

Illinois State Toll Highway Authority Disparity Study Construction And Construction Related Services 2015



About the Study Team

Colette Holt & Associates (“CHA”) is a national law and consulting firm specializing in disparity studies, affirmative action contracting programs, expert witness services, compliance monitoring and strategic development related to inclusion, diversity and affirmative action. Founded in 1994, it is led by Colette Holt, J.D., a nationally recognized attorney and expert. In addition to Ms. Holt, the firm consists of Steven C Pitts, Ph. D., who serves as the team’s economist and statistician, Robert C. Ashby, J.D., former Deputy Counsel at the US Department of Transportation, who serves as special counsel, Jeremy Jones, B.S, who serves as Assistant Economist, and Research Assistants Denise Oliver, B.S. and Katherine Wiggins, B.A. CHA is certified as a Disadvantaged Business Enterprise, Minority-Owned Business Enterprise and a Woman-Owned Business Enterprise by numerous agencies.

Trinal, Inc. (“Trinal”) is a Chicago-based consulting firm specializing in procurement policy development and economic development program monitoring, including program management, certification, affirmative action and community outreach. Trinal is certified as a Disadvantaged Business Enterprise, Minority-Owned Business Enterprise and a Woman-Owned Business Enterprise by several agencies.

Abaci Research & Consulting, LLC (“ARC”) is a national firm specializing in data collection and management for disparity studies and other research related to contracting affirmative action programs. President Kim Stewart has almost a decade of experience supporting legally defensible disparity studies and serving as Assistant Project Director. ARC is certified as a Disadvantaged Business Enterprise and a Woman-Owned Business Enterprise by several agencies.

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I. EXECUTIVE SUMMARY

Colette Holt & Associates was retained by the Illinois State Toll Highway Authority (“Tollway or “ISTHA”) to perform a study of possible disparities on the basis of race or gender in access to its prime contracting and associated subcontracting opportunities on Tollway construction and construction related services (“CRS”) contracts awarded between 2010 and 2012. We explored whether Disadvantaged Business Enterprises (“DBEs”), Minority-Owned Business Enterprises (“MBEs”) and Woman-Owned Business Enterprises (“WBEs”), collectively, “DBEs” or “M/WBES”, have equal access to Tollway construction and construction related services contracts, and if not, what remedies might be appropriate to redress the barriers created by race or gender discrimination. Additional details are provided in the Chapters following the Executive Summary.

A. Study Methodology and Data

The methodology for this Study embodies the constitutional principles of *City of Richmond v. Croson* and its progeny, as well as best practices for designing race-and gender-conscious contracting programs. Our approach has been specifically upheld by courts. It is also the approach developed by Ms. Holt for the National Academy of Sciences that is now the recommended standard for designing legally defensible disparity studies for state departments of transportation.

The Study addresses the following questions:

- What are the legal standards governing contracting affirmative action programs?
- What are the empirically-based geographic and procurement markets in which the Tollway procures construction and CRS contracts?
- What has been ISTHA’s utilization of DBEs as prime contractors and subcontractors on construction and CRS contracts compared to White male-owned firms as prime contractors and subcontractors? What has been the racial, ethnic and gender breakdown of that utilization? In what 6-digit North American Industry Classification (“NAICS”) codes do firms operate?
- What is the availability of DBEs compared to White male-owned firms in the agency’s construction and CRS markets?
- Are there disparities between the availability of DBEs and their utilization on Tollway construction and CRS contracts?
- What are the experiences of DBEs in the construction and CRS sectors compared to White male-owned firms in ISTHA’s markets throughout the wider Illinois economy, where affirmative action or diversity goals are rarely employed? Are there disparities in earnings between minorities and women and similar White males? Are there disparities in the rates at which minorities and women form firms compared to similarly situated White males? Are there disparities in the earnings from firms that do form of minorities and women compared to similarly situated White males?

- What have been the actual experiences of minorities and women in seeking prime contracts and subcontracts in the Tollway's markets? What barriers have they encountered, if any, based on race or gender?
- What are the elements of the Tollway's DBE program for construction and CRS contracts? How are the programs administered?
- What has been the experience of DBEs and non-DBEs in seeking Tollway work? What has been the effect of the DBE program? What race- and gender-neutral or small business measures have been helpful? What program aspects could be improved?
- Based on the Study's results, what remedies are appropriate and legally supportable? What measures could be implemented to enhance the DBE program and support inclusion?

To address these questions, we examined quantitative and qualitative evidence.

- We determined whether there is a disparity between the utilization of DBEs in ISTHA's construction and CRS markets, and the availability of these firms, both in the agency's own contracting and throughout the wider Illinois economy. Using approved statistical techniques, we also analyzed large Census Bureau databases that provide information on the rates at which DBEs form business and their earnings from such businesses compared to similar non-DBEs, to shed light on the effects of capacity variables like age of the firm, size, experience, etc. We reviewed existing literature on discrimination in access to business and human capital likely to affect opportunities for DBEs in the Tollway's markets.
- We gathered anecdotal data on DBEs' marketplace experiences through focus groups with business owners and community leaders and interviews with ISTHA's staff. We also explored firms' experiences with the DBE program, and evaluated the programs and race- and gender-neutral policies and procedures for their effectiveness and conformance with constitutional parameters and national standards for such initiatives.

Based on the results of these extensive analyses, we make recommendations about whether a constitutional basis exists for continuing the use of race- and gender-based contracting efforts, and if so, what those efforts might be.

B. Study Findings

Overall, we found extensive evidence that discrimination on the basis of race and gender continues to operate in the Tollway's construction and CRS markets and that disparities exist between the utilization of DBEs and their availability on its construction and CRS contracts and associated subcontracts, as well as throughout the wider Illinois economy. In our judgment, ISTHA has a strong basis in evidence to continue its DBE program and to employ narrowly tailored remedies to ameliorate discrimination.

1. The Tollway’s Industry and Geographic Markets

The courts require that a state or local agency limit its race-based remedial program to firms doing business in its geographic and industry markets. We therefore examined a sample of approximately \$4 billion to empirically determine the market areas.

Approximately ninety-four percent of the Tollway’s dollars were spent in the State of Illinois. Therefore, we used Illinois as the geographic market. Table A presents the distribution of Tollway’s spending in Illinois across counties.

Table A: Geographic Percentage Distribution of Contracts Dollars In Illinois

County	County Pct	Pct Total
Cook	62.842%	62.842%
Dupage	13.318%	76.160%
Winnebago	6.095%	82.255%
Lake	5.096%	87.351%
Will	4.437%	91.788%
McHenry	3.821%	95.609%
Kane	1.444%	97.053%
Stephenson	0.902%	97.955%
Sangamon	0.763%	98.718%
Dekalb	0.423%	99.141%
Boone	0.346%	99.487%
Lee	0.119%	99.606%
Champaign	0.095%	99.701%
Tazewell	0.070%	99.771%
Rock Island	0.053%	99.824%
Grundy	0.047%	99.871%
Whiteside	0.039%	99.910%
Livingston	0.029%	99.938%
Randolph	0.021%	99.959%
Wabash	0.012%	99.971%
Morgan	0.012%	99.983%
Williamson	0.007%	99.990%
Ogle	0.005%	99.995%
Kankakee	0.004%	99.999%
Fulton	0.001%	100.000%

Source: CHA analysis of Illinois Tollway data.

Twenty NAICS codes defined the subset product or industry market for ISTHA for contracts from the construction and construction related services industry sectors. Table B presents the distribution of the number of contracts and the amount of contract dollars across the 20 NAICS codes for that contract activity in Illinois.

**Table B: NAICS Code Distribution of Contracts and Contract Dollars,
Construction and Construction Related Services**

NAICS Code	Subsector	Share of Total Contracts	Share of Total Contract Dollars
236220	Commercial and Institutional Building Construction	3.0%	8.5%
237110	Water and Sewer Line and Related Structures Construction	3.3%	1.4%
237130	Power and Communication Line and Related Structures Construction	1.3%	1.0%
237310	Highway, Street, and Bridge Construction	21.2%	33.0%
238110	Poured Concrete Foundation and Structure Contractors	3.9%	1.4%
238120	Structural Steel and Precast Concrete Contractors	1.6%	0.6%
238140	Masonry Contractors	1.8%	0.5%
238190	Other Foundation, Structure, and Building Exterior Contractors	0.4%	3.9%
238210	Electrical Contractors and Other Wiring Installation Contractors	4.3%	6.1%
238910	Site Preparation Contractors	6.2%	5.6%
238990	All Other Specialty Trade Contractors	9.0%	3.5%
324121	Asphalt Paving Mixture and Block Manufacturing	2.5%	12.3%
327320	Ready-Mix Concrete Manufacturing	0.7%	0.5%
332322	Sheet Metal Work Manufacturing	1.6%	0.6%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	1.0%	0.7%
484110	General Freight Trucking, Local	1.6%	0.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.3%	0.9%
541310	Architectural Services	1.5%	0.7%
541330	Engineering Services	30.0%	17.9%
561730	Landscaping Services	2.8%	0.5%

Source: CHA analysis of Illinois Tollway data.

2. The Tollway's Utilization of DBEs

The next step was to determine the dollar value of the Tollway's utilization of DBEs on construction and CRS contracts in its geographic and product market areas, as measured by payments to prime firms and associated subcontractors and disaggregated by race and gender. Because ISTHA lacked full records for payments to subcontractors other than firms certified as DBEs, we contacted the prime contractors to request that

they describe in detail their contract and associated subcontracts, including race, gender and dollar amount paid to date. We further developed a Master D/M/WBE Directory based upon lists solicited from dozens of agencies and organizations. We used the results of this extensive data collection process to assign minority or female status to the ownership of each firm in the analysis.

Table C presents data on the distribution of contract dollars by NAICS code for each racial and ethnic group, White women, DBEs as a whole and non-DBEs. We do not include Native Americans in these tables because these firms received no dollars.

Table C: Demographic Share of Contract Dollars by Industry, Construction and Construction Related Services

NAICS	Black	Hispanic	Asian	White Female	DBE	Non-DBE
236220	0.00%	9.73%	0.54%	0.49%	10.76%	89.24%
237110	3.42%	3.13%	0.00%	0.17%	6.72%	93.28%
237130	0.00%	74.50%	23.75%	0.00%	98.25%	1.75%
237310	0.42%	5.08%	0.00%	4.72%	10.22%	89.78%
238110	22.22%	0.00%	0.00%	30.92%	53.14%	46.86%
238120	0.00%	35.96%	0.00%	53.80%	89.76%	10.24%
238140	0.00%	98.30%	0.00%	0.00%	98.30%	1.70%
238190	0.00%	99.83%	0.00%	0.17%	100.00%	0.00%
238210	1.43%	0.87%	0.00%	1.81%	4.12%	95.88%
238910	0.00%	5.84%	0.94%	0.46%	7.25%	92.75%
238990	0.00%	0.00%	0.32%	5.77%	6.10%	93.90%
324121	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%
327320	0.00%	80.36%	0.00%	0.00%	80.36%	19.64%
332322	0.00%	98.76%	0.00%	1.08%	99.84%	0.16%
423510	0.00%	0.00%	98.61%	0.00%	98.61%	1.39%
484110	0.00%	26.54%	0.00%	60.90%	87.45%	12.55%
484220	0.61%	99.19%	0.00%	0.00%	99.81%	0.19%
541310	0.00%	36.12%	29.15%	34.69%	99.97%	0.03%
541330	2.96%	2.08%	15.89%	2.97%	23.90%	76.10%
561730	0.00%	36.26%	0.00%	29.55%	65.82%	34.18%
TOTAL	1.13%	11.49%	4.34%	3.85%	20.82%	79.18%

Source: CHA analysis of Illinois Tollway data.

3. Availability of DBEs in the Tollway’s Market

Using the “custom census” approach to estimating availability and the further assignment of race and gender using the Master Directory and misclassification surveys, we found the aggregated weighted availability of DBEs in construction and CRS to be 29.24

percent. Table D presents the aggregated weighted availability data for various racial and gender categories.

Table D: Aggregated Weighted Availability, Construction and Construction Related Sectors

Demographic Group	Weighted Availability
Black	9.12%
Hispanic	5.16%
Asian	4.10%
Native American	0.23%
White Female	10.63%
DBE	29.24%
Non-DBE	70.76%

Source: CHA analysis of Illinois Tollway data.

4. Disparity Analysis of ISTHA’s Utilization of DBEs

We next compared the utilization of DBEs with their availability. This is known as the “disparity ratio” or “disparity index.” 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 percent. Courts have looked to disparity indices in determining whether strict scrutiny is satisfied. An index less than 100 percent 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 percent” rule that a ratio less than 80 percent presents a *prima facie* case of discrimination, referred to as “substantive” significance.¹ A discussion of statistical significance is provided in Appendix D.

Table E presents the results of this disparity analysis by demographic group and by industry sectors. Blacks, Native Americans and White females, and DBEs as a group, continue to suffer large disparities in utilization, even with the application of the Tollway’s remedial efforts. These results support the inference that barriers based on race and gender continue to impede opportunities on the full range of Tollway projects for DBEs. Without the continued implementation of race- and gender-conscious measures, it is likely that these identified disparities would continue and worsen, suggesting that the Tollway would then function as a passive participant in marketplace discrimination.

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

**Table E: Disparity Ratios,
Construction and Construction Related Services**

Demographic Group	Disparity Ratio
Black	13.41%*
Hispanic	213.31%
Asian	110.07%
Native American	0.00%*
White Female	43.10%*
DBE	72.91%*
Non-DBE	111.19%

Source: CHA analysis of Illinois Tollway data.

* Indicates substantive significance

5. Analysis of Race and Gender Disparities in the Illinois Construction and Construction Related Services Economy

We explored the data and literature relevant to how discrimination in the Tollway’s markets and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in its contract opportunities. First, we analyzed the earnings of minorities and women relative to White men; the rates at which minority- and women-owned firms in Illinois form firms; and their earnings from those firms. Next, we summarized the literature on barriers to equal access to commercial credit. Finally, we summarized 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 overall marketplace discrimination without some type of affirmative interventions.

Data from the Census Bureau’s Survey of Business Owners is used to examine a group’s share of total sales and/or payroll relative to its share of total firms. Parity would be represented by the ratio of sales or payroll share over the share of total firms equaling 100% (*i.e.*, a group has 10% of total sales and comprises 10% of all firms.) A ratio that is less than 100% indicates an underutilization of a demographic group, and a ratio of more than 100% indicates an overutilization of a demographic group. Tables F1 and F2 present data from the Census Bureau’s Survey of Business Owners (“SBO”) that indicate underutilization of non-White firms when examining all three measures of firm utilization in the construction and professional, scientific, and technical services industries.² White women were underutilized when examining all three measures except for the ratio of sales to the number of firms for all firms in the construction industry.

² The SBO does not break out construction related services separately.

**Table F1. Disparity Ratios of Firm Utilization Measures
Construction**

	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
Non-Whites	34.2%	71.4%	91.3%
White Women	102.6%	81.4%	97.2%
Not Non-White/Not White Women	108.7%	103.7%	100.9%

Source: CHA Calculations from Survey of Business Owners

**Table F2. Disparity Ratios of Firm Utilization Measures
Professional, Scientific, and Technical Services**

	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
Non-White	57.2%	91.8%	96.3%
White Women	50.4%	59.2%	80.2%
Not Non-White/Not White Women	129.1%	110.9%	103.5%

Source: CHA Calculations from Survey of Business Owners

Data from the Census Bureau’s American Community Survey (“ACS”), presented in Tables F3 and F4, indicate that (with a few exceptions) Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women received wages and business earnings less than similarly situated White men.

