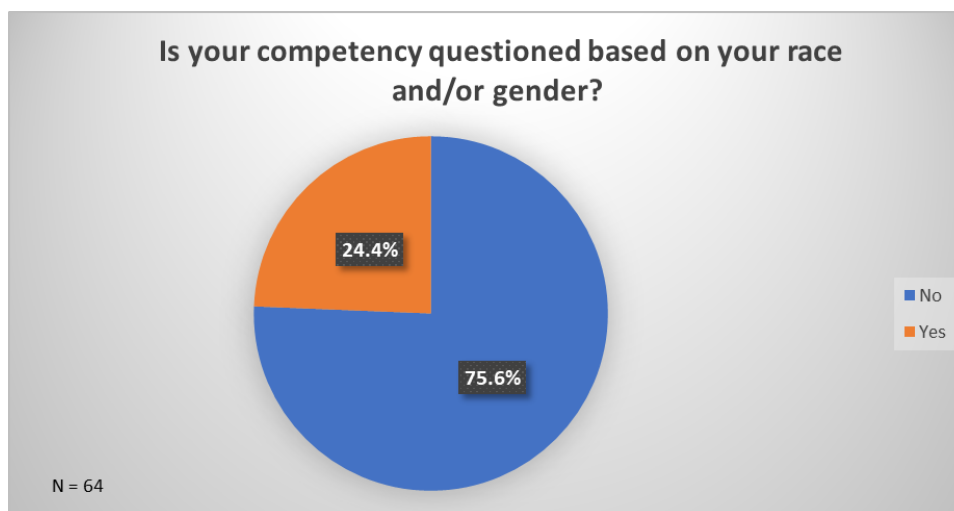
*Chart 6-4:* Almost 60% (59.4%) of DBEs reported that they had experienced barriers to contracting opportunities based on their race and/or gender.

**Chart 6-4: Barriers to Contracting Opportunities Based on Race and Gender**



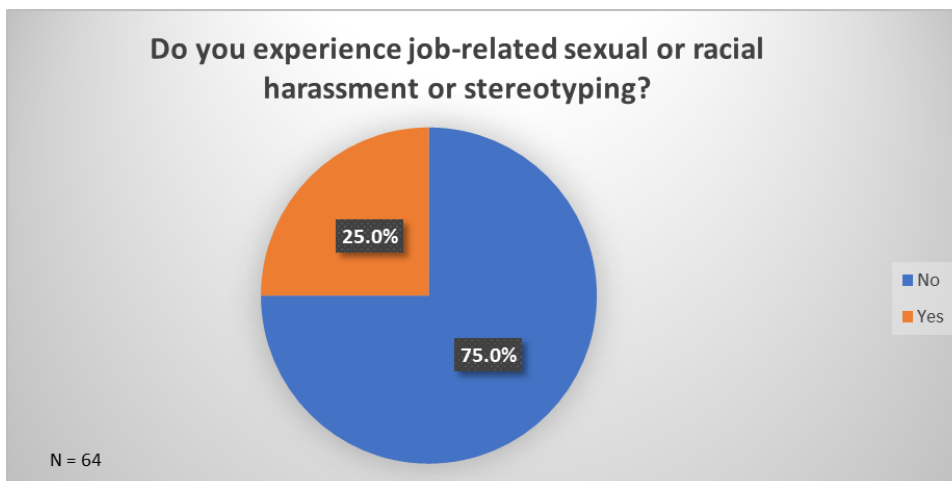
*Chart 6-5:* Among DBE respondents, one quarter (24.4%) answered "Yes" to the question, "Is your competency questioned based on your race and/or gender?".

**Chart 6-5: Negative Perception of Competency Based on Race or Gender**



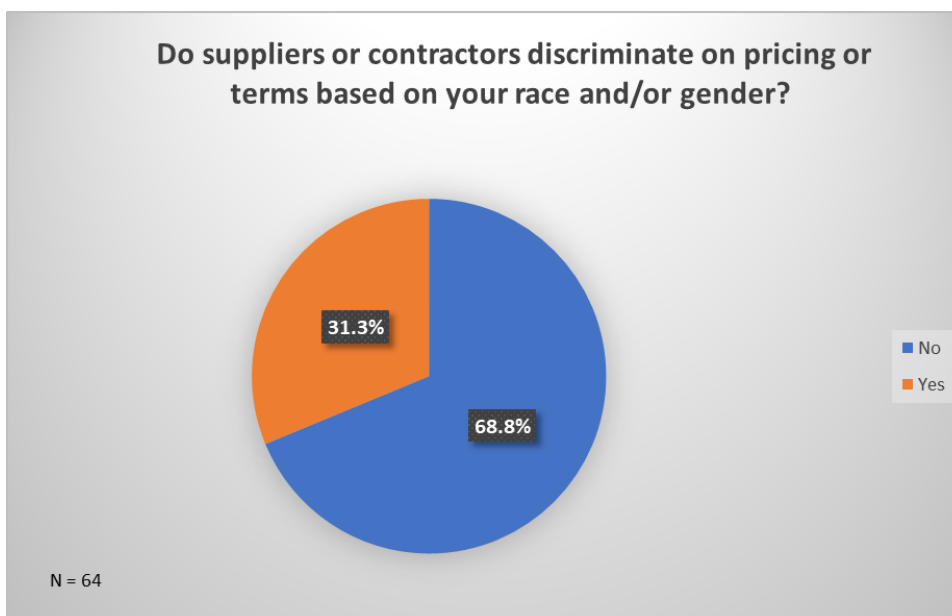
*Chart 6-6:* A quarter (25.0%) indicated that they had experience job-related sexual or racial harassment or stereotyping.