**Table F3. Economic Outcome Differentials of Minorities
and White Women Relative to White Males
Construction**

Demographic Group	Wages Differentials Relative to White Men (% Change)	Business Earnings Relative to White Men (% Change)
Black	-51.0%***	-26.3%*
Latino	-13.3%***	-6.1%***

Native American	-36.0%***	-25.8%***
Asian/Pacific Islander	-51.5%***	-10.0%**
Other	-13.3%***	0.0%
White Women	-45.0%**	-19.4%**

Source: CHA calculations from the American Community Survey
 *** indicates statistical significance at the 0.001 level
 ** indicates statistical significance at the 0.01 level
 * indicates statistical significance at the 0.005 level

**Table F4. Economic Outcome Differentials of Minorities and White Women
 Relative to White Males
 Construction Related Services**

Demographic Group	Wages Differentials Relative to White Men (% Change)	Business Earnings Relative to White Men (% Change)
Black	-49.2%**	-57.7%***
Latino	-20.2%***	0.0%
Native American	-28.1%***	0.0%
Asian/Pacific Islander	-19.0%***	-222.6%*
Other	-13.0%*	0.0%
White Women	-33.8%***	-60.8%***

Source: CHA calculations from the American Community Survey
 *** indicates statistical significance at the 0.001 level
 ** indicates statistical significance at the 0.01 level
 * indicates statistical significance at the 0.005 level

The literature on barriers to access to commercial credit and the development of human capital further reports that minorities continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed.

Taken together with other evidence, this is the type of proof that supports the ability of ISTHA to continue to employ narrowly tailored race- and gender-conscious measures to ensure equal opportunities to access its contracts and associated subcontracts.

6. Qualitative Evidence of Race and Gender Disparities in the Illinois Economy

In addition to quantitative data, the courts look to anecdotal evidence of firms' marketplace experiences to evaluate whether the effects of current or past discrimination continue to impede opportunities for DBEs. To collect this evidence, we interviewed 123 individuals to explore DBEs' experiences and information regarding attempting to do work on Tollway contracts as prime firms and subcontractors, as well as throughout the wider economy. Most reported that while progress has been made in reducing barriers on the basis of race and gender, significant obstacles to full and fair opportunities remain, including:

- Exclusion from industry and information networks: Relationships are key to obtaining work from the agency as well as from prime vendors as subcontractors, subconsultants or suppliers. Exclusion from the industry networks necessary for success coupled with longstanding relationships between majority-owned firms and white males were cited as barriers to success.
- Discriminatory attitudes and negative perceptions of competency: Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications and capabilities. Women, especially in construction, reported the continuing effects of stereotypes about gender roles and sexist attitudes from male colleagues and clients. DBEs were perceived to lack the capacity to do additional work or more complex work. Some DBEs felt that majority-owned firms were sometimes resentful about what was perceived as others taking "their" work.
- Barriers to obtaining work on an equal basis: There was almost universal agreement among minority and women owners that the DBE program remains essential to reduce barriers to equal contracting opportunities. Few firms were successful in obtaining private sector or "no goals" work.
- Obtaining prime contracts: Many owners stressed that they would like to obtain prime contracts directly with the Tollway and that more focus on creating new opportunities was needed. "Unbundling" contracts into smaller scopes or lower dollar thresholds was repeatedly recommended.

7. DBE Program Elements and Implementation

a. DBE Program administration

The Tollway adopted its DBE Program in 2005 based on trial records from litigation against the City of Chicago's and IDOT's programs, as well as additional evidence presented to the City Council of the City of Chicago. In 2006, ISTHA commissioned a report to provide additional evidence and to more narrowly tailor its DBE Program.³

³ *Race, Sex, and Business Enterprise: Evidence from the State of Illinois and the Chicago Metropolitan Area*, NERA Economic Consulting, 2006.

Based upon the report's findings, the Tollway determined it has a strong basis in evidence that without its continued affirmative intervention through the DBE program, it would be a passive participant in the economy-wide discrimination still experienced by minorities and women in the construction markets in which it operates. The Study also provided narrowly tailored estimates of DBE availability as a percentage of all firms to form the starting point for developing DBE contract goals.

ISHTA accepts DBE certifications from the Illinois Unified Certification Program; M/WBE certifications from the City of Chicago and Cook County; and 8(a) certifications from the Small Business Administration.

The Tollway has developed documents to administer the program, such as contract language, forms, etc. These generally mirror the USDOT DBE regulations at 49 C.F.R. Part 26.

b. Program elements

The Tollway's DBE program encompasses several elements. These include:

- Extensive outreach and communication efforts, such as making information widely available on its website; publishing a newsletter; attending outreach events; and providing training, including through video presentations.
- Technical assistance and supportive services, such as the Coaching for Growth Program for small business owners specializing in heavy highway construction, and the Construction Business Development Center to provide the customized training and technical assistance needed to bid on Tollway contracts.
- The Small Business Initiative that sets aside contracts generally valued at approximately \$1 million or less for bidding only by small firms on a totally race-neutral basis.
- The Small Contractor Bridge Program, which provides bonding and working capital financing to small businesses seeking work on infrastructure projects in the Chicago area.
- The Mentor-Protégé Partnership Program for professional services contracts.

c. Business Owner Interviews: Experiences with the Tollway's Contracting Affirmative Action Programs

To explore the operation of the program elements in actual contract opportunities, we interviewed 123 business owners and trade organization representatives, as well as Tollway staff members, about their experiences with the Tollway's affirmative action programs and solicited their suggestions for improvements. Topics included:

- Networking and training opportunities: DBEs have benefited from ISTHA's outreach efforts and would like more events and opportunities for networking. Some professional services and non-construction industry owners found it difficult to access the Tollway's decision makers.

- Contract size and specifications: There was a recognition that the Tollway has made efforts recently to “unbundle” contracts into smaller scopes to facilitate prime contracting opportunities for DBEs. However, some larger general contractors cautioned that the nature of the Tollway’s contracts militates against unbundling contracts.
- Small Business Enterprise Program: There was significant support from DBEs for the use of small business set-asides. Several DBEs reported they had received prime contracts using this procurement method. Some non-DBEs also encouraged greater use of small business set-asides
- Qualifications requirements: The requirement that firms be prequalified by IDOT to do prime contractor work was reported to be a major barrier to the growth and development of DBEs and other small firms. Some general contractors stated that the Tollway’s reliance on IDOT’s standards makes it more difficult to meet contract goals. Other large firm representatives stated that DBEs need to be more patient about how long it takes to become prequalified and compete against firms that were formed many decades ago.
- Mentor-Protégé Partnership Program: There was a wide consensus that the Tollway’s Mentor-Protégé program for design contracts was useful for both prime consultants and DBEs by increasing DBEs’ capacities.
- Meeting DBE contract goals: Most prime design firms reported they were able to meet contract goals, although it was sometimes a challenge. General contractors’ experiences were often somewhat different. Several were puzzled about how goals are set on specific projects and frustrated that the goals were too high. A number of general contractors stated that it is more costly and risky to use DBEs. Many general contractors felt that the criteria for establishing good faith efforts to meet a goal were too vague; however, some had received waivers of contract goals from the Tollway. Some general contractors urged the Tollway to prequalify subcontractors on specific jobs. Several White, male owners of specialty trade contractors felt their firms were being discriminated against by the DBE program
- Contract performance compliance: Very few DBEs reported that they had been listed on a Tollway construction or design Utilization Plan but not used during contract performance, a common problem at many agencies. Several general contractors found it difficult to substitute a certified firm listed on the Utilization Plan for poor performance. A few prime bidders wanted consequences from the Tollway to a DBE that is unable to perform after being listed on a Plan. Several general contractors were concerned about what level of assistance to DBEs during performance is permissible within the DBE program’s requirement that the certified firm maintain its independence from the prime contractor; recent local investigations and prosecutions had created a climate of wariness.

C. Recommendations

Based on these findings, we make the following recommendations.

- **Ensure bidder non-discrimination and fairly priced subcontractor quotations:** To address concerns about price inflation by DBEs and bid shopping by prime contractors, require bidders to maintain information on pricing and date/time of receipt on all subcontractor quotes on larger projects for a specified minimum time period. The prices, scopes and timing can then be evaluated to determine whether bidders are in fact soliciting and contracting with subcontractors on a non-discriminatory basis and if DBEs cost more than White-male owned firms.
- **Increase training opportunities for prime contractors:** Conduct at least semi-annual seminars on DBE program compliance to discuss in detail the programs' policies and procedures and address questions and concerns.
- **Continue to review contract sizes and scopes:** Expand current efforts to "unbundle" appropriate contracts by dollars, scopes or locations to add design contracts and goods and services procurements, with a focus on identifying prime contracting possibilities.
- **Review experience requirements:** Review qualification requirements beyond basic prequalification standards to ensure that DBEs and small firms are not unfairly disadvantaged and that there is adequate competition for ISTHA work. For example, equivalent experience— especially that gained by working for other government agencies— should be permitted to increase access for small firms and guard against unfair incumbent advantages
- **Expand the Small Business Initiative:** Apply the contract setaside element to contracts outside construction, to the extent permitted by law.
- **Continue to apply race- and gender-conscious measures to appropriate contracts:** the Study found large disparities for many groups on various industry categories. The courts have held that there is no requirement to find the same quantum of evidence of discrimination in order to support overall, flexible remedial program elements. To ensure that the Tollway is not functioning as a passive participant in market area discrimination, we recommend that it continue its narrowly tailored DBE Program.
- **Use the Study to set DBE contract goals:** The detailed availability estimates in the Study should serve as the starting point for contract goal setting. ISTHA should bid some "control contracts" without goals to illuminate whether certified firms are used or even solicited in the absence of goals.
- **Expand the Mentor-Protégé Program to construction contractors:** Use USDOT's guidelines, samples and approved programs as a model. Include formal program guidelines; an ISHTA-approved written development plan; a long term and specific commitment between the parties; extra credit for the mentor's use of the protégé to meet a contract goal; a fee schedule to cover the direct and indirect cost for services; and regular review by the Tollway.
- **Review DBE contract compliance policies and processes:** Continue to follow the general elements of the USDOT DBE program regulations. Develop an overarching DBE program document. Create more specific guidance, perhaps in the form of new policies, checklists, and "tips," to help prime contractors and

subcontractors to understand best practices and comply with program requirements.

- **Consider measures to encourage prime contractors to utilize new DBEs:** To encourage prime contractors to spread opportunities for DBEs across racial and ethnic groups and subindustries, ISHTA should consider providing extra credit towards meet a contract goal for contractors that employ DBE subcontractors that either they have not used previously on Tollway jobs or firms that have never participated in Tollway projects as either a prime contractor or a subcontractor. For example, a bidder could receive 1.25 percent credit for every dollar spent with a new firm. This will, we note, require the electronic monitoring system recommended below to ensure that credit is properly tracked and accounted for in reporting.
- **Implement an electronic contract data collection and monitoring system:** Functionality should include full firm contact information; contract goal setting; utilization plan capture; contract compliance; spend analysis of informal contracts and pcards; program report generation; integrated email and fax notifications; outreach tools; export/import integration with existing systems; and access by authorized users.
- **Develop performance measures for DBE program success:** Performance measures could include information on good faith effort waiver requests; the number and dollar amounts of bids rejected as non-responsive for failure to make good faith efforts to meet the goal; the number, type and dollar amount of DBE substitutions during contract performance; growth in the number, size and scopes of work of certified firms; increased diversification in the industries in which DBEs submit bids and are awarded prime contracts and subcontracts; and increased capacity of DBEs as measured by bonding limits, size of jobs, complexity of work, etc.
- **Conduct regular DBE program reviews:** Conduct a full and thorough review of the evidentiary basis for the program approximately every five to seven years. Establish a sunset date for the DBE program, by which date the program will end unless the Tollway again finds strong evidence of the need to continue the use of race- and gender-conscious measures to ensure a level playing field for its contracts.

II. LEGAL STANDARDS FOR CONTRACTING AFFIRMATIVE ACTION PROGRAMS

A. Summary of Constitutional Standards

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

- The government must establish its “compelling interest” in remedying race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
- Any remedies adopted must be “narrowly tailored” to that discrimination, that is, the program must be directed at the types and depth of discrimination identified.⁴

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

- Statistical evidence of the underutilization of minority firms by the agency and/or throughout the agency’s geographic and industry market area compared to their availability in the market area. These are as disparity indices, comparable to the type of “disparate impact” analysis used in employment discrimination cases.
- Anecdotal evidence of race-based barriers to the full and fair participation of minority firms in the market area and in seeking contracts with the agency, comparable to the “disparate treatment” analysis used in employment discrimination cases.⁵ Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, etc.

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

- The efficacy of race-neutral remedies at overcoming identified discrimination.
- The relationship of numerical benchmarks for government spending to the availability of minority- and women-owned firms and to subcontracting goal setting procedures.

⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁵ *Id.* at 509.

- The congruence between the remedies adopted and the beneficiaries of those remedies.
- Any adverse impact of the relief on third parties.
- The duration of the program.⁶

In *Adarand v. Peña*,⁷ the Supreme Court extended the analysis of strict scrutiny to race-based federal enactments such as the Disadvantaged Business Enterprise (“DBE”) program for federally-assisted transportation contracts. Just as in the local government context, the national government must have a compelling interest for the use of race and the remedies adopted must be narrowly tailored to the evidence relied upon.

In general, courts have subjected preferences for Women-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny.” Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related” to the objective.⁸ However, appellate courts, including the Seventh Circuit Court of Appeals, have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program.⁹ Therefore, we advise that the Tollway evaluate gender-based remedies under the strict scrutiny standard.

Classifications not based on race, ethnicity, religion, national origin or gender are subject to the lesser standard of review of “rational basis” scrutiny, because the courts have held there are no equal protection implications under the Fourteenth Amendment for groups not subject to systemic discrimination.¹⁰ In contrast to strict scrutiny of government action directed towards persons of “suspect classifications” such as racial and ethnic minorities, rational basis means the governmental action must only be “rationally related” to a “legitimate” government interest. Thus, preferences for persons with disabilities, veterans, etc. may be enacted with vastly less evidence than race- or gender-based measures to combat historic discrimination.

Unlike most legal challenges, the defendant has the initial burden of producing “strong evidence” in support of a race-conscious program.¹¹ 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.¹² “[W]hen the

⁶ *United States v. Paradise*, 480 U.S. 149, 171 (1987).

⁷ *Adarand v. Peña*, 515 U.S. 200 (1995).

⁸ *Cf. United States v. Virginia*, 518 U.S. 515 (1996).

⁹ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007) (“*Northern Contracting III*”).

¹⁰ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹¹ *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).

¹² *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941 (2001) (“*Adarand VII*”); *W.H. Scott Construction Co., Inc. v. City of Jackson, Mississippi*, 199 F.3d 206, 219 (5th Cir. 1999).

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.”¹³ A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”¹⁴ For example, in the challenge to the Minnesota and Nebraska DBE programs, “plaintiffs presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.”¹⁵ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.¹⁶ A plaintiff cannot rest upon general criticisms of studies or other evidence; it must carry the case that the government’s proof is inadequate to meet strict scrutiny, rendering the legislation or governmental program illegal.¹⁷

There is no need of formal legislative findings of discrimination,¹⁸ nor “an ultimate judicial finding of discrimination before [a local government] can take affirmative steps to eradicate discrimination.”¹⁹

To meet strict scrutiny, studies have been conducted that gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of minority- and women-owned firms and their actual utilization compared to white male-owned businesses. Quality studies also examine the elements of the agency’s programs to determine whether they are sufficiently narrowly tailored. The following is a detailed discussion of the parameters for conducting studies leading to defensible programs that can establish the Tollway’s compelling interest in remedying discrimination and developing narrowly tailored initiatives.

¹³ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997).

¹⁴ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989, *cert. denied*, 540 U.S. 1027 (2003) (10th Cir. 2003) (“*Concrete Works III*”).

¹⁵ *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

¹⁶ *Engineering Contractors II*, 122 F.3d at 916; *Coral Construction Co. v. King County*, 941 F.2d. 910 921 (9th Cir. 1991).

¹⁷ *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1522-1523 (10th Cir. 1994) (“*Concrete Works II*”); *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

¹⁸ *Webster*, 51 F.Supp.2d at 1364.

¹⁹ *Concrete Works III*, 36 F.3d at 1522.

B. *City of Richmond v. J.A. Croson Co.*

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

The Court struck down the City of Richmond’s Minority Business Enterprise Plan that required prime contractors awarded City construction contracts to subcontract at least 30 percent of the project to Minority-Owned Business Enterprises (“MBEs”). A business located anywhere in the country which was at least 51 percent owned and controlled by “Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut” citizens was eligible to participate. The Plan was adopted after a public hearing at which no direct evidence was presented that the City had discriminated on the basis of race in awarding contracts or that its prime contractors had discriminated against minority subcontractors. The only evidence before the City Council was: (a) Richmond’s population was 50 percent Black, yet less than one percent of its prime construction contracts had been awarded to minority businesses; (b) local contractors’ associations were virtually all White; (c) the City Attorney’s opinion that the Plan was constitutional; and (d) general statements describing widespread racial discrimination in the local, Virginia, and national construction industries.

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

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment... [I]f the City could show that it had essentially become a “passive participant” in a system of racial exclusion...[it] could take affirmative steps to dismantle such a system.²⁰

Strict scrutiny of race-based remedies is required to determine whether racial classifications are in fact motivated by either notions of racial inferiority or blatant racial politics. This highest level of judicial review “smokes out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a

²⁰ 488 U.S. at 491-92.

highly suspect tool.²¹ It further ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The Court made clear that strict scrutiny seeks to expose racial stigma; racial classifications are said to create racial hostility if they are based on notions of racial inferiority.²²

Race is so suspect a basis for government action that more than “societal” discrimination is required to restrain racial stereotyping or pandering. The Court provided no definition of “societal” discrimination or any guidance about how to recognize the ongoing realities of history and culture in evaluating race-conscious programs. The Court simply asserted that:

[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.... [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota. It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination.²³

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

²¹ See also *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.”).

²² 488 U.S. at 493.

²³ *Id.* at 499.

In the case at hand, the City has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in City construction projects. The City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the City has demonstrated “a strong basis in evidence for its conclusion that remedial action was necessary.”²⁴

The foregoing analysis was applied only to Blacks. The Court then emphasized that there was “absolutely no evidence” 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.”²⁵

Having found that Richmond had not presented evidence in support of its compelling interest in remedying discrimination—the first prong of strict scrutiny—the Court went on to make two observations about the narrowness of the remedy—the second prong of strict scrutiny. First, Richmond had not considered race-neutral means to increase MBE participation. Second, the 30 percent quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.²⁶ Further, Justice O’Connor rejected the argument that individualized consideration of Plan eligibility is too administratively burdensome.

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

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

²⁴ *Id.* at 510.

²⁵ *Id.*

²⁶ See *Grutter*, 529 U.S. at 336-337 (quotas are not permitted; race must be used in a flexible, non-mechanical way).

discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.²⁷

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.²⁸ 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.²⁹

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

[I]t is important to remember what the *Croson* plurality opinion did and did not decide. The Richmond program, which the *Croson* Court struck down, was insufficient because it was based on a comparison of the minority population in its entirety in Richmond, Virginia (50%) with the number of contracts awarded to minority businesses (.67%). There were no statistics presented regarding number of minority-owned contractors in the Richmond area, *Croson*, 488 U.S. at 499, and the Supreme Court was concerned with the gross generality of the statistics used in justifying the Richmond program. There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.³⁰

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

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

²⁸ *Id.* at 502.

²⁹ *See, e.g., Northern Contracting III*, 473 F.3d at 723.

³⁰ *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785, *28-29 (E.D. N.Y. 1998); *see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2nd Cir. 1992) ("*Croson* made only broad pronouncements concerning the findings necessary to support a state's affirmative action plan"); *cf. Concrete Works II*, 36 F.3d at 1528 (City may rely on "data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion").

contracting opportunities. The *Croson* Court said nothing about the constitutionality of flexible subcontracting goals based upon the availability of MBEs to perform the scopes of the contract in the government's local market area. In contrast, the USDOT DBE Program avoids these pitfalls. 49 CFR Part 26 "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."³¹

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

C. Strict Scrutiny as Applied to Federal Enactments

In *Adarand v. Peña*,³² the Supreme Court again overruled long settled law and extended the analysis of strict scrutiny under the Due Process Clause of the Fourteenth Amendment to federal enactments. Just as in the local government context, when evaluating federal legislation and regulations:

[t]he strict scrutiny test involves two questions. The first is whether the interest cited by the government as its reason for injecting the consideration of race into the application of law is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the government is concerned. The second is whether the government has narrowly tailored its use of race, so that race-based classifications are applied only to the extent absolutely required to reach the proffered interest. The strict scrutiny test is thus a recognition that while classifications based on race may be appropriate in certain limited legislative endeavors, such enactments must be carefully justified and meticulously applied so that race is determinative of the outcome in only the very narrow circumstances to which it is truly relevant.³³

1. U.S. Department of Transportation's Disadvantaged Business Enterprise Program

To comply with *Adarand*, Congress reviewed and revised the Disadvantaged Business Enterprise (DBE) Program statute³⁴ and implementing regulations³⁵ for federal-aid contracts in the transportation industry. To date, every court that has considered the

³¹ *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983, 994 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

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

³³ *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1569-1570 (D. Colo. 1997), *rev'd*, 228 F.3d 1147 (2000) ("*Adarand IV*"); *see also Adarand III*, 515 U.S. at 227.

³⁴ Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178 (b)(1), 112 Stat. 107, 113.

³⁵ 49 C.F.R. Part 26.

issue has found the regulations to be constitutional on their face.³⁶ While binding strictly only upon the federal DBE Program, these cases provide important guidance to the Tollway about the types of evidence necessary to establish its compelling interest in adopting a DBE program and how to narrowly tailor a program. For example, the Fourth Circuit noted with approval that North Carolina's M/WBE program for state-funded contracts largely mirrored Part 26.³⁷

All courts have held that Congress had strong evidence of widespread race discrimination in the construction industry.³⁸ Relevant evidence before Congress included:

- Disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms;
- Disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners;
- The large and rapid decline in minorities' participation in the construction industry when affirmative action programs were struck down or abandoned; and
- Various types of overt and institutional discrimination by prime contractors, trade unions, business networks, suppliers and sureties against minority contractors.³⁹

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

[S]pent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, [the plaintiffs] presented evidence that the data were susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in

³⁶ See, e.g., *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), cert. granted then dismissed as improvidently granted, 532 U.S. 941, 534 U.S. 103 (2001); *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2004 U.S. Dist. LEXIS 3226 at *64 (N.D. Ill., Mar. 3, 2004) ("*Northern Contracting I*").

³⁷ *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 236 (4th Cir. 2010).

³⁸ See also *Western States*, 407 F.3d at 993 ("In light of the substantial body of statistical and anecdotal material considered at the time of TEA-21's enactment, Congress had a strong basis in evidence for concluding that-in at least some parts of the country-discrimination within the transportation contracting industry hinders minorities' ability to compete for federally funded contracts.").

³⁹ See *id.*, 407 F.3d at 992-93.

highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.⁴⁰

Next, the regulations were facially narrowly tailored. Unlike the prior program,⁴¹ Part 26 provides that:

- The overall goal must be based upon demonstrable evidence of the number of DBEs ready, willing, and able to participate on the recipient's federally assisted contracts.
- The goal may be adjusted to reflect the availability of DBEs but for the effects of the DBE Program and of discrimination.
- The recipient must meet the maximum feasible portion of the goal through race-neutral measures as well as estimate that portion of the goal it predicts will be met through such measures.
- The use of quotas and set-asides is limited to only those situations where there is no other remedy.
- The goals are to be adjusted during the year to remain narrowly tailored.
- Absent bad faith administration of the Program, a recipient cannot be penalized for not meeting its goal.
- The presumption of social disadvantage for racial and ethnic minorities and women is rebuttable, "wealthy minority owners and wealthy minority firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage."
- Exemptions and waivers from any or all Program requirements are available.⁴²

These elements have led the courts to conclude that the program is narrowly tailored on its face. First, the regulations place strong emphasis on the use of race-neutral means to achieve minority and women participation. Relying upon *Grutter v. Bollinger*, the Eighth Circuit held that while "[n]arrow tailoring does not require the exhaustion of every

⁴⁰ *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.").

⁴¹ 49 C.F.R. Part 23.

⁴² *Sherbrooke*, 345 F.3d. at 973.

conceivable race-neutral alternative...it does require serious, good faith consideration of workable race-neutral alternatives.”⁴³

The DBE Program is also flexible. Eligibility is limited to small firms owned by persons whose net worth is under a certain amount.⁴⁴ There are built-in Program time limits, and the recipient may terminate race-conscious contract goals if it meets its annual overall goal through race-neutral means for two consecutive years. Moreover, the authorizing legislation is subject to Congressional reauthorization that will ensure periodic public debate.

The court next held that the goals are tied to the relevant labor market. “Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Crosen*....”⁴⁵

Finally, Congress has taken significant steps to minimize the race-conscious nature of the Program. “[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively [socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.”⁴⁶

DBE programs based upon a methodology similar to that for this Study for the Tollway, including the availability analysis and the examination of disparities in the business formation rates and business earnings of minorities and women compared to similarly situated non-minority males, have been held to be narrowly tailored in their application of Part 26. For example, in upholding the Minnesota Department of Transportation’s DBE program using the same approach, the Eighth Circuit opined that while plaintiff attacked the study’s data and methods,

it failed to establish that better data was [sic] available or that Mn/DOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results. The precipitous drop in DBE participation in 1999, when no race-conscious methods were employed, supports Mn/DOT’s conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures, and there is no evidence that Mn/DOT failed to adjust its use of race-conscious and race-neutral methods as the year progressed, as the DOT regulations require.⁴⁷

⁴³ *Id.* at 972.

⁴⁴ The personal net worth limit was \$750,000 when the DBE program regulations were amended to meet strict scrutiny in 1999. The limit was increased to \$1.32 million in 2012, and is now indexed by the Consumer Price Index. 49 C.F.R. § 26.67(b)(1).

⁴⁵ *Id.*

⁴⁶ *Id.* at 973.

⁴⁷ *Id.*

2. U.S. Department of Defense’s Small Disadvantaged Business Program

In 2008, the Federal Circuit Court of Appeals struck down the Department of Defense (DOD) program for Small Disadvantaged Businesses (SDBs) in *Rothe Development Corporation v. U.S. Department of Defense*.⁴⁸ The program set an overall annual goal of five percent for DOD contracting with SDBs and authorized various race-conscious measures to meet the goal.

In *Rothe VII*,⁴⁹ the appeals court held that the DOD program violated strict scrutiny because Congress did not have a “strong basis in evidence” upon which to conclude that DOD was a passive participant in racial discrimination in relevant markets across the country. The six local disparity studies upon which the DOD primarily relied for evidence of discrimination did not meet the compelling interest requirement, and its other statistical and anecdotal evidence did not rise to meet the heavy constitutional burden.

Of particular relevance to this report for the Tollway, the primary focus of the court’s analysis was the six disparity studies. The court reaffirmed that such studies are relevant to the compelling interest analysis.⁵⁰ It then rejected *Rothe’s* argument that data more than five years old must be discarded, stating “We decline to adopt such a *per se* rule here.... [The government] should be able to rely on the most recently available data so long as that data is reasonably up-to-date.”⁵¹

In the absence of expert testimony about accepted econometric models of discrimination, the court was troubled by the failure of five of the studies to account for size differences and “qualifications” of the minority firms in the denominator of the disparity analysis, or as the court labeled it, “relative capacity.”⁵² The court was concerned about the studies’ inclusion of possibly “unqualified” minority firms and the failure to account for whether a firm can perform more than one project at a time in two of the studies.⁵³ In the court’s view, the combination of these perceived deficits rendered the studies insufficiently probative to meet Congress’ burden.

The appellate court ignored the analyses in the cases upholding the USDOT DBE Program and the City of Denver’s local affirmative action contracting program where the fallacy of “capacity” was debunked, all of which were cited extensively by the district

⁴⁸ *Rothe Development Corporation v. U.S. Department of Defense*, 545 F.3d 1023 (*Fed. Cir.* 2008). We note that the jurisdiction of the Court of Appeals for the Federal Circuit is limited to the jurisdiction described in 28 U.S.C. §§ 1292 (c) and (d) and 1295. Pursuant to 28 U.S.C. § 1295(a)(2), jurisdiction in *Rothe* was based upon the plaintiff’s claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), which governs contract claims against the United States.

⁴⁹ This opinion was the latest iteration of an 11-year-old challenge by a firm owned by a White female to the DOD’s award of a contract to an Asian American–owned business despite the fact that plaintiff was the lowest bidder.

⁵⁰ *Rothe*, 545 F.3d at 1037-1038.

⁵¹ *Id.* at 1038-1039.

⁵² *Id.* at 1042.

⁵³ *Ibid.*

court. It relied instead on a report from the USCCR, which adopts the views of anti-affirmative action writers, including those of Rothe's consultant.⁵⁴

However, the court was careful to limit the reach of its review to the facts of the case:

To be clear, we do *not* hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. Where the calculated disparity ratios are low enough, we do not foreclose the possibility that an inference of discrimination might still be permissible for *some* of the minority groups in *some* of the studied industries in *some* of the jurisdictions. And we recognize that a minority owned firm's capacity and qualifications may themselves be affected by discrimination. But we hold that the defects we have noted detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the "strong basis in evidence" required to uphold the statute.⁵⁵

The Federal Circuit concluded its analysis of compelling interest by "stress[ing] that [its] holding is grounded in the particular terms of evidence offered by DOD and relied on by the district court in this case, and should not be construed as stating blanket rules, for example, about the reliability of disparity studies."⁵⁶

Given the holding that Congress lacked a strong basis in evidence for the DOD program, the court did not rule on whether its provisions were narrowly tailored. The court did note, however, in its prior rulings that the program is flexible, limited in duration, and not unduly burdensome to third parties, and that the program has tended to narrow the reach of its remedies over time.⁵⁷

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

It is well established that disparities in an agency's utilization of Disadvantaged Business Enterprises ("DBEs")⁵⁸ 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 DBEs and the disparate treatment of such firms by actors critical to their success will meet strict scrutiny. Discrimination must be shown using statistics and economic models to examine the effects of systems or markets on different groups, as well as by evidence of personal experiences with

⁵⁴ U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting* (May 2006): 79.

⁵⁵ *Rothe*, 545 F.3d at 1045.

⁵⁶ *Id.* at 1049.

⁵⁷ *Id.* at 1049.

⁵⁸ For the balance of this Report, we use the terms DBE and Minority- and Women-Owned Business Enterprises ("M/WBEs") interchangeably to mean firms owned by minorities or women.

discriminatory conduct, policies or systems.⁵⁹ 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.⁶⁰

Croson's admonition that “mere societal” discrimination is not enough to meet strict scrutiny does not apply 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.”⁶¹

Nor must a government 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.”⁶² 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 have looked to in examining the basis for and determining the constitutional validity of race- and gender-conscious programs and the steps in performing a disparity study necessary to meet these elements.