**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 third (31.3%) of the respondents.

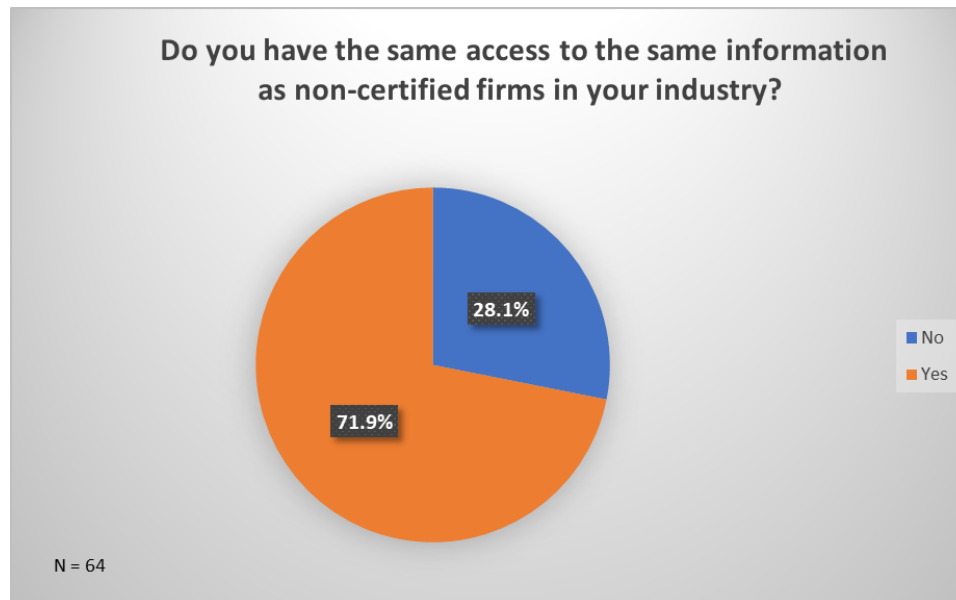
**Chart 6-7: Supplier Pricing and Terms Discrimination Based on Race and Gender**



### 3. Access to Formal/Informal Business and Professional Networks

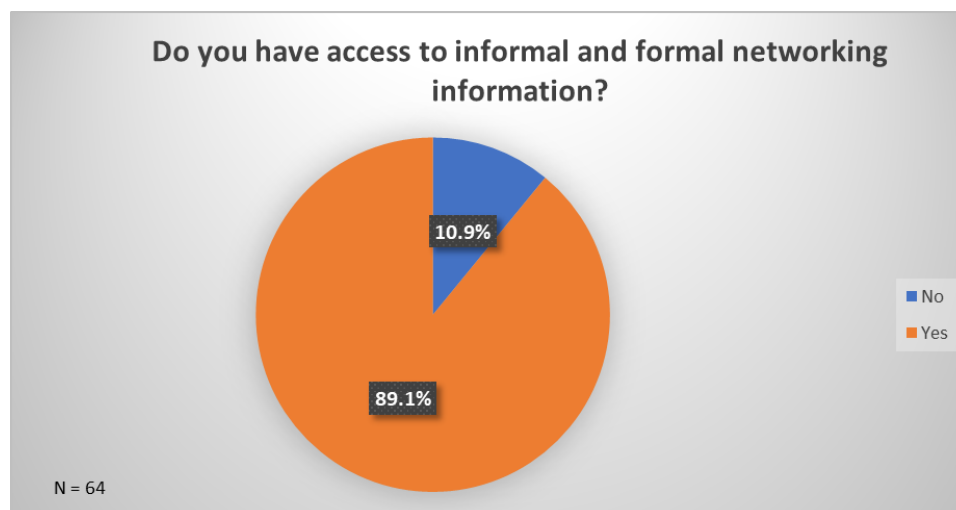
*Chart 6-8:* Over a quarter (28.1%) of DBE respondents reported that they did not have equal access to the same information as non-certified firms in their industry.

**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 10.9% of DBE respondents.

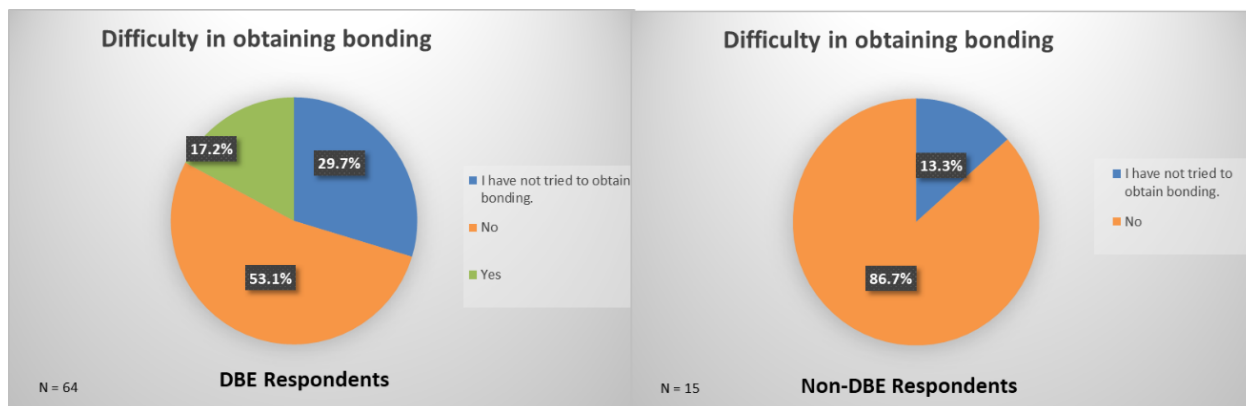
**Chart 6-9: Access to Informal and Formal Networking Information**



#### 4. Access to Financial Supports

*Chart 6-10:* Among DBEs, 17.2% reported challenges in their efforts to obtain bonding. In comparison, none of the non-DBEs reported difficulty with obtaining bonding.

**Chart 6-10: Barriers to Obtaining Bonding**



*Chart 6-11:* Over a quarter (26.6%) of DBEs reported experiencing barriers in their efforts to obtain financing and loans. In comparison, none of the non-minority firms reported such difficulties.