1. Define the Tollway’s Market Area

The first step is to determine the market areas in which the agency 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.⁶³ The agency 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.⁶⁴

⁵⁹ *Adarand VII*, 228 F.3d at 1166 (“statistical and anecdotal evidence are appropriate”).

⁶⁰ *Id.*

⁶¹ *Concrete Works IV*, 321 F.3d at 976.

⁶² *Id.* at 977.

⁶³ *Croson*, 488 U.S. at 508.

⁶⁴ *Concrete Works II*, 36 F.3d at 1520 (to confine data to strict geographic boundaries would ignore “economic reality”).

A commonly accepted definition of geographic market area for disparity studies is the locations that account for at least 75 percent of the agency's contract and subcontract dollar payments.⁶⁵ Likewise, the accepted approach is to analyze those detailed industries that make up at least 75 percent of the prime contract and subcontract payments for the Study period.⁶⁶

2. Examine Disparities between DBE Availability and the Tollway's Utilization of DBEs

Next, the study must estimate the availability of minorities and women to participate in the Tollway's contracts and its history of utilizing DBEs as prime contractors and associated subcontractors. The primary inquiry is whether there are statistically significant disparities between the availability of DBEs and the utilization of such firms.

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.⁶⁷

This is known as the "disparity ratio" or "disparity index." 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.⁶⁸ An index less than 100 percent 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 percent" rule that a ratio less than 80 percent presents a *prima facie* case of discrimination.⁶⁹

The first step in the disparity analysis is to calculate the availability of minority- and women-owned firms in the Tollway's geographic and industry market area. In addition to

⁶⁵ "Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program," Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, p. 49 ("National Disparity Study Guidelines").

⁶⁶ *Id.* at pp. 50-51.

⁶⁷ *Croson*, 488 U.S. at 509; *see Webster*, 51 F.Supp.2d at 1363, 1375.

⁶⁸ *Scott*, 199 F.3d at 218; *see also Concrete Works II*, 36 F.3d at 1526-1527; *O'Donnell Construction Co., Inc., v. District of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990).

⁶⁹ 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 F.3d at 914.

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.⁷⁰

The second step is to determine whether there are disparities between the Tollway's utilization of M/WBEs and the availability estimates. Where possible, statistical techniques are applied to examine whether any disparities are significant.

There is no requirement to control for firm size, area of specialization, and whether the firm had bid on agency projects. While it may be true that M/WBEs are smaller in general than white male firms, most construction firms are small and can expand and contract to meet their bidding opportunities. Importantly, the courts have recognized that size and experience are not race- and gender-neutral variables: "M/WBE construction firms are generally smaller and less experienced *because of* discrimination."⁷¹ To rebut this inference, a plaintiff must proffer its own study showing that the disparities disappear when such variables are held constant and that controlling for firm specialization explained the disparities. Additionally, *Croson* does not "require disparity studies that measure whether construction firms are able to perform a *particular contract*."⁷²

The agency need not prove that the statistical inferences of discrimination are "correct." In upholding Denver's M/WBE Program, the Tenth Circuit 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.⁷³

Nor must the government 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.⁷⁴

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

⁷⁰ *Northern Contracting II*, 2005 U.S. Dist. LEXIS 19868, at *70 (IDOT's custom census approach was supportable because "discrimination in the credit and bonding markets may artificially reduce the number of M/WBEs").

⁷¹ *Concrete Works IV*, 321 F.3d at 983 (emphasis in the original).

⁷² *Id.* at 987-88 (emphasis in the original).

⁷³ *Id.* at 971.

⁷⁴ *Id.* at 973 (emphasis in the original).

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 eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence.⁷⁵

Similarly, statistical evidence by its nature cannot identify the individuals responsible for the discrimination.⁷⁶

3. Evaluate the Results of Unremediated Markets

Where such evidence is available, a study should next review the results of contracts solicited without goals. Courts have held that such outcomes are an excellent indicator of whether discrimination continues to impact opportunities in public contracting. Evidence of race and gender discrimination in relevant “unremediated”⁷⁷ markets provides an important indicator of what level of actual DBE participation can be expected in the absence of government mandated affirmative efforts to contract with M/WBEs.⁷⁸ As the Eleventh Circuit has acknowledged, “the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.”⁷⁹ If DBE utilization is below availability in unremediated markets, an inference of discrimination may be supportable. The virtual disappearance of M/WBE participation after programs have been enjoined or abandoned strongly indicates substantial barriers to minority subcontractors, “raising the specter of racial discrimination.”⁸⁰ Unremediated markets analysis addresses whether the government has been and continues to be a “passive participant” in such discrimination, in the absence of affirmative action remedies.⁸¹ The court in the *Chicago* case held that the “dramatic decline in the use of M/WBEs when an affirmative action program is terminated, and the paucity of use of such firms when no affirmative action program was ever initiated,” was proof of the City’s compelling interest

⁷⁵ *Id.* at 971.

⁷⁶ *Id.* at 973.

⁷⁷ “Unremediated market” means “markets that do not have race- or gender-conscious subcontracting goals in place to remedy discrimination.” *Northern Contracting II*, at *36.

⁷⁸ *See, e.g., Western States*, 407 F.3d at 992 (Congress properly considered evidence of the “significant drop in racial minorities’ participation in the construction industry” after state and local governments removed affirmative action provisions).

⁷⁹ *Engineering Contractors II*, 122 F.3d at 912.

⁸⁰ *Adarand VII*, 228 F.3d at 1174.

⁸¹ *See also Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 599-601 (3rd Cir. 1996) (“*Philadelphia III*”).

in employing race- and gender-conscious measures.⁸² Evidence of unremediated markets “sharpens the picture of local market conditions for MBEs and WBEs.”⁸³

Therefore, if DBEs are “overutilized” because of the entity’s program, that does not end the study’s inquiry. Where the government has been implementing affirmative action remedies, DBE utilization reflects those efforts; it does not signal the end of discrimination. Any DBE “overutilization” on projects with goals goes only to the weight of the evidence because it reflects the effects of a remedial program. For example, Denver presented evidence that goals and non-goals projects were similar in purpose and scope and that the same pool of contractors worked on both types. “Particularly persuasive” was evidence that M/WBE participation declined significantly when the program was amended in 1989; the utilization of M/WBEs on City projects had been affected by the affirmative action programs that have been in place in one form or another since 1977.

4. Examine Economy-Wide Evidence of Race- and Gender-Based Disparities

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 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 Chicago’s construction program.⁸⁴ As 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 race-based denial of access to

⁸² *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 737 (N.D. Ill. 2003); see also *Concrete Works IV*, 321 F.3d at 987-988.

⁸³ *Concrete Works II*, 36 F.3d at 1529.

⁸⁴ *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) (holding that City of Chicago’s M/WBE program for local construction contracts met compelling interest using this framework).

capital, without which the formation of minority subcontracting enterprises is stymied.⁸⁵

Business discrimination studies and lending studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. “Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”⁸⁶ Despite the contentions of plaintiffs that possibly dozens of factors might influence the ability of any individual to succeed in business, the courts have rejected such impossible tests and held that business formation studies are not flawed because they cannot control for subjective descriptions such as “quality of education,” “culture” and “religion.”

For example, in unanimously upholding the USDOT DBE Program, the courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.⁸⁷ 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.⁸⁸

5. Examine Anecdotal Evidence of Race- and Gender-Based Barriers

In addition to quantitative data, 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

⁸⁵ *Adarand VII*, 228 F.3d at 1168-69 .

⁸⁶ *Id.*

⁸⁷ *Id.*; *Western States*, 407 F.3d at 993; *Northern Contracting I*, 2004 U.S. Dist. LEXIS 3226 at *64.

⁸⁸ *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.”).

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.”⁸⁹ Evidence about discriminatory practices engaged in by prime contractors, bonding companies, suppliers, lenders 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.⁹⁰ 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.”⁹¹ “[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.”⁹²

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making as opposed to judicial proceedings. “Plaintiff offers no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not— indeed cannot— be verified because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perception.”⁹³ 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.”⁹⁴

E. Narrowly Tailoring a Disadvantaged Business Enterprise Program for the 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 also be narrowly tailored to that evidence. The courts have repeatedly examined the following factors in determining whether race-based remedies are narrowly tailored to achieve their purpose:

- The efficacy of race-neutral remedies at overcoming identified discrimination;

⁸⁹ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

⁹⁰ *Adarand VII*, 228 F.3d at 1168-1172.

⁹¹ *Concrete Works II*, 36 F.3d at 1520, 1530.

⁹² *Engineering Contractors II*, 122 F.3d at 926.

⁹³ *Id.* at 249.

⁹⁴ *Concrete Works IV*, 321 F.3d at 989.

- The relationship of numerical benchmarks for government spending to the availability of minority- and women-owned firms and to subcontracting goal setting procedures;
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;
- The congruence between the remedies adopted and the beneficiaries of those remedies;
- Any adverse impact of the relief on third parties; and
- The duration of the program.⁹⁵

It is imperative that remedies not operate as fixed quotas.⁹⁶ Programs that lack waivers for firms that fail to meet the subcontracting goals but make good faith efforts to do so have been struck down.⁹⁷ In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the USDOT's DBE program.⁹⁸ This feature has been central to the holding that the DBE program meets the narrow tailoring requirement.⁹⁹

1. Consider Race- and Gender-Neutral Remedies

Race- and gender-neutral approaches are a necessary component of a defensible and effective DBE program¹⁰⁰ and the failure to seriously consider such remedies has been fatal to several programs.¹⁰¹ 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

⁹⁵ *United States v. Paradise*, 480 U.S. 149, 171 (1987); *see also Sherbrooke*, 345 F.3d at 971-972.

⁹⁶ *See* 49 C.F.R § 26.43 (quotas are not permitted and setaside contracts may be used only in limited and extreme circumstances "when no other method could be reasonably expected to redress egregious instances of discrimination").

⁹⁷ *See, e.g., 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.").

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

⁹⁹ *See, e.g., Sherbrooke*, 345 F.3d at 972.

¹⁰⁰ *Croson*, 488 U.S. at 507 (Richmond considered no alternatives to race-based quota); *Philadelphia III*, 91 F.3d at 609 (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).

¹⁰¹ *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.

without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units, providing technical support, and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.¹⁰² Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.¹⁰³

The requirement that an agency must meet the maximum feasible portion of the goal through race-neutral measures as well as estimate that portion of the goal it predicts will be met through such measures has been central to the holdings that the DBE regulations meet narrow tailoring.¹⁰⁴

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.¹⁰⁵ While an entity must give good faith consideration to race-neutral alternatives, “strict scrutiny does not require exhaustion of every possible such alternative...however irrational, costly, unreasonable, and unlikely to succeed such alternative might be... [S]ome degree of practicality is subsumed in the exhaustion requirement.”¹⁰⁶

2. Set Targeted Goals

Numerical goals or benchmarks for DBE participation must be substantially related to their availability in the relevant market.¹⁰⁷ For example, the DBE regulations require 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.¹⁰⁸ Goal setting, however, is not an absolute science.¹⁰⁹ “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*.”¹¹⁰

¹⁰² See 49 CFR § 26.51.0.

¹⁰³ *Croson*, 488 U.S. at 503 n.3; *Webster*, 51 F.Supp.2d at 1380.

¹⁰⁴ See, e.g., *Sherbrooke*, 345 F.3d. at 973

¹⁰⁵ *Grutter*, 529 U.S. at 339.

¹⁰⁶ *Coral Construction*, 941 F.2d at 923.

¹⁰⁷ *Webster*, 51 F.Supp.2d at 1379, 1381 (statistically insignificant disparities are insufficient to support an unexplained goal of 35 percent M/WBE participation in County contracts); see also *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, et al.*, 83 F.Supp.2d 613, 621 (D. Md. 2000) (“*Baltimore I*”).

¹⁰⁸ 49 C.F.R. § 26.45.

¹⁰⁹ In upholding New Jersey Transit’s DBE program, the court held that “Plaintiffs have failed to provide evidence of another, more perfect, method” of goal setting. *GEOD Corp. v. New Jersey Transit Corp.*, 2009 U.S. Dist. LEXIS 74120, at *20 (D. N.J. 2009).

¹¹⁰ *Sherbrooke*, 345 F.3d. at 972.

It is settled case law that goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets. Contract specific goals must be based upon availability of DBEs to perform the anticipated scopes— including the work estimated to be performed by the prime firm— of the individual contract. Not only is contract goal setting legally mandated,¹¹¹ but this approach also reduces the need to conduct good faith efforts reviews as well as the temptation to create “front” companies and sham participation to meet unrealistic contract goals. While more labor intensive than defaulting to the annual, overall goals, there is no option to eschew narrowly tailoring program implementation because to do so would be more burdensome.

3. Ensure Flexibility of Goals and Requirements

It is imperative that remedies not operate as fixed quotas.¹¹² A DBE program must provide for contract awards to firms who fail to meet the contract goals but make good faith efforts to do so.¹¹³ Further, firms that meet the goals cannot be favored over those who made good faith efforts. In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the USDOT’s DBE program.¹¹⁴ This feature has been central to the holding that the DBE program meets the narrow tailoring requirement.¹¹⁵

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

The over- or under-inclusiveness of those persons to be included in a program is an additional consideration, and goes to whether the remedies truly target the evil identified. The “fit” between the problem and the remedy manifests in two ways: which groups to include and how to define those groups, and which persons will be eligible to be included within those groups.

First, the groups eligible to benefit from the remedies must be based upon the evidence.¹¹⁶ 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.”¹¹⁷ In striking down Cook County’s program, the Seventh Circuit Court of

¹¹¹ See *id*; *Coral Construction*, 941 F.2d at 924.

¹¹² See 49 C.F.R 26.43 (quotas are not permitted and setaside contracts may be used only in limited and extreme circumstances “when no other method could be reasonably expected to redress egregious instances of discrimination”).

¹¹³ See, e.g., *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.”).

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

¹¹⁵ See, e.g., *Sherbrooke*, 345 F.3d. at 972.

¹¹⁶ *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990, 1007-1008 (3rd Cir. 1993) (“*Philadelphia II*”) (strict scrutiny requires data for each minority group; data was insufficient to include Hispanics, Asians or Pacific Islanders or Native Americans).

¹¹⁷ *Webster*, 51 F.Supp.2d at 1380–1381.

Appeals 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.”¹¹⁸ 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.¹¹⁹ Therefore, remedies should be limited to those firms that have suffered actual harm in the market area.¹²⁰

Second, the DBE Program’s limitation to persons who are socially and economical disadvantaged, as opposed to membership in a group standing alone, has been key to its constitutionality. The 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 must meet the Small Business Administration’s size definitions for its industry, have been central to the courts’ holdings that Part 26 is narrowly tailored.¹²¹ “[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively [socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.”¹²² Further, anyone can challenge the disadvantaged status of any firm.¹²³

5. Evaluate the Burden on Third Parties

Failure to make “neutral” changes to contracting and procurement policies and procedures that disadvantage DBEs and other small businesses may result in a finding that the program unduly burdens non-DBEs.¹²⁴ The burden of compliance need not be placed only upon those firms directly responsible for the discrimination. “Innocent” parties can be made to share some of the burden of the remedy for eradicating racial

¹¹⁸ *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001).

¹¹⁹ *Concrete Works IV*, 321 F.3d at 971 (Denver introduced evidence of bias against each group; that is sufficient).

¹²⁰ *Rowe*, 615 F.3d at 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 overinclusiveness.”).

¹²¹ *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 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).

¹²² *Id.* at 973.

¹²³ 49 C.F.R. §26.87.

¹²⁴ *See Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County (“Engineering Contractors I”)*, 943 F.Supp. 1546, 1581-1582 (S.D. Fla. 1996) (County chose not to change its procurement system).

discrimination.¹²⁵ The proper focus is whether the burden on third parties is “too intrusive” or “unacceptable.”

Burdens must be proven, and cannot constitute mere speculation by a plaintiff.¹²⁶ “Implementation of the race-conscious contracting goals for which TEA-21 provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although this places a very real burden on non-DBE firms, this fact alone does not invalidate TEA-21. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities.”¹²⁷

Narrow tailoring permits certified firms acting as prime contractors to count their self-performance towards meeting contract goals. There is no requirement that a program be limited only to the subcontracting portions of contracts, and numerous decisions and studies have found that discrimination operates against D/M/WBE prime vendors. For example, the trial court in upholding the Illinois DOT’s DBE program explicitly recognized that barriers to subcontracting opportunities affect the ability of DBEs also 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.¹²⁸

The DBE program regulations recognize these facts and therefore provide remedial benefits not only to firms acting as subcontractors on a project,¹²⁹ but also to DBEs

¹²⁵ *Concrete Works IV*, 321 F.3d at 973; *Wygant*, 476 U.S. at 280-281; *Adarand VII*, 228 F.3d at 1183 (“While there appears to be no serious burden on prime contractors, who are obviously compensated for any additional burden occasioned by the employment of DBE subcontractors, at the margin, some non-DBE subcontractors such as *Adarand* will be deprived of business opportunities”); *cf. Northern Contracting II*, at *5 (“Plaintiff has presented little evidence that it [sic] has suffered anything more than minimal revenue losses due to the program.”).

¹²⁶ *See, e.g., Rowe*, 615 F.3d at 254 (prime bidder had no need for additional employees to perform program compliance and need not subcontract work it can self-perform).

¹²⁷ *Western States*, 407 F.3d at 995.

¹²⁸ *Northern Contracting II*, 2005 U.S. Dist. LEXIS 19868 at 74.

¹²⁹ 49 C.F.R. § 26.45(a)(1).

seeking prime work.¹³⁰ Moreover, utilization of D/M/WBEs as prime firms reduces the need to set contract goals, thereby meeting the test that the agency use race-neutral measures to the maximum feasible extent.

6. Regularly Review the Program

The Tollway should continue to conduct regular reviews of the DBE program. Race-based programs must have duration limits and “not last longer than the discriminatory effects it is designed to eliminate.”¹³¹

The absence of a sunset clause and lack of review were factors in the court’s holding that the City of Chicago’s M/WBE 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 2004.¹³² In contrast, the USDOT DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.¹³³ 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 5 years.”¹³⁴

The legal test is the most recent available data.¹³⁵ How old is too old is not definitively answered, but the Tollway would be wise to analyze data at least once every five to seven years.

F. Cases from the Seventh Circuit Court of Appeals

Two cases from the circuit governing Illinois illustrate almost all of these principles, and have provided significant guidance to other circuits and agencies across the country.

¹³⁰ 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.”).

¹³¹ *Adarand III*, 515 U.S. at 238.

¹³² *BAGC v. Chicago*, 298 F.Supp.2d at 739. See also *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) (fourteen-year-old evidence of discrimination “too remote to support a compelling governmental interest.”).

¹³³ See *Western States*, 407 F.3d at 995.

¹³⁴ *Rowe*, 615 F.3d at 253.

¹³⁵ *Rothe*, 545 F.3d at 1038-1039.

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

The City of Chicago 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 Black-, Hispanic- and women-owned construction firms.¹³⁶ However, the program as implemented in 2003, which had not been reviewed since its inception in 1990, was not sufficiently narrowly tailored to meet strict constitutional scrutiny. The court stayed the final order against operation of the Program for construction contracts for six months, to permit the City to review the ruling and adopt a new program.¹³⁷

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 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 percent of City contracts be awarded to minority-owned businesses and 5 percent to women-owned businesses.

In response to *Croson*, Chicago commissioned a Blue Ribbon Panel to recommend an effective program that would survive 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 in 1990 that retained the 25 percent MBE and 5 percent WBE goals; added a Target Market, wherein contracts were limited to bidding only by M/WBEs; 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 overutilization 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

¹³⁶ *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003).

¹³⁷ 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.

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. 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.”¹³⁸

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.

After finding that Chicago met the compelling interest prong, the court held that the City’s program was not narrowly tailored to address these market distortions and barriers because:

- 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 have 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.

¹³⁸ *BAGC v. Chicago*, 298 F. Supp.2d at 738.

Chicago is the only city ever to have received a stay to permit revision of its program to meet narrow tailoring. It amended its ordinance to meet the court's 2004 deadline and continues to implement M/WBE subcontracting goals without interruption.

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.¹³⁹ 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 women construction firms in the Illinois area. IDOT had commissioned an Availability Study to meet Part 26's requirements. The IDOT Study included a custom census of the availability of DBEs in IDOT's market area, weighted by the location of IDOT's contractors and the types of goods and services IDOT procures. The Study estimated that DBEs comprised 22.77 percent of IDOT's available firms.¹⁴⁰ It next examined 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. If disparities are large and statistically significant, then the inference of discrimination can be made. 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 percent higher, for an estimate of DBE availability "but for" discrimination of 27.51 percent.

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 M/WBE Procurement Program ordinance;
- Anecdotal evidence gathered at IDOT's public hearings on the DBE program;

¹³⁹ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007) (7th Cir. 2007) ("*Northern Contracting III*"). Ms. Holt authored IDOT's DBE goal submission and testified as IDOT's expert witnesses at the trial.

¹⁴⁰ This baseline figure of DBE availability is the "step 1" estimate U.S. DOT grant recipients must make pursuant to 49 CFR §26.45.

- Data on DBE involvement in construction projects in markets without DBE goals,¹⁴¹ and
- IDOT’s “zero goal” experiment, where DBEs received approximately 1.5 percent of the total value of the contracts. This was designed to test the results of “race-neutral” contracting policies, that is, the utilization of DBEs on contracts without goals.

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 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.¹⁴²

¹⁴¹ *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 percent, this goal is completely voluntary -- the average DBE usage rate in 2002 and 2003 was 1.6 percent. On the basis of all of this data, IDOT adopted 22.77 percent as its Fiscal Year 2005 DBE goal.”).

¹⁴² *Northern Contracting II*, at *82 (internal citations omitted); see *Croson*, 488 U.S. at 492.

III. ILLINOIS TOLLWAY'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

This Chapter describes the Tollway's Disadvantaged Business Enterprise ("DBE") Program, as well as various race-neutral measures. We then turn to experiences with the DBE program reported by business owners, advocacy group representatives and Tollway staff.

A. History of the DBE Program

The Tollway adopted its DBE Program in 2005. Prior to that time, it encouraged prime bidders to utilize DBEs on a strictly voluntary basis. Resolution No. 16726 of the Board of Directors acknowledged that other public entities in Illinois, including the Illinois Department of Transportation ("IDOT"), had adopted contracting affirmative action programs and achieved significantly higher rates of participation by Minority- and Women-Owned Business Enterprises ("M/WBEs"), and that there was a significant disparity between the availability of DBEs and M/WBEs (collectively, "D/M/WBEs") and the Tollway's utilization of these businesses. These facts supported the inference that the Tollway may be a passive participant in marketplace discrimination against D/M/WBEs.

The Board also relied upon the trial records in *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) and *Northern Contracting, Inc. v. Illinois Department of Transportation*, 00 C 4515 (N. D. Ill. 2004).¹⁴³ These cases provided evidence of current discrimination faced by minorities and women in the Illinois construction industry. The Board also relied upon the additional statistical and anecdotal testimony about barriers to full and fair competition in the construction industry that was presented to the City Council of the City of Chicago in 2004.

Based upon this evidence, ISTHA adopted a non-discrimination policy for its contracts and "committed itself to a business diversity program to ensure a level playing field for minority and women owned businesses in the Tollway's procurement process." The program included:

- Contract-specific DBE participation goals based on objective analyses of the availability of DBEs for the types of goods and services sought by the Tollway;
- Outreach efforts to business and professional associations, assisting disadvantaged businesses in obtaining bonding capacity, and assisting in the establishment of mentoring programs between Tollway contractors and DBEs;
- Reasonable programs and initiatives to ensure the diversity of the contracting workforce; and

¹⁴³ The Seventh Circuit Court of appeals subsequently upheld IDOT's program, finding it was supported by ample evidence and was narrowly tailored to that evidence. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).

- Collaboration with other public entities on reasonable programs and initiatives designed to level the playing field for M/WBEs.

In 2006, ISTHA commissioned a report to provide additional evidence and to more narrowly tailor its DBE Program.¹⁴⁴ The Study examined the availability of D/M/WBEs in the Tollway's geographic and procurement markets and whether there were disparities between DBE availability and the Tollway's utilization of D/M/WBEs. The Study also analyzed various Census databases to determine whether there were disparities in the wider construction economy in Illinois. It found overall statistical evidence of disparities affecting minority- and women-owned firms in all major construction and construction-related professional services procurement categories in Tollway contracts and associated subcontracts and throughout the wider economy.

Based upon the Study's findings, the Tollway determined it has a strong basis in evidence that without its continued affirmative intervention through the DBE program, it would be a passive participant in the economy-wide discrimination still experienced by minorities and women in the construction markets in which it operates. The Study also provided narrowly tailored estimates of DBE availability as a percentage of all firms to form the starting point for developing DBE contract goals.

B. ISTHA's Current DBE Program Elements

1. ISTHA's DBE Policy

The Tollway has established as its policy that

qualified and *bona fide* DBEs, as that term is defined herein, have maximum feasible opportunities to participate fully in the performance of all contracts funded and administered by the Tollway. The Tollway seeks to ensure non-discrimination in the award and administration of its contracts and associated subcontracts and that it is not a passive participant in a discriminatory marketplace; to create a level playing field on which DBEs can compete fairly for its contracts; to ensure that its Special Provision 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.

Consistent with this policy, it is the responsibility of all Contractors for general contracting work and a specific condition of all Tollway contracts to which they are parties to ensure full and fair opportunities for DBEs to compete in contracts funded and administered by the Tollway and to fully comply with this Special Provision.

¹⁴⁴ *Race, Sex, and Business Enterprise: Evidence from the State of Illinois and the Chicago Metropolitan Area, NERA Economic Consulting, 2006 ("Study").*

2. DBE program administration

The DBE program is managed by the Department of Diversity and Strategic Development (“Diversity Department”). This function consists of the Chief of Diversity and Strategic Development; the General Manager of Diversity; the Senior Manager of Program Development; the DBE Manager; and two outside Consultants housed in the Department. There is also a Secretary, part-time Consultant assistance from outside the Department, and temporary administrative help, as needed. The Chief reports directly to the Executive Director and meets regularly with other department heads.

The Tollway supports the professional development of Department staff through participation in the American Contract Compliance Association, the national group that provides training to affirmative action contacting officials. Department members have earned Masters in Contract Compliance and Certificates in Contract Compliance. ISTHA also attends national conferences such as the DBE Committee of the American Association of State Highway Transportation Officials and the Conference of Minority Transportation Officials. It is also an active member of the Governmental Compliance and Procurement Forum, a group of Chicago-area D/M/WBE program officials that meets regularly to share best practices and address challenges.

3. Outreach and communication

The Tollway makes information on its opportunities and policies and procedures widely available on its website, and makes special efforts to inform DBEs and small firms of upcoming contract opportunities. It publishes a newsletter, “Diversity Program Updates,” that describes various programs and updates, training opportunities and other important procurement information.

The Tollway conducts “Are You Ready to Bid?” workshops, which provide assistance is available to firms on policies and procedures. Sessions on specific skills such as guardrail installation are offered.

The Department’s staff and staff from the Procurement Department attend dozens of outreach events every year, including meeting with industry groups and DBE organizations. They also work with other state agencies such as IDOT, the Capital Development Board and the Illinois Department of Labor, as well as sister agencies like the City of Chicago and Cook County, and private sector groups, to provide information about Tollway policies and future contract opportunities.

The Procurement Department has a Goods and Services Buying Plan on the Tollway’s website. This plan lists upcoming opportunities.

Special outreach efforts are made to award contracts and associated subcontracts to firms new to the Tollway on its 15-year, \$12 billion capital program, *Move Illinois: The Illinois Tollway Driving the Future*. Since 2012, over 300 new firms have participated in these opportunities.

The agency has created two Online Training Videos. The Construction Contracts 101 Video and Presentation goes over the bid process, contract documents and bid submittal, as well as the various Diversity Programs. The one-hour-long Invoice Training Video is designed to assist prime consultants and subconsultants of professional services firms, including individuals responsible for completing monthly invoicing package and payroll. Topics include setting up certified payroll, monthly invoice packaging and how to incorporate subdocuments.

4. Technical assistance and supportive services

ISTHA has entered into a partnership with the Illinois Department of Commerce and Economic Opportunity and the Illinois Hispanic Chamber of Commerce to develop a Coaching for Growth Program for small business owners specializing in heavy highway construction. This program provides targeted training and direct, strategic business counseling to support and promote business growth through a three-month, one-on-one program and a series of group workshops.

The Construction Business Development Center (“CBDC”) has been established in collaboration with the Illinois Community College Board. The CBDC is led by various community colleges that provide small, M/WBEs with the customized training and technical assistance needed to bid on Tollway contracts. The initiative is designed to be intensive and focused on meeting the specific needs of each business client.

5. Small Business Initiative

ISTHA has adopted a Small Business Initiative that sets aside contracts for bidding only by small firms on a totally race-neutral basis. The Initiative identifies construction contracts generally valued at approximately \$1 million or less that can be set aside specifically for small businesses and establishes small business goals for select construction contracts on a project-by-project basis. To qualify, a firm must have annual gross revenues of \$10 million or less¹⁴⁵; be enrolled in the State of Illinois' Small Business Set Aside Program; and, in the Tollway's discretion, be prequalified with either the IDOT or the Illinois Capital Development Board, which will be determined on a project-by-project basis.

6. Small Contractor Bridge Program

In 2013, the Illinois Finance Authority (“IFA”), in cooperation with the Chicago Community Loan Fund (“CCLF”), announced a \$1 million pilot Small Contractor Bridge Program to provide bonding and working capital financing to small businesses, including D/M/WBEs, seeking work on infrastructure projects in the Chicago area. The Tollway has joined in this initiative. The Program is intended to fill a gap in the market, help credit-disadvantaged businesses compete for projects, and boost economic development

¹⁴⁵ The limit will increase to \$14 million on January 1, 2015.

throughout Illinois by pairing essential infrastructure improvements with support for small contractors.

When ready to bid on a project, small contractors work with CCLF and a partner surety bond underwriting firm to establish creditworthiness according to program guidelines. Successful applicants obtain the surety bond required for bids and are preapproved for a loan for project working capital. Loans can be used to pay for surety bond premiums, suppliers, equipment leasing, employees and other direct project-related expenses. All loans have a simple interest rate of 10 percent or less and must be repaid within one year.

Subject to IFA Board approval, IFA purchases 50 percent of the principal amount of each working capital loan (there is a minimum of \$25,000 and a maximum of \$250,000), reducing its lending partners' risk and freeing up additional partner funds for lending. As an added control, both loan funds and payments for contractor services are paid into a third-party escrow account. Lenders, including IFA, are in first lien position on available monies in the escrow account, ensuring continued availability of funds for other borrowers. Technical assistance and business training is also required by the program.