**Chart 6-11: Barriers to Obtaining Financing and Loans**

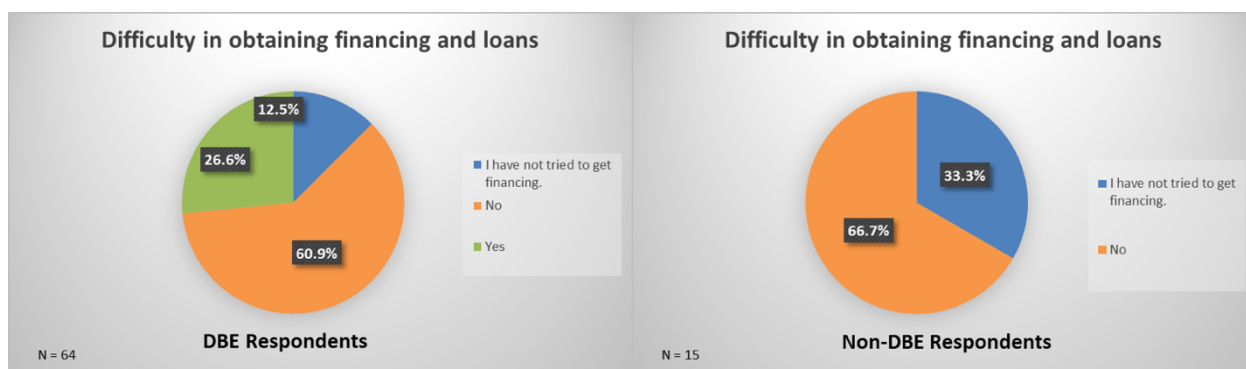
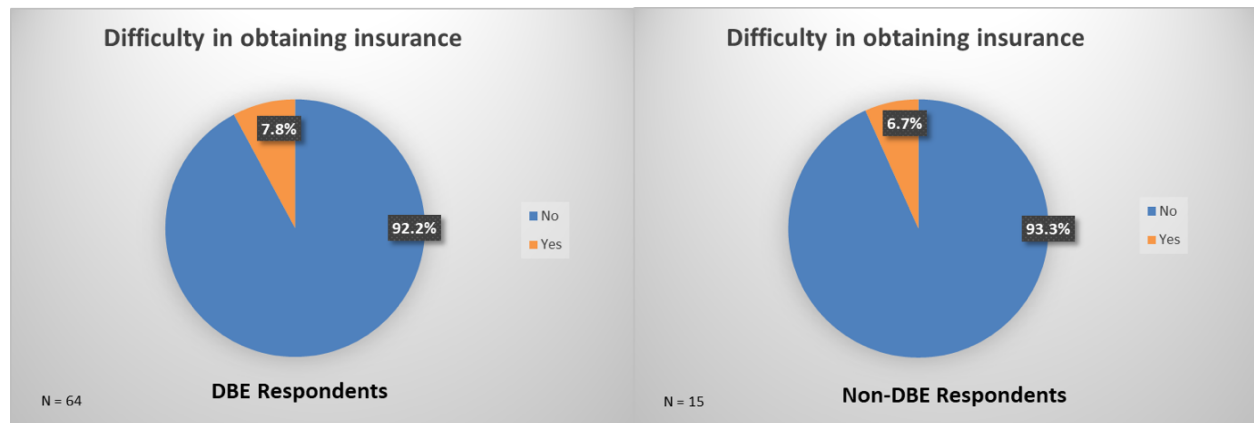


Chart 6-12: Among DBEs, 7.8% reported experiencing barriers to obtaining insurance. Among non-minority firms, 6.8% reported such difficulties.

**Chart 6-12: Barriers to Obtaining Insurance**



## 5. Obtaining Work on an Equal Basis

Chart 6-13: Three quarters (75.0%) of DBEs reported that they are solicited for Tollway or government projects with DBE goals.

**Chart 6-13: Solicitation for Tollway or Government Projects with DBE Goals**

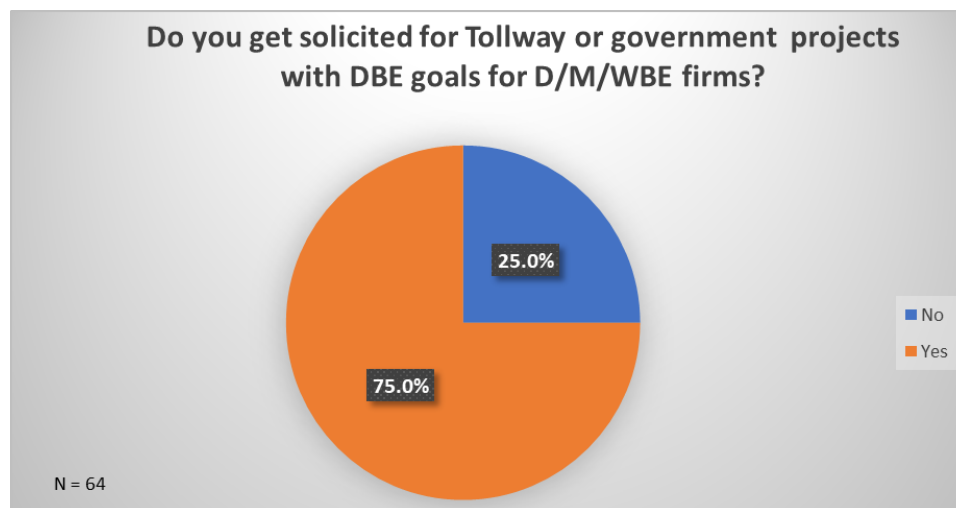


Chart 6-14: Less than half (45.3%) reported that they are solicited for private projects or projects without goals.

**Chart 6-14: Solicitation for Private Projects or Projects Without Goals**



## 6. Capacity for Growth

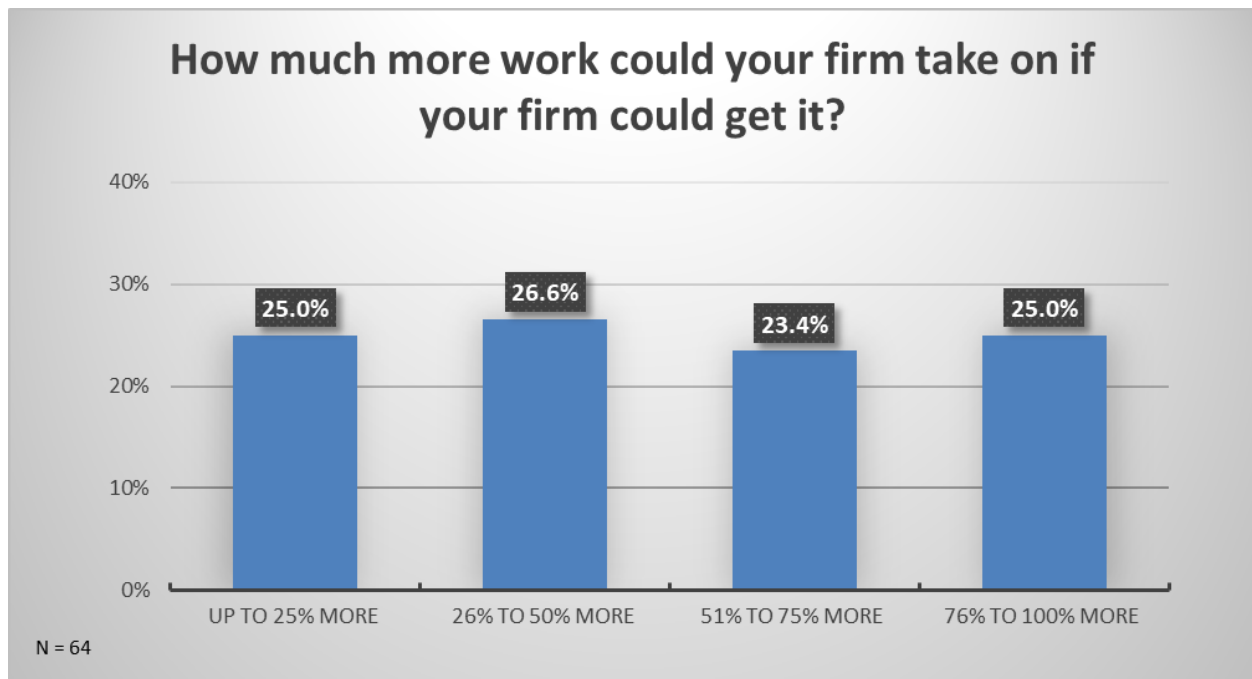
Chart 6-15: Over half of the DBEs (54.7%) reported that their firm's contract size was either well or slightly below the amount they are qualified to perform.

**Chart 6-15: Firm Contract Size vs. Contract Amounts Qualified to Perform**



*Chart 6-16:* A majority (75%) of minority and female respondents reported that they could take on up to 75% more work if it were offered. Twenty-five per-cent could take on up to 100% more work.

**Chart 6-16: Capacity for More Work**

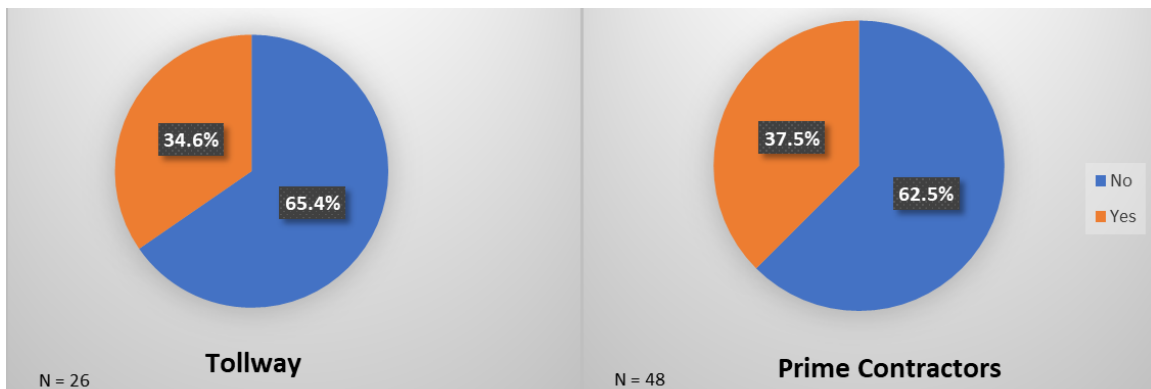




## 7. Prompt Payment

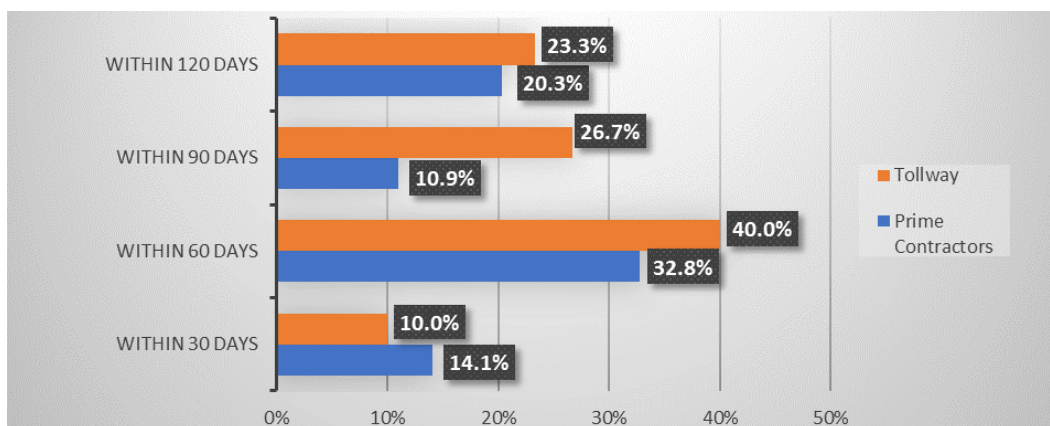
*Chart 6-17:* Of the prime DBE contractors who reported doing work for the Tollway, only 34.6% said that the Tollway paid them promptly. Prime contractors were reported to pay slightly timelier, with 37.5% of DBE respondents reporting that when they worked as subcontractors, prime contractors paid promptly within 30 days.

**Chart 6-17: Prompt Payment within 30 Days<sup>297</sup>**



*Chart 6-18:* Of DBE contractors performing work for the Tollway, 50% reported receiving payment within 60 days; 26.7% were paid within 90 days; and 23.3% were paid in 120 days or later. Prime vendors were reported to pay on a slightly quicker schedule. Almost two-thirds (62.5%) said prime vendors paid within 60 days; 14% reported they were paid within 90 days; and 26% reported they were paid within 120 days or later.