7. Mentor-Protégé Partnership Program

The Tollway has created the Mentor-Protégé Partnership Program ("MPP") for professional services contracts solicited using the Professional Services Bulletin ("PSB"). The MPP is designed to facilitate professional services consultants' ability to meet the DBE goal; assist D/M/WBEs to build capacity through participating in a prime consultant role; and assist D/M/WBEs in being self-sufficient, competitive and profitable.

A Mentor may receive a 3 percent credit toward meeting its DBE goal on a project for using a Protégé that has not been mentored previously on either a Tollway or IDOT project.

The Mentor-Protégé Agreement must be submitted with the prime consultant's Statement of Interest ("SOI"). The agreement must contain the following elements:

- An assessment of the Protégé's needs;
- A description of the specific assistance the Mentor will provide to address those needs (including a minimum of three optional capacity building items, described below);
- Mandatory capacity building items;
- A provision that either party may terminate the Agreement with 30 days notice to the other party and the Tollway. The Agreement may be terminated if the Mentor or Protégé has failed or becomes unable to fulfill its obligations or the Protégé is not making sufficient progress or is unlikely to do so under the terms of the Agreement.

The Agreement must contain a narrative of the scope of services the Protégé will provide and a detailed description of training, support and services the Mentor will provide to the Protégé. The Mentor must demonstrate a significant level of commitment, performance and capability to provide meaningful instruction and resources to the Protégé.

The Protégé must perform a commercially useful function with its own workforce under the contract, and have a record of performance as a professional services consultant in such fields as construction management, engineering, construction, inspection services, project management or surveying. It must be a separate and independent business from its Mentor.

If a Protégé does not meet IDOT's prequalification requirements for a given job, the Mentor's prequalification will be used to qualify the Protégé's participation, in which case the Mentor retains responsibility for the work.

Both parties are free to participate in other contract opportunities with the Tollway outside of the Agreement, and exclusive arrangements are prohibited.

Mandatory capacity building must be provided to the Protégé in the following areas:

- Guidance and oversight;
- Development of a Project Management Plan for the project from conception to completion;
- Guidance and oversight on the development of the Quality Assurance/Quality Control Plan; and
- Familiarization of the Protégé with applicable laws, regulations and rules.

Optional capacity building may be provided to the Protégé in the following areas:

- Training in the technical aspects of operating the business, such as invoicing, accounts receivable, marketing, business forecasting and budgeting, human resource and information technology development, selection techniques for insurance, and banking relationships;
- Assistance with change orders, filing claims, dispute resolution, scheduling and other performance issues;
- Assistance in preparing contract documents, proposals and SOIs;
- Guidance regarding the Protégé's procedures in accounting for daily actual costs of labor, production and overhead; and
- Identification of the Protégé's unique challenges and development of a plan to address them.

The Agreement must be approved by the Diversity Department. If it is not approved, the parties have 5 working days to address any deficiencies and resubmit the revised Agreement.

The Mentor must report quarterly on the Protégé's work and the assistance it has provided, and the Tollway can monitor compliance. Commencing 30 days after approval of the Agreement, the parties must submit a Monthly Utilization Report ("MUR") to verify payments to meet the contract goal. The MUR must summarize the services and skills provided to the Protégé, including hours and areas of involvement such as managerial, technical or financial assistance. The Tollway may require additional information in its discretion. Timesheets in a format acceptable to the Tollway must be maintained by the Mentor, with sign off by the Protégé, and submitted with the MUR.

8. DBE program eligibility

To conserve resources and reduce paperwork burdens on minority and women owners, ISTHA does not conduct DBE certifications. Rather, to be eligible to participate, a business must be certified by the Illinois Unified Certification Program ("ILUCP") for U.S. Department of Transportation-assisted contracts as a DBE pursuant to 49 C.F.R. Part 26, or certified by the City of Chicago or Cook County, Illinois as a MBE or a WBE, or certified by the U.S. Small Business Administration as a 8(a) firm.

9. DBE contract goal setting

A critical element of the constitutional requirement of narrow tailoring is the development of goals for individual solicitations that reflect estimates of the availability of DBEs to perform the possible scopes of the construction contract. The Tollway has developed a detailed construction contract goal setting procedure that considers the scopes of work of the contract, including scopes a prime contractor will perform; pay item estimates; the availability of DBEs to perform the anticipated scopes of work of the construction contract; and the project's location.

First, the Tollway's Project Engineer requests that the Diversity Department develop a goal on the project. The request provides the project's name, number, location, dollar estimate and pay items' scopes with estimates. The Diversity Department next adds the scopes deemed eligible for DBE participation, the availability of DBEs by pay items, and the dollar amount estimated to go to DBEs. In addition to these factors, the Diversity Department also considers the requirement that the prime contractor must usually self-perform at least 35 percent of the project; the project's location; the size of the pay item estimate; the nature of any specialized work; knowledge of other industry factors; and the total dollar value of the project. The Diversity Department will meet with the Chief of Engineering and the Deputy Chief of Program Control/Systems Integrity to review the proposed goal, as necessary.

Not all contracts have a DBE goal. If the availability of DBEs is very low, the Tollway will set a zero goal. Regardless of whether a contract goal was established, any race-neutral¹⁴⁶ utilization of DBEs is captured and reported.

10. Contract award policies and procedures

The primary document that embodies the DBE Program for construction contracts is the Special Provision (“Special Provision”) for Disadvantaged Business Enterprise Participation. The DBE Program as applied to professional services contracts for engineering and other construction-related services is described in the Professional Services Bulletins (“PSBs”) for individual solicitations. These different industries are treated similarly in the Program¹⁴⁷; we note below any pertinent differences.

a. Counting DBE participation

If a DBE contract goal has been set for the solicitation, the goal percentage applies to the core work of the contract, not contingency work identified in the bid documents. The bidder’s DBE commitment will be assessed for any and all extra work orders and change orders at the time of issuance.

A bidder may only count the value of payments made for the work actually performed by the DBE’s own forces, including the cost of materials and supplies. Work that the DBE subcontracts to a non-DBE does not count towards the DBE goal.

If the DBE will perform as a subcontractor or subconsultant (collectively, “subcontractor”), the prime firm will receive 100% goal credit for the work of the subcontract performed by the DBE’s own forces, including the cost of materials and supplies, excluding the purchase of materials and supplies or the lease of equipment by the DBE subcontractor from the prime contractor or its affiliates. Work that a DBE subcontractor in turn subcontracts to a non-DBE does not count towards the DBE goal.

If the DBE will perform as a trucker, the bidder will receive 100 percent goal credit for trucking participation if the DBE is responsible for the management and supervision of the entire trucking operation. At least one truck owned, operated, licensed and insured by the DBE must be used on the contract. One hundred percent credit will be given for the full value of all DBE owned or leased trucks operated using DBE-employed drivers. Goal credit will be limited to the value of the reasonable fee or commission received by the DBE for the costs of trucks leased from a non-DBE trucking firm or operator.

¹⁴⁶ See 49. C.F.R. § 26.51(b) (“Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).”).

¹⁴⁷ We refer to bidders on construction contracts and proposers on professional services contracts collectively as “bidders”.

If the DBE will perform as a material supplier other than a manufacturer, the bidder will receive 60 percent goal credit for the cost of the materials or supplies purchased from a DBE regular dealer or distributor, and for the value of reasonable fees and commissions for the procurement of materials and supplies if the DBE is not a regular dealer, distributor or manufacturer. The Special Provisions define “regular dealer” in accordance with 49 C.F.R. § 26.55.¹⁴⁸

A DBE acting as a broker is not eligible for DBE credit. A broker is defined as “a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of its own existing inventory and provides no substantial service other than acting as a conduit between his or her supplier and his or her customer is a broker.”

A DBE not operating as a regular dealer or as a broker may be considered a distributor for the purposes of DBE credit.

In addition to the use of subcontractors, suppliers or trucking firms to meet a contract goal, a bidder may also enter into a joint venture with a certified firm to perform as the prime contractor on the project. A joint venture is defined as “an association between two or more persons, or any combination of types of business enterprises and persons numbering two or more, proposing to perform a for-profit business enterprise, in which each joint venture partner contributes property, capital, effort, skill and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work on the project and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.” The DBE joint venture partner’s share in the capital contribution, control, management, risks and profits of the joint venture must be equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the parties and their relationship, risks and responsibility under the contract. A joint venture may count towards goal credit that portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work performed by the DBE’s own forces. A joint venture may also count the dollar value of work subcontracted to other DBEs. Work performed by the forces of the non-DBE joint venture partner may not be counted toward the goal. Each joint venture partner must provide the attestation to the Utilization Plan.

Regardless of the DBE’s role in the contract, the DBE must perform a commercially useful function on the contract to count its participation towards the contract goal. Enforcing the requirement that the firm perform a commercially useful function ensures that participation is legitimate and that the program’s remedial purpose is affected by

¹⁴⁸ “A regular dealer is a firm that owns, operates or maintains a store, warehouse or other establishment in which materials, supplies, articles or equipment are bought, kept in stock and regularly sold or leased to the public in the usual course of business.... [T]he firm must be an established business that engages as its principal business and under its own name in the purchase and sale or lease of the products in question.... [The DBE] may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business ... if the person owns and operates distribution equipment for the products. Any supplementing of regular dealer’s own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.”

limiting participation to only firms that function in the marketplace. The Special Provision provides extensive guidance on how to determine a commercially useful function.¹⁴⁹

b. Contract solicitation requirements

To be considered responsive to the solicitation, a bidder must submit with the bid a DBE Utilization Plan (“Plan”) on Form 2026. The failure of the as-read low bidder to comply will render the bid non-responsive. The Plan must indicate that the bidder either has met the contract goal or has not obtained enough DBE participation commitments in spite of its good faith effort to do so. The Plan must further provide the name, telephone number and facsimile number of a responsible official of the bidder designated for purposes of notification of Plan approval or disapproval. It must include a DBE Participation Commitment Statement (Form 2025) for each DBE proposed for the performance of work to achieve the contract goal. All elements of information must be provided, including:

- The name and address of each DBE;
- A description, including pay item numbers, of each DBE’s commercially useful function;
- The price to be paid to each DBE for the identified work specifically stating the quantity, unit price and total subcontract price for the work. If partial pay items are to be performed by the DBE, the form must indicate the portion of each item, a unit price where appropriate and the subcontract price amount;
- A commitment statement signed by the bidder and each DBE evidencing availability and intent to perform commercially useful work on the project; and

¹⁴⁹ A DBE performs a commercially useful function when it is responsible for the execution of the work and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. 1. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, ISTHA will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is paid is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors. 2. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, ISTHA will examine similar transactions, particularly those in which DBEs do not participate. 3. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, ISTHA will presume that the DBE is not performing a commercially useful function. 4. When a DBE is presumed not to be performing a commercially useful function as provided in paragraph 3 of this section, the DBE may present evidence to rebut this presumption.”

- If the bidder is a joint venture comprised of DBEs and non-DBEs, the Utilization Plan must also include a clear identification of the portion of the work to be performed by the DBE partner(s).

Neither the Tollway nor IDOT, upon which the Tollway's pay items are based, includes a specific pay item for trucking services. Trucking is addressed as an "incidental" activity to the contract, which varies greatly by contractor and is dependent on the individual contractor's means and methods. Therefore, the Plan does not specifically list the detailed scope of services the DBE trucking firms will perform on the project.

The Special Provision contains a list of references that bidders should use to locate DBEs, including the ILUCP, the City of Chicago's M/WBE Directory, Cook County's M/WBE Directory, or the Small Business Administration's 8(a) Program Directory. Only firms certified at the time of bid opening are eligible to be considered for contract award to meet the contract goal or to establish the bidder's good faith efforts to do so.

Professional services contracts are treated somewhat differently. First, because these contracts are qualifications-based, consultants submit a Statement of Interest ("SOI") in response to the PSB rather than a bid package. Only firms that are prequalified for the services listed in the PSB may submit a SOI. Selection of professional consultants is based on the firm's qualifications, related experience, expertise and availability of key personnel to be assigned to the project. One criterion is the "quality and scope of D/M/WBE participation, including any Mentor-Protégé proposals over and above the D/M/WBE goal." Goals are set on an individual contract basis. The SOI must provide the DBE commitment and percentage breakdown, current D/M/WBE certification letters, and if relied upon to meet the DBE goal, the Mentor-Protégé Agreement and Mentor-Protégé Detail sheet.

c. Good faith efforts procedures

If the bidder cannot obtain sufficient DBE commitments to meet the contract goal, the bidder must document in its Utilization Plan and on the Good Faith Efforts Contact Log and Checklist (DBE Form 2023) its good faith efforts to do so. The bidder must show that all necessary and reasonable steps were taken to achieve the contract goal. ISTHA will consider the quality, quantity and intensity of the kinds of efforts that the bidder has made. Mere *pro forma* efforts are not good faith efforts; rather, the bidder is expected to have taken those efforts that would be reasonably expected of a bidder actively and aggressively trying to obtain DBE participation sufficient to meet the contract goal. Waivers are available, including of the entire goal amount, if sufficient good faith efforts have been made.

The Special Provision defines in detail the types of actions ISTHA considers as part of the evaluation of the bidder's good faith efforts to obtain participation.¹⁵⁰ The listed factors are not intended to be a mandatory checklist and are not intended to be

¹⁵⁰ See 49 C.F.R. § 26.53, upon which these provisions are based.

exhaustive. Other factors or efforts brought to the attention of the Tollway may be relevant in appropriate cases, and will be considered by ISTHA.

In determining whether a bidder made good faith efforts, ISTHA may take into account the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but other bidders meet it, ISTHA will review whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, ISTHA may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

A bidder that rejected a DBE based on price must provide to ISTHA all quotes received for the scope of work proposed by the DBE from all firms, including non-DBEs, so that the agency can determine whether negotiations were conducted in good faith and the price difference relied upon to demonstrate good faith efforts is reasonable.

If ISTHA determines that the bidder has made good faith efforts to meet the contract goal, it will award the contract if the bidder is otherwise eligible for award. A bidder must complete its good faith efforts before bid submission, which must reflect the maximum possible participation it achieved through good faith efforts. A bidder is not permitted to “cure” its failure to meet the goal or to make good faith efforts after bid submission.

If the Tollway determines that the bidder has not made good faith efforts, the bidder may request administrative reconsideration in writing within the 5 working days after the notification date of the determination. A request may provide additional written documentation and/or argument concerning the issue of whether adequate good faith efforts were made to meet the contract goal. In addition, the request will be considered consent by the bidder to extend the time for award. The request will be forwarded to the Chief of Diversity, who may extend an opportunity to the bidder to meet in person. After the review by the Chief of Diversity, the bidder will be sent a written decision within 10 working days after receipt of the request for reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. A final decision by the Chief of Diversity that good faith efforts were made shall approve the Utilization Plan submitted by the bidder and shall clear the contract for award. A final decision that good faith efforts were not made shall render the bid non-responsive.

11. Contract performance policies and procedures

ISTHA does not credit the participation of a DBE included in the Plan toward the contract goal until the amount has been paid to the DBE. After approval of the Plan and award of the contract, the Utilization Plan and individual DBE Participation Statements become part of the contract. If the contractor did not succeed in obtaining enough DBE participation to achieve the advertised contract goal, and the Plan was approved and contract awarded based upon a determination of good faith efforts, the total dollar value

of DBE work calculated in the approved Plan, as a percentage of the awarded contract value, shall become the amended contract goal.

No amendment to the Plan may be made without prior written approval from the Diversity Department. Amendment requests must be submitted in writing to the Department no later than the date on which the contractor approaches the DBE with a proposed amendment to the Plan. Unauthorized changes or substitutions, including performing the work designated for a subcontractor with the contractor's own forces, is a violation of the Special Provision and a breach of contract.