**Chart 6-18: Amount of Time to Receive Payment**

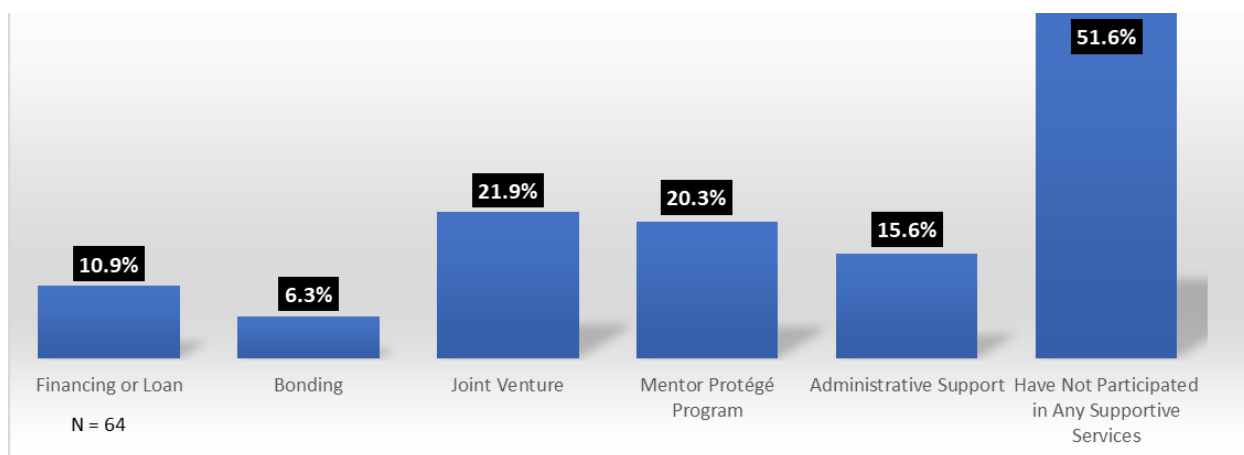


297. Payment within 30 calendar days is a widely accepted standard for business invoices.

## 8. Capacity Development and Participation Incentives

*Chart 6-19:* Close to half (48.8%) of the DBE respondents reported they had participated in a business support program. A little over ten percent (10.9%) had participated in financing or loan assistance programs, and 6.3% had accessed bonding support programs. Over a fifth had joint ventured with another firm (21.9%) or had participated in a mentor-protégé program (20.3%). Slightly over 15 percent (15.6%) had received support services such as assistance with marketing, estimating, information technology.

**Chart 6-19: Participation in Supportive Services**



## C. 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.

### 1. Negative perceptions of competency and professionalism

Minority business owners reported that they continue to experience negative assumptions and perceptions about their competency and capabilities.

[I] was in a preconstruction meeting with engineers, architects and managers [Hispanic/Latino firm]. 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.

Because you're a minority the government organizations and private owners don't think you're qualified to do the work.

If you're a minority, the majority firms don't think you're able to perform on your own. Most agencies limit you to what they think your capable of.

Minority businesses are looked at as not prepared and competent.

Sure [my competency is questioned], until I do the work. Then they have no issues as my employees perform quality work.

[My] technical know-how [is questioned].

It's frustrating when you know you're qualified but you're questioned because of your race.

I will be asked, "are you sure that you will be able to do this work"? Non-minorities are not asked that question. It is assumed that if they're [non-minorities] bidding they can handle it.

People think you're not qualified. They think you don't have the money to support your workforce.

I was asked to do a mock bid for a grocery store. My company built the first 12 stores of a competing chain. We have also built the flagship store of the other chain in Chicago.

Client thinks all Black firms are small, have less quality, need financial help and as a result, not considered for larger projects as prime.

Prime firms have stated that they are worried about my capacity.

More stereotypes, for some reason we're not supposed to know our trade and when we do, we're labeled as being arrogant.

Some minority and woman business owners reported there was often a stigma attached to being a certified firm.

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.

Yes, there is a stigma associated with DBEs. The large primes do not want "lessor" service & quality from the DBEs.

When you're on the job, the majority firm treats you like a sub instead of a partner or equal.

## **2. Systemic racial exclusion**

Several minority respondents reported that fair opportunities to compete for contracts were not available because of systemic racial barriers.

As a minority business we get cheated out of bids or given the wrong information on why we weren't used as a vendor.

African American firms are limited in the work the client feels we can handle, yet smaller, less qualified non-Black firms get opportunities.

Primes and suppliers create obstacles once they find that I am a Black woman owned company.

## **3. Gender bias and barriers**

Many woman owners reported sexism and stereotyping about their roles and authority.

Many times, if I am in a project meeting, the men in the room will look to my superintendent/project manager for answers or responses instead of me.....and then he has to defer to me.

I have had occasions where engineers did not want to speak to me because they felt I lacked the knowledge necessary to answer their questions despite being the owner.

It is assumed that I am a front and not a legitimate contractor/fabricator/supplier. I guarantee any work my men perform; I can do as well. From construction to fabrication to supply.

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.

Old boys club - different set of standards for minorities/women.

Phase II Design Services lost because of baby- concerned it was too much for me to handle.

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.

Being a female in the construction [industry] is still a challenge.

Potential partners don't consider me able to participate in a higher-level position (Project Management, etc...) as those consulting roles (locally) are typically males.

So many inspectors and engineers have made a point of telling me what their daughters do for a living... I also have to meet criteria that my competitors don't. 2 sets of standards for sure. Not to mention contractors calling me Honey.

More so due to my gender being that the industry is still a good ole boy network.

Yes, when on job sites with male - always assumes the male is in charge or the engineer and not me until I explain otherwise.

My key personnel are male for daily operations. I have found it streamlines the process having males speak to males & lessens my frustrations. I can then concentrate on the financial aspects of the business.

Several women business owners reported instances of demeaning comments and harassment.

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.

Not as much anymore, but significant sexual harassment when I was younger on job sites - still some bias toward the men vs women even if I am the owner.

#### **4. Access to networks**

DBE firms reported entrenched relationships and "good 'ole boy" networks impede access to contract opportunities.

I am not aware of any formal or informal networking lists or other information.

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.

I'm not interested in golf outings.

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.

Not able to network informally with majority firms for business as far in advance of opportunities [as necessary].

Some information is only passed through the "good old boy" network.

There are so many organizations where membership would be beneficial but we just don't have access to them.

We don't have the same contacts.

We feel our prices and scopes are sometimes shared with our competitors.

When the top Agency brass leave and go private, those firms that send [sic] to ALWAYS have more information.

## **5. Access to contract opportunities**

Many DBEs reported that primes use them only on projects with goals and that private sector and no-goal work is unavailable.

More scrutiny, lack of acceptance as subject matter experts, clear indication that were it not for goals we would not be awarded.

I do think that in order to become a contractor's Go-To supplier/fabricator/contractor you need to provide them incentives to use us on non-goal projects. How can we become mainstream if we can't find a way to succeed without our DBE/WBE/MBE certification? I believe that once we are outside of these programs, our success will no longer exist. Our usefulness is no longer of an advantage to them - so we have to find a way to create value that transcends our certifications. I struggle trying to figure out how to achieve that.

We only receive opportunities on public projects requiring MBE/DBE participation. Opportunities at all other projects are almost not available for us.

Most primes will only use minority vendors, to fill quotas. Once quota is met, they will not talk to us for bids.

Not being invited to bid on non-goal projects.

Only want us to fulfill percent. Client rarely chooses MBE Primes.

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.

The only way they will use my bids is if there is a goal attached to the project. Otherwise, they go with my competitors.... This is still a man's world and if they have to choose between me or a male minority, usually I lose. Most of the minority women I have talked to have the same issue. Gender definitely plays a part in our success, even when doing construction work, it was the same.

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.

In most cases where there is a scope gap or design deficiency our position is met with obstinance.

## **6. Financial barriers to opportunities**

Some DBEs reported discriminatory obstacles when trying to obtain financing, bonding and insurance that have reduced their ability to compete on an equal basis. Small and new firms face particularly large challenges.

I had been with a neighborhood bank for 15 years and had a great relationship. During the downturn in the economy (2008, etc.), my bank was bought out by [bank]. [Bank] told they could pull my operating line of credit at any time and they wanted me out of their bank. Two accounts were asked to leave the bank, myself and another female owned contracting business.

I have been in business for 40 years. If I were a male owned firm, I doubt that I would have trouble getting financing.

Not all banks want to loan to firms with non-White males at the helm. It has gotten better in the last 5 years.

Industry talks. I know that Black firms pay more [in insurance] premiums. We are perceived as riskier.

As a newly formed startup company, local banks will reject any attempts to loan DBE companies the capital necessary to secure funding.

We've had to push to just to get what we feel is the bare minimum funding and always being asked to put our home on the line for a 15k-30k equipment loan.

When we started in business, you had to be creative to get loans and financing. Banks wanted a male to co-sign even if they were not in the business. We ended up getting life insurance where the bank was the beneficiary. Not standard.

Access to capital [is a major obstacle].

Financing for newly formed start-up trucking company [is a barrier].

Several reported obtaining surety bonding was especially challenging.

Bonding Companies expect a greater financial back up for such a small company.

Bonding is sometimes difficult to get.

Hard to get larger bonds, etc.

I refuse to bond. Bonding is a tool that only protects the GC when working as a sub-contractor.

Being bondable is difficult, especially with DBE Net Worth limitations. It requires personal & spousal guarantees which increases the risks of the project.

Years ago, yes. Unfavorable terms, personal guarantees, banks who want to handcuff you.

Borrowing against bonded receivables is frowned upon by banks due to their concerns about the bond having priority to their loans.

There are unnecessary insurance requests for smaller contractors; we don't need to carry the same levels as a main contractor.



With the way that the programs are set up there is no way to have good cash flow which makes it so much more difficult to have what banks and bonding are looking for.

## **7. Barriers to equal contract terms**

I feel like I'm under paid compared to partners at same job, same project.

All contracts are negotiable but not treated all the same rate wise based on hourly premium.

I am having issues with a state agency (contracting based on QBS) for my cost of surveying. Words are being said within the agency and with other consultants that our services are too expensive. In some instances, we are the Prime, the agency cuts our hours up to 20% of our hours, leaving the hours of our subconsultant (a big non-minority company) intact.

We've had a prime change our numbers and make them lower. We withdrew our name from that bid process.

(Performance) P & P bonds are requested of us and not of non-MBE vendors with similar-sized contracts.

## **8. Discriminatory Supplier Pricing**

Not paid on time, haggling with pricing, not treated with respect from some vendors.

Suppliers says that you don't do enough volume so you can't have the same pricing. They also have back-end deals that they do not share with minorities.

Of course, they [suppliers] do [discriminate]... think we don't pay our bills, so we get unfavorable payment terms.

[Suppliers discriminate, DBEs are] not usually given long terms as non-MBEs are given [sic].

The bigger, older contractors are buying in volume so they are getting better pricing. Welcome to America!

## **D. 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 Tollway's market area. Many DBEs reported negative perceptions and assumptions about their competency that impeded their ability to conduct business. Minorities and women still face challenges related to stereotyping, racial harassment and sexism. DBEs had reduced opportunities to obtain contracts, less access to formal and informal networks, and much greater difficulties in securing financial support relative to non-DBEs 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 DISADVANTAGED 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 construction and construction-related services contracts and associated subcontracts. As required by strict constitutional scrutiny, we analyzed evidence of DBE utilization by the Tollway as measured by dollars spent. We next estimated the availability of DBEs in the Tollway's markets in the aggregate and by detailed industry code. We then compared the Tollway's utilization of DBEs to the availability of all ready, willing and able firms in its markets to calculate whether there are disparities between the Tollway's utilization of DBEs and availability of DBEs to perform on its contracts.

We further solicited anecdotal or qualitative evidence of DBEs' experiences in obtaining contracts in the public and private sector construction and design industry. 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 DBE program as required by the federal courts.

The Tollway's DBE program is in compliance with strict constitutional scrutiny and national best practices. Several elements are outstanding, such as its supportive services offerings and commitment to leveling the playing field for DBEs. The following suggestions are addressed towards additional enhancements to support current efforts and activities to provide even greater opportunities for all firms to compete on a level playing field for Tollway contracts and subcontracts. We recognize that several of these recommendations may require additional staff resources, and some may necessitate changes in state statute.

## A. Enhance Race- and Gender-Neutral Measures

The courts require that an agency use race-neutral<sup>298</sup> approaches to the maximum feasible extent to meet its DBE goal. This is a critical element of narrowly tailoring the program, so that the burden on non-DBEs is no more than necessary to achieve the Tollway's remedial purposes. Increased participation through race-neutral measures by DBEs will also reduce the need to set contract goals.