The facts supporting the request for changes to the Plan must not have been known or reasonably could not have been known by the parties prior to entering into the subcontract. The contractor must negotiate in good faith with the subcontractor to resolve the problem. If requested by either party, the Tollway shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the DBE can be substituted only where agreement cannot be reached for a reasonable price or reasonable schedule for the correct scope of work.

Substitutions of a DBE subcontractor will be permitted only under the following circumstances:

1. Unavailability after receipt of reasonable notice to proceed;
2. Failure of performance;
3. Financial incapacity;
4. Refusal by the subcontractor to honor the bid or proposal price or scope or schedule;
5. Material mistake of fact or law about the elements of the scope of work of a solicitation where a reasonable price cannot be agreed;
6. Failure of the subcontractor to meet insurance, licensing or bonding requirements;
7. The subcontractor's withdrawal of its bid or proposal; or
8. Decertification of the subcontractor as a DBE, other than on the basis of its exceeding firm size or personal net worth limits.

If it becomes necessary to substitute a DBE or otherwise change the Plan, the contractor's request must state specific reasons for the substitution or change. 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. Any refusal by the DBE to provide such a letter must be documented by the contractor. The Diversity Department will approve or deny a request for substitution

or other change in the Utilization Plan in writing within 5 working days of receipt of the request.

Where the contractor has established the basis for the substitution to the Tollway's satisfaction, it must make good faith efforts to meet the contract goal by substituting a DBE subcontractor. Documentation of a replacement DBE, or of good faith efforts, must meet the requirements in the Special Provision. If the contract goal cannot be reached and good faith efforts have been made, the contractor may substitute with a non-DBE.

If the contractor plans to hire a subcontractor for any scope of work that was not previously disclosed in the Plan, the contractor must obtain the approval of the Diversity Department to modify the Plan and must make good faith efforts to ensure that DBEs have a fair opportunity to bid on the new scope of work.

If a change order or extra work order is issued by the Tollway or contingency work is authorized, the contractor in ISTHA's discretion may be required to amend its Plan to reflect the recalculated DBE dollars and any percentage change in the goal. The DBE contract goal may change in the Tollway's discretion to reflect a change order or extra work order or the authorization of contingency work.

A new subcontract, a new Form 2025 for the substituted DBE (if applicable) and an amended Plan must be executed and submitted to the Diversity Department within 5 working days of the contractor's receipt of the Tollway's approval for the substitution or other change.

12. Payments

On a fully race- and gender-neutral basis, the Tollway processes construction pay applications every two weeks. This helps to smooth cash flow requirements, thereby supporting small firms' capacities to better function as prime contractors and as subcontractors.

The contractor must submit payment information to the Tollway as directed and maintain a record of payments to DBEs for work performed. The records must be made available to ISTHA for inspection upon request. After the performance of the final item of work or delivery of material by a DBE and final payment to the DBE by the contractor, but not later than 30 calendar days after payment has been made to the contractor for such work or material, the contractor must submit a DBE Final Payment Report (Form 2115) to the Construction Manager's Resident Engineer. If full and final payment has not been made to the DBE, the Report must indicate whether there is a disagreement concerning the final payment or if the contractor believes that the DBE's work has not been satisfactorily completed.

The Tollway may withhold payment to the contractor to enforce the provisions of the Special Provision. Final payment, including retention, is not made until the Contractor submits Form 2115 or as directed by the Tollway.

13. Sanctions

The Tollway periodically reviews the contractor's compliance with the Special Provision and the terms of the contract, including the Plan. The contractor's failure to comply with the Special Provision or its Plan, or to cooperate in providing information regarding its compliance, or the provision of false or misleading information or statements concerning compliance, certification status of subcontractors or suppliers, good faith efforts or any other material fact or representation will constitute a material breach of the contract and may result in damages to the Tollway. Such breach or damages will entitle the Tollway to declare a default, terminate the contract, impose liquidated damages or exercise remedies provided for in the contract or at law or in equity.

In imposing sanctions, the Tollway will consider the *bona fide* efforts of the contractor to meet the DBE goal, its history of good faith efforts on other Tollway contracts, the size of the contract, the degree to which the contractor fell below the DBE goal, and other factors deemed relevant by the Tollway.

The contractor may appeal the decision within 5 working days of its receipt of the written decision by filing an appeal with the Tollway's Sanctions Committee. An appeal may provide additional documentation and/or arguments and request an oral presentation to the Sanctions Committee. The Sanctions Committee will notify the contractor in writing of the final determination and the basis for the determination within 10 working days after receipt of the appeal or after the date of the oral presentation by the contractor, whichever is later. The contractor may appeal an adverse decision within 5 working days of receipt of the final determination to the Executive Director. The Executive Director or his/her designee, who may not be employed within the Diversity Department, may solicit information and shall render a final decision on the appeal within 30 calendar days

C. Business Owner Interviews: Experiences with the DBE Program

To explore the operation of the program elements in actual contract opportunities, we interviewed 123 business owners and trade organization representatives, as well as Tollway staff members, about their experiences and solicited their suggestions for improvements.

1. Networking and training opportunities

DBEs have benefited from ISTHA's outreach efforts and would like more events and opportunities for networking.

[Matchmaking events are good because they] giv[e] companies the opportunity to have conversations with one another, match capabilities, even personalities.

Some professional services and non-construction industry owners found it difficult to access the Tollway's decision makers.

Having some kind of event where we can actually get to know staff would be good, the actual project managers, would be very helpful. Because a lot of times if

they don't know you, you call them and try to get a meeting to do your dog and pony show and they won't meet with you.

There was significant support from DBEs for continued training in how to do business with the Tollway as a prime contractor or consultant.

It would be very helpful if once you are a first time prime, it would be really nice if the Tollway would coach us through the paperwork the first time.

Offer a workshop on the process and how to really succeed through all the paperwork that's necessary to act as a C[onstruction] M[anager]. I'm not sure what it's like for design section engineers, but for CMs, it would be a great.

It is the paperwork.... If [the Tollway] would just coach us ...[about] how to do the paperwork off the clock [then] we aren't wasting all of our profit on our first job [on a cycle of] submittal, review, submittal, review.

2. Contract size and specifications

There was a recognition that the Tollway has made efforts recently to "unbundle" contracts into smaller scopes to facilitate prime contracting opportunities for DBEs.

The Tollway is really working, has listened and is really working at doing things that at least benefits the people in this room. They've unbundled a lot of projects.... All those things are great at helping us build capacity and doing work as a prime is always great because it allows us to go on and get the next job.

They got to break it out of the package.

We should fight for more and more breaking of the contracts down so that there are more prime opportunities at a smaller level and those big boys have all tried to get these contracts to be larger and larger, stressing economies of scale, which are not true.

One small firm had been repeatedly successful in obtaining prime contracts.

As long as the qualifications are there, the Tollway has shown they have no issues giving major projects to smaller firms.

Some larger general contractors cautioned that the nature of the Tollway's contracts militates against unbundling contracts.

The Tollway is not a place to learn. They are very schedule driven. So, it might be a five million dollar contract that if you're working with the city you might have a year and a half to do it. You have three months for the Tollway. Instead of coming out there with 10 people for a year and a half, you need 50 people for three months. That doesn't work for a lot of people.

Because of the state procurement laws and all the paperwork, it's very burdensome for smaller companies. They don't have the overhead that the large primes do to come up with that.... They have these very stringent rules that drive the primes crazy and they have 30 people in their office trying to figure it out.

3. Small Business Enterprise program

There was significant support from DBEs for the use of small business set-asides, whereby only smaller firms would be eligible to submit bids or proposals. Several firms reported they had received prime contracts using this procurement method.

We have gotten contracts with small business set asides. We developed a team of firms that are all small businesses to do that work.

One of the things that's nice about the set aside is that it puts the smaller firm in the lead and then we run the project. We have to learn all that paperwork and stuff right upfront and know how to run a project right upfront. So, it reverses the roles. You may be bringing along a larger firm.

The small business initiative [should be geared towards contracts] in the million dollar range where we can bid it and bond it and things of that nature.

Some non-DBEs also encouraged greater use of small business set-asides.

Use more small business set aside-type stuff and give the small business, in addition to DBEs, opportunities to prime work.

We just can't offer [prime teaming opportunities] to somebody else in terms of a teaming arrangement, so a small business setaside would give us the opportunity to submit as a prime, bring my little buddy [name] here in as a sub. And then maybe in another time, he looks at us a little differently and says, hey [name], you brought us in on this one, we can turn around and bring you in on that one. It gives us the reciprocal opportunity that typically we can't enjoy right now.

4. Qualifications requirements

The requirement that firms be prequalified to do prime contractor work was reported to be a major barrier to the growth and development of DBEs and other small firms.

At IDOT, you have to be prequalified as a general contractor and when you get prequalified as a general contractor, they set a limit for you on how much work you can do for them. And presently I do 10 to 12 million [in annual revenues]. They gave me one million. So, I'm already done ... as a prime contractor.

The Tollway has to take another look at the prequalifications.

Some general contractors stated that the Tollway's reliance on IDOT's standards make it more difficult to meet contract goals.

[There is a gap between] the number of firms that are prequalified to do that kind of work.

Others stated that DBEs need to be more patient about how long it takes to become prequalified and compete against firms that were formed many decades ago.

[It] is going to take time and it's going to take someone who says, I'm tired of working for [name], I want to go out here and do this on my own.... But I know I can't bid to the Tollway tomorrow because I'm a brand new company. I'm going to start working for municipalities and townships doing that type of work and grow.... You can't grow in the prime community overnight.

They have to stick their neck out to get anywhere. Are there people around that are going to do that, that they're in it for the long haul, they're not in it for just to make a few bucks and screw somebody and walk away?

5. Mentor-Protégé Partnership Program

There was a wide consensus that the Tollway's Mentor-Protégé program for design contracts was useful for both prime consultants and DBEs by increasing DBEs' capacities.

[The Mentor-Protégé program has] allow[ed] firms to enhance their prequalification status without already having that status.

The Mentor-Protégé is a good program.

It's been good for us [as prime consultants] because instead of just having this DBE outside of our office completing work for us, it has forced us to have deliverables, to have them in our office working with us, and then kind of just actually mentoring them in person. It's worked out really nice for us.

It gives an opportunity to be more focused in the task.

In terms of the mentoring, we want them as part of the team. We want them to be out in our facilities so that we can truly mentor them. The end product goes through a Q[uality] C[ontrol] process. We make sure before it's turned in that we don't have those hiccups later on that you find out that there wasn't a quality product that was produced by the sub.

One consultant questioned whether DBEs actually increased their skills.

A lot of times it's just mentor-protégé, put it on paper. You help us out. Do you really gain any additional competencies or all that type of stuff? A lot of times you don't. And so I would say what we need is a real partnership between the firms to actually take these firms and teach them how to do certain things.

Several consultants urged the Tollway to revisit the requirement that the protégé perform at least 15 percent of the work of the contract because it limits their ability to use DBEs.

Reducing the percentage would go a long way to get a lot of companies into the program and help them. And that's also one way to get some of the newer companies to get familiar with the paperwork.

The issue is and it holds us back at times is the 15 percent requirement that has to go to the protégé. And on these larger jobs, that's a big chunk of work that there aren't many firms that can accommodate that.

We've never taken advantage of the reduction [in a contract goal available to an approved mentor's use of the protégé]. But on every job we've exceeded it just to help bring up some very good firms. But ... to put all that in one [DBE] firm [because other DBEs are not permitted to county towards the if the protégé is used], as a prime is just too much [risk].

The 15 [percent utilization requirement] is a little bit too large for the formal [program] so that the Tollway should consider reducing the 15 [percent].

Let's just say for round numbers that you're talking about a 10 million dollar contract value on a particular project. For some of these smaller firms, that's a pretty heavy load. Especially when, like we talked about before, there aren't a whole heck of a lot of them out there and in order to be able to do that kind of volume of work in the timeframes we're talking about, their headcount's got to start to creep up. And, you would certainly hope that that's not the only project that they've got.... It starts to become a volume issue where, can they really handle that much. So, the 15 percent becomes limiting as far as the number of DBE firms that are qualified and have the capacity to do a project of that size.

6. Meeting DBE goals at contract award

Most prime consulting firms in the design sector reported they were able to meet contract goals.

I don't think there's an issue.

Nobody's not meeting— if not exceeding— the DBE percentages.

Some consultants experienced challenges meeting goals and working with DBE because of their limited capacities.

At the end of the day, you can bring new firms in but the number of people that have Tollway experience and a solid, solid reputation is limited. And that's what the Tollway is hiring you for.

Now with a long-term program like the Tollway has, I would think that there would be some incentive [for the DBEs] to bring staff on and keep them [which will increase their capacities].

There have been on some of [the DBEs], performance issues. But you have that with big firms too.

Some consultants pointed to the often less than fully defined nature of design contracts as a reason the Tollway needs to be flexible in its approach to evaluating DBE compliance.

The Tollway diversity group probably needs to consider to be more flexible.... When you originally submit your S[tatement] O[f] I[nterest], you put these [DBE attainment] numbers in and they hold them to you. You have no idea scope, fee, breakout of work.... We've all gone through recently negotiations haven't been extremely pleasant with the Tollway necessarily, and positions are cut out and some of those positions are MBE, DBE, WBE. You're not allowed to work with those numbers..... Perhaps a firm's capacity has dried up or the scope changed or whatever the reasons are. There should be flexibility allowed because we're going to have to adjust.... Our intent is to do what we said we're going to do. But, unlike contractors, we don't have a list of items ... that we're going to deal with. We deal with a lot of unknown that we design to and the scope moves around, especially if you're doing planning.

Sometimes the scope of the Tollway project does not allow the prime to bring in a new relationship, because he does not have the time to be able to develop that expertise that a DBE firm needs and also to meet his [schedule].

It's the quality of the staff those firms have now that's the capacity that we're running out. They go out and find the positions after you put them on your team. They don't necessarily have qualified individuals.

The experiences of general contractors that provide construction goods and services were somewhat different. First, several were puzzled about how goals are set on specific projects and frustrated that the goals were too high.

We've asked, how did you [set the contract goal] ... [but] I've never seen any more detailed information.

The prime industry would really appreciate much more quantitative numbers and descriptions of where they come up with their numbers.

Take your blinders off to see what other factors are influencing the marketplace. How big is IDOT's program? How big is Lake County's program? How big are all the counties, municipalities? Is the private market coming back?

A number of general contractors stated that it is more costly and risky to use DBEs.

I overpaid because of the fact that I need to meet a DBE requirement and there's no other way for me to do it

How do we try and attain a 17 percent goal on this job? And this is, in my opinion, the only way to do it: evaluate the low prices and then throw out the low bids and accept the lowest DBE [quote].

While not an easy process, some general contractors had received waivers from the Tollway.

We've submitted waivers on jobs and received them.

Many general contractors stated that the criteria for establishing good faith efforts to meet a goal were too vague. They sought certitude about whether a waiver would be granted.

We live in an objective world. In this highway heavy industry, everything else is low bid. It's very definitive. You're going to get the bid if you're the low or not, other than this issue [of making good faith efforts to reach a contract goal]. And so we are looking for a number for how much over the non-DBE[s price the DBE's price] would be [to get a waiver].

Job number two, we went about it the same way [as job number one], often on the same letting, and applied for a waiver. We received a waiver or a contract modification on this contract and didn't on this one.... We're just walking around in the room blindfolded trying to hit the goal [because no detailed explanation is provided about why or why not a waiver was granted].