### 1. Enhance the Small Business Initiative

The Tollway's Small Business Initiative ("SBI") is an important race- and gender-neutral element of its DBE efforts. The SBI sets aside smaller contract 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. Most small firms in our interview sessions supported this approach and reported it has been an important avenue for them to do work for the Tollway. We suggest the following enhancements to further the program's objectives.

1. Conduct regular introductory workshops on the program. Some DBEs were unfamiliar with the program and requested some training about how to benefit from its many elements.
2. Raise the size standards for program eligibility. The Tollway currently relies on the State of Illinois' cap of revenues less than \$14M. Given the size of Tollway contracts, even smaller projects are still large by the standards of most agencies. We suggest that the Tollway follow the lead of the City of Chicago, which recently raised the size limits in its Minority- and Woman-owned Business Program for Construction contracts to 150% of the U.S. Small Business Administration's size standards. This will allow M/WBEs certified by the City that exceed the \$14M cap to benefit from the race- and gender-neutral SBI setaside.
3. Revise the SBI to remove the ceiling of 40% on prime self-performance so that small prime firms may participate as fully as possible in the job. This arbitrary limitation hinders the ability of small firms and DBEs to grow, and there are sufficient opportunities for smaller subcontractors on open market Tollway jobs.
4. Consider additional types of contracts for inclusion in the SBI. For example, landscape architects suggested that the design of streetscape projects could be severed. Add a "quick pay" component for small contractors, where SBI prime contractors would be allowed to invoice every two weeks. Many DBEs reported that access to working capital is a

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298. The term race-neutral as used here includes gender-neutrality, as defined in 49 C.F.R. §5.

hurdle to working on Tollway jobs, so smoothing out cash flow can help to support their participation.

5. Do not set DBE contract goals on SBI solicitations. While it is always laudable to encourage DBEs to participate as subcontractors, this additional requirement for small contractors was reported to be a barrier to their participation.

## **2. Expand Technical Assistance Offerings**

Many DBEs and non-DBEs requested additional training on specific aspects of doing business with the Tollway. For example, small firms seeking to bid as prime contractors requested targeted training on how to submit invoices to the Tollway. Another identified need was support with obtaining information technology required by the Tollway for large projects, such as special licenses and software.

Many DBEs urged the Tollway to eliminate the fee to access construction solicitation plans. We agree. This is an unnecessary barrier to small firms' abilities to bid as prime contractors.

The concentration analyses in Chapter IV suggest that DBEs could benefit from efforts to expand the subindustries in which they receive work. DBEs had received few to no dollars in some North American Industry Classification System ("NAICS") codes and utilization was highly concentrated in a handful of DBEs in the major subindustries in which the Tollway procures construction services. Perhaps DBEs could be surveyed to determine what would help them to expand their capacities into broader lines of work.

## **3. 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. Require the disclosure of all known subs on Form 2026 not just DBEs prior to contract award. 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 DBE participation by whether the dollars were achieved using DBE contract goals or through race- and gender-neutral approaches (i.e., SBI contracts, and DBE prime dollars on open market contracts).

#### **4. 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 DBE Program**

The Tollway’s DBE program has been very successful in opening opportunities for minority and woman firms on its contracts. As reported in Chapter IV, overall, DBEs have reached parity with non-DBEs 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, on the basis of race or gender, a picture emerged of unequal outcomes for DBEs compared to non-DBEs. 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 D/M/WBEs 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 D/M/WBE firms and non-D/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 D/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 DBE 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 steps<sup>299</sup>:

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 DBEs 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.

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299. See [www.contractgoalsetting.com](http://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 firms.

Written procedures spelling out these steps should be drafted. The Tollway uses the B2Gnow<sup>®</sup> electronic diversity management system to support DBE 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.<sup>300</sup>

We further urge the Tollway to bid some contracts without goals that it determines have significant opportunities for DBE 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 IDOT’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 DBE Program Policies and Procedures**

The DBE program 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.

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300. For information about using disparity study data to set narrowly tailored contract goals, please see [www.contractgoal-setting.com](http://www.contractgoal-setting.com). We developed this free website in conjunction with B2Gnow<sup>®</sup>, Inc., to assist agencies to set defensible and achievable contract goals.



- More transparency about how DBE contract goals are set would be helpful. As discussed below, 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 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.
- Reduce the current emphasis on the numbers of DBEs submitted on engineering projects in favor of the quality of the work that will be subcontracted. DBEs and non-DBEs reported that having any subconsultants reduces the value of the work they receive and hampers their ability to grow through meaningful work. Similarly, while well intentioned, the emphasis on using “new” DBEs has the further consequences of sowing confusion about what counts as a “new” firm and then freezing out firms just as they get a foothold into Tollway opportunities. The Tollway should make it clear that it will take a holistic approach to evaluating teams rather than focus on these two factors.
- Clarify that bids or proposals will be accepted based on the bidder’s submission of Good Faith Efforts (“GFE”). Too many prime firms reported that they did not believe that the Tollway would accept GFE and therefore they either crossed their fingers and hoped it would all work out in the end or did not bid the project. 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 DBE participation of GFE (beyond any clarifying information) where it did not meet the contract goal. While well intentioned, this undercuts the concept that DBE 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 DBEs because the as-read low bidder now has a committed price and the DBEs can be shopped until one agrees to whatever the bidder presented for that item in its bid. This approach is a major deviation from the USDOT DBE program requirements, which in large part formed the basis for the Tollway’s successful defense of its program. We recommend that the Tollway faithfully follow the DBE regulations and dispense with this after-the fact, anti-DBE approach.

- To address the reported delays in project performance created by the lack of a definitive time by which a subcontractor sought to be substituted must respond, we suggest streamlining the DBE substitution process. A subcontractor that does not respond to the prime contractor's letter requesting the substitution within five business days should be deemed to not contest the substitution and the prime contractor will then be required to make GFE to substitute with another DBE. This refinement recognizes the need to only allow substitutions when necessary while balancing the Tollway's need to keep projects on schedule.
- Increased monitoring of DBE program compliance was urged by DBEs and Tollway staff. Examples include the requirement that prime contractors promptly pay all subcontractors (not only DBEs), meeting the DBE commitments in the bid submission and the contractual documents, and evaluating contractors' GFE throughout the life of the contract. Currently there is not an easy way to compare actual payments and the timelines with which they were received by subcontractors or the impact of change orders on goal attainment. 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 DBE 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.

# 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;  $\beta_1$ ,  $\beta_2$  and  $\beta_3$  are coefficients, and  $\mu$  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 Illinois Tollway, the analysis was limited to data from the State of Illinois. 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;  $\beta_1$ ,  $\beta_2$ , and  $\beta_3$  are coefficients, and  $\mu$  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.<sup>301</sup> 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.

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301. 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.<sup>302</sup> 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.

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302. 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
<b>TOTAL</b>	<b>40</b>	<b>45</b>	<b>53</b>	<b>12</b>	<b>48</b>	<b>1230</b>	<b>1428</b>

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%
BBBBBB	4.2%	3.1%	3.1%	0.8%	3.3%	85.4%	100.0%
CCCCCC	2.1%	2.1%	3.8%	0.6%	3.6%	87.9%	100.0%
<b>TOTAL</b>	<b>2.8%</b>	<b>3.2%</b>	<b>3.7%</b>	<b>0.8%</b>	<b>3.4%</b>	<b>86.1%</b>	<b>100.0%</b>

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%
CCCCCC	\$2,000.00	44.4%
<b>TOTAL</b>	<b>\$4,500.00</b>	<b>100.0%</b>

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
<b>TOTAL</b>	<b>0.028</b>	<b>0.029</b>	<b>0.037</b>	<b>0.008</b>	<b>0.034</b>	<b>0.864</b>

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 firms 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 886 individuals.

This summary of anecdotal reports provides an overview of the following disparity studies:<sup>303</sup> the Chicago Park District 2022 ("CPD"); Cook County, Illinois 2022 ("Cook County 2022");<sup>304</sup> Metropolitan Water Reclamation District of Greater Chicago 2021 ("MWRD 2021"); the City of Chicago 2021 ("City of Chicago");<sup>305</sup> the Chicago Transit Authority 2019 ("CTA"); the Regional Transportation Authority 2016 ("RTA"); the Northeast Illinois Regional Commuter Railroad Corporation doing business as Metra 2016 ("Metra"); the Illinois State Toll Highway Authority 2015 ("Tollway"); the State of Illinois Department of Central Management 2015 ("CMS"); Cook County, Illinois 2015 ("Cook County

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303. Copies of these studies can be accessed at the following links: CPD <http://www.mwbelaw.com/wp-content/uploads/2022/09/Chicago-Park-District-Disparity-Study-2022.pdf>; Cook County 2022 <http://www.mwbelaw.com/wp-content/uploads/2022/10/Cook-County-Study-Report-2022.pdf>; MWRD 2021 <https://mwrdd.org/sites/default/files/documents/Metropolitan%20Water%20Reclamation%20District%20of%20Greater%20Chicago%20Disparity%20Study%202021.pdf>; City of Chicago <http://www.mwbelaw.com/wp-content/uploads/2021/11/City-of-Chicago-Disparity-Study-for-Construction-Contracts-2021.pdf>; CTA <http://www.mwbelaw.com/wp-content/uploads/2019/12/Chicago-Transit-Authority-Disparity-Study-2019.pdf>; RTA <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-RTA-Availability-Study.pdf>; Metra <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-Metra-Availability-Study.pdf>; Tollway <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Illinois-State-Toll-Highway-Authority-Disparity-Study.pdf>; CMS <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-State-of-Illinois-Department-of-Central-Management-Services-Disparity-Study.pdf>; Cook County 2015 <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-Cook-County-Illinois-Disparity-Study.pdf>; Pace <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Pace-Chicago-Suburban-Bus-Disparity-Study.pdf>; MWRD 2015 <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-The-Metropolitan-Water-District-of-Greater-Chicago-Disparity-Study.pdf>.

304. The Cook County Study also included responses from a written survey of 447 respondents.

305. The City of Chicago Study also included responses from a written survey of 115 respondents.

2015”); Metropolitan Water Reclamation District of Greater Chicago 2015 (“MWRD 2015”); and Pace Suburban Bus 2015 (“Pace”).

## **1. Discriminatory Attitudes and Negative Perceptions of Competency and Professionalism**

Many minority and woman owners reported being stigmatized by their race and/or gender. 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.

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.

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, interview)

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)

People assume MBE means low quality or inability to perform. (Cook County 2022, page 287, survey)

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, page 111)

I don't think things have changed that much from 30 years ago, I just think that majority contractors have gotten better at hiding it. But there are some generals that can't even do that. (City of Chicago, page 129, survey)

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)

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, survey)

[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)

We were having problems when we first became an MBE, we used to hear MBE had a reputation of not performing like the outside markets.... It’s just a stigma that MBEs can’t perform like the market leaders. (CPD, page 179)

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, survey)

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)

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, interview)

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, survey)

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, survey)

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, survey)

They think that because you're a minority or a woman business that you don't have your act together. (Pace, page 118)

[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, survey)

[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, survey)

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)

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, survey)

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 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, interview)

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)

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, interview)

They call you sweetheart. Sweetheart, honey, just inappropriate comments. (Pace, page 119)

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, interview)

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, interview)

In negotiations, people think that women aren't savvy businesspeople and that I'll just do this for nothing. (CMS, page 125)

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, interview)

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, survey)

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, interview)

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, interview)

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, survey)

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, survey)

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, survey)

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)

## **2. Access to Business and Professional Networks**

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 decision makers.

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 132, interview)

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, survey)

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)

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, survey)

[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, survey)

[The CTA should hire DBEs to] do staff augmentation that allows us to get to know some of the people without having to work

through a prime that doesn't really want you to get to know who they know. (CTA, page 64)

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, survey)

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, interview)

It always goes back to relationships.... We're all in the trust business. (MWRD 2015, page 134)

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, survey)

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, interview)

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, survey)

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, survey)

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, survey)

### **3. Obtaining Work on an Equal Basis**

Respondents reported that institutional and discriminatory barriers continue to exist in the Chicago area marketplace. 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, interview)

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, survey)

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, page 114)



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, survey)

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, survey)

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, interview)

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)

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, interview)

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, interview)

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)

If you have an MBE, WBE status it somehow implies non-prime. (Cook County 2015, page 131, interview)

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)

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, interview)

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)

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, interview)

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, interview)

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, survey)