And if the head of the DBE department or the head of the Tollway or the head of the City of Chicago changes, [the standards] might change so you're afraid also that you don't know the new guy in there. What's his criteria for a good faith effort? So not only is it not defined, it's so subjective.

Rejecting a DBE's quote based on price was seen as very risky.

He's taking his chance that [the Tollway will] say, you didn't do a good faith effort. You should have used that person. I'm going to throw your bid out and give it to the next person.

What we're doing as an industry ... [is] taking the non-low bid instead of getting the waiver.

To address concerns about DBEs' abilities to perform, one suggestion from some general contractors was for the Tollway to prequalify subcontractors on specific jobs to ensure they can perform.

If the state and all the public agencies that we do business with actually have an insurance program with us through the prequal[ification] program to ensure that

we don't go over our capacity, it seems to me that it would only make sense to carry that through to the next tier so you would have that insurance, if you will, on the subs that are actually doing the work. And it would provide a couple things. One, I think peace of mind to the primes who are actually getting the quotes that they know that subcontractors, and I'm not talking about DBEs, I'm talking about subs across the board, are in the solid financial, project managing, technology capacity to actually perform the work. And also, guarantee that we don't have to guess when we're going over all of our line items as closely as we can.... So, from my perspective it seems to be a logical step and it has nothing to do with how long you've been in business, how big you are, any barriers to the industry. But it actually seems to me that it would ensure an insurance program to allow companies to grow at a safe and stable pace, just as we have. When we first got into the business and started working with the Tollway and with IDOT, we couldn't go out and bid a 50 million dollar job. It wasn't, it wasn't until we were in business for 15, 20 years that we reached that capacity.

If there were a prequalification provision, that would better educate everyone, the agency, the primes, the subs, whether they should be looking at throwing [DBE goal] numbers at 20 jobs on an IDOT letting, or three jobs on a Tollway letting. So, I think there's a different need where a state has a provision that requires writing in [the utilization plan for] DBEs at the time of the bid [rather than permitting DBE compliance to be established after bid submission].

I want to see some analysis by the Tollway, an understanding of what size business a DBE actually has.... Prequal light. An idea that they don't go through the financials and it doesn't need to be a full, in depth prequalification.

Several White, male owners of specialty trade contractors felt their firms were being discriminated against by the DBE program.

Our bid comes in at least 15 percent under the WBE or the DBE for the project and the contractor won't use us, won't file a waiver. They say the Tollway's not going to accept it. So, on the other end of the spectrum, I'm as frustrated the other way. Because if I'm bidding and my number's 15 percent lower- I'm just using that [15 percent] number because that's what I hear- I don't know what the rules are. I should get the job, whether I'm certified or not, because of these waivers. But the G[eneral] C[ontractor]s don't apply for them, therefore I'm booted out.

When are you going to graduate some of these people from their DBE program and when is a non-minority contractor considered a minority? In my business, we're probably one of 30 contractors that do our business and we're probably one of the only non-minority DBE program that's out there.... We're the dumb white guys doing a business in a minority-ridden business.... We're the ones that are getting left out. We're the ones that are the low bids and my [DBE] competitors are getting more money for work that we do.... We do some Tollway work. We do very

little state work. We go to other counties. We go out towards the western suburbs and down south where their percentages are only 5 percent instead of 23 percent.

The burden of the entire program has fallen on our shoulders.

There's no fresh blood. There's no turnover of companies in the system. The DBEs that are there, there's a lot of them that have been DBEs for 20, 30 years.

A few White males stated that race and gender are not barriers to success in the highway industry.

For the first generation guy that started from scratch and a pickup, I can tell you that there are no barriers. There are rules and it's difficult. But it can be done.... You follow the rules which are not different for me than for anybody in this room.... It's easier nowadays to start a firm as a DBE than it is to start it as a regular guy.

There's not this barrier [based on race or gender] in this area that I've seen. We've never done and I've never had anybody suggest it to me, hint about it, think about it. Hey, we're not going to hire them because they're Hispanic. Or we're not going to hire them because they're Black. We're not going to hire them because they're female. I've never heard anything like that.

Another disagreed.

The reason for the DBE [program] was because minorities were not getting contracts. They weren't getting jobs. The unemployment rates in the minority sector are still incredibly high and that's the reason for the DBEs. So, they've tried to rectify that by making [prime firms] get DBEs. So, I would suggest that that probably is still needed. It's actually probably more needed now than ever.

7. Contract performance compliance

Very few DBEs reported that they had been listed on a Tollway construction or design Utilization Plan but not used during contract performance, a common problem at many agencies.

Several general contractors found it difficult to substitute a certified firm listed on the Utilization Plan for poor performance.

It's very difficult to change a DBE. You can get it done ...but the process is just painful and very long for something that seems very obvious.

The job's done and billed before you have a judgment on whether they're going to accept the substitution.

The difference with a non-DBE sub and a DBE sub now with the no "cure" period or the no cure provisions in the bidding systems, is that a non-DBE sub can be very aggressive in their bidding and they can end up having a lot of work. That

when the dust all settles and there's five large contracts that were let and they were low bidder for their item of work on all five contracts, they can then pick and choose Now, as a general contractor, we're not going to take kindly to somebody backing out of that but they can do that. A DBE on the other hand, when they come to us and they give us numbers the night before a bid is due, they also sign a piece of paper that says ... I will do this work for this price.... And so now that DBE can't back out. Because that goes into our record as far as our DBE participation program.... They will be forced by me as the general contractor [to perform at that price] because I have an agreement with them that says that they will do it for this price.

A few prime bidders wanted consequences from the Tollway to a DBE that is unable to perform after being listed on a Plan.

I'd like to see a ramification to [DBEs] walking away from a contract. Because as a non-DBE, if I walked away from a contract ... [the prime contractor] can sue me and there's nothing I can do. You try to sue a DBE you're black[balled]. The Tollway will go after you for trying to sue the DBE and you lose that case.

Several general contractors were concerned about what level of assistance to DBEs during performance is permissible within the DBE program's requirement that the certified firm maintain its independence from the prime contractor. Recent local investigations and prosecutions had created a climate of wariness.

We try to help the DBEs. Because they're out there and they don't have a lot of money.... But they won't let you partner with the DBEs.

Clarify those rules. Oftentimes ... the Tollway, says you can't use that piece of equipment and the DBE comes to us [and says] we're supposed to be out there next week. We want to use your piece of equipment. We always thought we could. And there's a very big disconnect there over whether you can or not [loan the DBE the equipment]. And paying bills for them, joint checks. There's a lot of confusion out there what is acceptable and what is not.

There's some good business practices that we would do if we worked together [but for the program rules].... If a DBE contractor working for me wanted to use one of my facilities to store anything now or ask me to unload anything for them, sign to receive anything in a common yard, I wouldn't do it because I'd be afraid somewhere on the other end to get accused of fraud or getting in the middle of their business. And that's counterintuitive to what you're doing. With good business partners, you want to help them out but you're so afraid of things that we all just do for each other that you're like, I can't do that because someone might take a picture of my machine unloading your material onto the jobsite and next thing I know I was doing your work for you. So there's a lot of that backlash.... We're very, very careful, overly careful, with our [DBE] partners that we've worked with for years, for fear of getting caught in some kind of something that's nothing.

We're all very nervous and unfortunately they have made everybody so worried about fraud they've actually made it more difficult to work with a DBE contractor, a subcontractor, than a non-DBE.

D. Conclusion

Overall, the Tollway implements a DBE program that contains the elements held by the courts to meet the narrow tailoring requirements for race-conscious programs. These include utilizing race- and gender-neutral approaches to increase opportunities; outreach and capacity building efforts to increase DBEs' abilities to work as prime vendors and subcontractors; program eligibility standards that limit the program's remedies to firms likely to be subject to discrimination in its markets; contract goal setting procedures that recognize the scopes of work of the contract and the availability of DBEs to perform those scopes; flexible bid and proposal submission policies and procedures that require individualized consideration of responsiveness and responsibility and permit waivers for making good faith efforts to meet the contract goal; and contract performance monitoring procedures that limit substitutions of DBEs to specific circumstances while providing flexibility for prime contractors.

IV. UTILIZATION, AVAILABILITY AND DISPARITY ANALYSIS FOR THE ILLINOIS TOLLWAY

A. Contract Data Sources and Sampling Method

The Study analyzed contract data for years 2010 through 2012 for the Tollway.

The Study analyzed contract data for the years 2010 through 2012 for the Tollway. In total, we received records for 535 contracts. Of these, 29 were eliminated because there were cancelled contracts, contracts with other governments, duplicate records, etc. From the remaining 506 contracts, we identified 85 contracts with a total award amount of \$9,269,978.56 that were between \$25,000 and \$50,000, and therefore had very little likelihood of subcontracting opportunities. These contracts are included in the final file. For the remaining 421 large contracts with an award amount of \$3,070,071,853.22, we were able to collect subcontract data for 85 percent of the dollars to include in the Final Contract File. The Final Contract File was used to determine the product and geographic market area for the Study; to estimate the utilization of D/M/WBEs on those contracts; and to calculate D/M/WBE availability in ISTHA's marketplace.

B. The Tollway's Product and Geographic Markets

1. The Tollway's Geographic Market

The courts require that a state or local government limit the reach of its race- and gender-conscious contracting program for contracts it funds to its market area.¹⁵¹ While it may be that the agency's jurisdictional borders or other defined area comprise its market area, this element of the analysis must also be empirically established.¹⁵²

To determine the relevant geographic market area, we applied the rule of thumb of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.¹⁵³ Location was determined by ZIP code as listed in the file and aggregated into counties as the geographic unit.

As presented in Table 1, spending in Illinois accounted for 93.9% of all contract dollars paid in the product market. Therefore, Illinois constituted the geographic market area from which we drew our availability data. Table 2 presents data on how the contract dollars were spent across the Tollway's counties.

¹⁵¹ *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).

¹⁵² *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (to confine data to strict geographic boundaries would ignore "economic reality").

¹⁵³ National Disparity Study Guidelines, p. 49.

Table 1: Distribution of Contracts in the Illinois Tollway Product Market, by State

STATE	Pct Total Contract Dollars	STATE	Pct Total Contract Dollars	STATE	Pct Total Contract Dollars
IL	93.900%	IA	0.155%	GA	0.002%
PA	3.228%	MO	0.124%	MN	0.002%
WI	2.314%	MI	0.017%	MS	0.002%
IN	0.244%	VA	0.011%	FL	0.001%

Source: CHA analysis of Illinois Tollway data.

Table 2: Distribution of Contracts in the Illinois Tollway Product Market within Illinois, by County

COUNTY	Pct Total Contract Dollars	COUNTY	Pct Total Contract Dollars
Cook	62.842%	Tazewell	0.070%
Dupage	13.318%	Rock Island	0.053%
Winnebago	6.095%	Grundy	0.047%
Lake	5.096%	Whiteside	0.039%
McHenry	4.437%	Livingston	0.029%
Kane	3.821%	Randolph	0.021%
Stephenson	1.444%	Wabash	0.012%
Sangamon	0.902%	Morgan	0.012%
Dekalb	0.763%	Williamson	0.007%
Boone	0.423%	Ogle	0.005%
Lee	0.346%	Kankakee	0.004%
Champaign	0.119%	Fulton	0.001%

Source: CHA analysis of Illinois Tollway data.

2. The Tollway’s Product Market

A defensible disparity study must determine empirically the industries that comprise the agency’s product or industry market. The accepted approach is to analyze those detailed industries, as defined by 6-digit North American Industry, Classification System (“NAICS”) codes,¹⁵⁴ that make up at least 75 percent of the prime contract and subcontract payments for the Study period.¹⁵⁵

¹⁵⁴ www.census.gov/eos/www/naics.

¹⁵⁵ “Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program,” Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, pp. 50-51 (“National Disparity Study Guidelines”).

Tables 1 through 3 presents the NAICS codes used to define the product market when examining contracts disaggregated by level of contract (*i.e.*, was the firm receiving the contract a prime vendor or a subcontractor); the label for each NAICS code; and the industry percentage distribution of the number of contracts and spending across NAICS codes and funding source.

Table 3: Industry Percentage Distribution of All Contracts by Dollars Paid, Construction and Construction Related Services

NAICS	NAICS Code Description	NAICS PCT	PCT TOTAL DOLLARS
237310	Highway, Street, and Bridge Construction	33.0%	33.0%
541330	Engineering Services	17.9%	50.9%
324121	Asphalt Paving Mixture and Block Manufacturing	12.3%	63.2%
236220	Commercial and Institutional Building Construction	8.5%	71.8%
238210	Electrical Contractors and Other Wiring Installation Contractors	6.1%	77.9%
238910	Site Preparation Contractors	5.6%	83.5%
238190	Other Foundation, Structure, and Building Exterior Contractors	3.9%	87.4%
238990	All Other Specialty Trade Contractors	3.5%	90.9%
237110	Water and Sewer Line and Related Structures Construction	1.4%	92.3%
238110	Poured Concrete Foundation and Structure Contractors	1.4%	93.7%
237130	Power and Communication Line and Related Structures Construction	1.0%	94.6%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.9%	95.5%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.7%	96.2%
541310	Architectural Services	0.7%	96.9%
332322	Sheet Metal Work Manufacturing	0.6%	97.5%
238120	Structural Steel and Precast Concrete Contractors	0.6%	98.1%
561730	Landscaping Services	0.5%	98.6%
327320	Ready-Mix Concrete Manufacturing	0.5%	99.1%
238140	Masonry Contractors	0.5%	99.6%
484110	General Freight Trucking, Local	0.4%	100.0%

Source: CHA analysis of Illinois Tollway data.

Table 4: Industry Percentage Distribution of Prime Contracts by Dollars Paid, Construction and Construction Related Services

NAICS	NAICS Code Description	NAICS PCT	PCT TOTAL DOLLARS
237310	Highway, Street, and Bridge Construction	37.7%	37.7%
541330	Engineering Services	22.9%	60.6%
324121	Asphalt Paving Mixture and Block Manufacturing	18.9%	79.5%
236220	Commercial and Institutional Building Construction	13.6%	93.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	6.6%	99.7%
238990	All Other Specialty Trade Contractors	0.2%	100.0%
238110	Poured Concrete Foundation and Structure Contractors	0.0%	100.0%

Source: CHA analysis of Illinois Tollway data

Table 5: Industry Percentage Distribution of Sub Contracts by Dollars Paid, Construction and Construction Related Services

NAICS	NAICS Code Description	NAICS PCT	PCT TOTAL DOLLARS
237310	Highway, Street, and Bridge Construction	27.7%	27.7%
541330	Engineering Services	12.3%	40.0%
238910	Site Preparation Contractors	11.9%	51.9%
238190	Other Foundation, Structure, and Building Exterior Contractors	8.4%	60.2%
238990	All Other Specialty Trade Contractors	7.2%	67.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	5.6%	73.0%
324121	Asphalt Paving Mixture and Block Manufacturing	4.9%	77.9%
237110	Water and Sewer Line and Related Structures Construction	3.0%	80.9%
238110	Poured Concrete Foundation and Structure Contractors	2.9%	83.8%
236220	Commercial and Institutional Building Construction	2.8%	86.5%
237130	Power and Communication Line and Related Structures Construction	2.0%	88.6%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.8%	90.4%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	1.5%	91.9%
541310	Architectural Services	1.5%	93.4%
332322	Sheet Metal Work Manufacturing	1.3%	94.7%
238120	Structural Steel and Precast Concrete	1.3%	96.0%

	Contractors		
561730	Landscaping Services	1.1%	97.1%
327320	Ready-Mix Concrete Manufacturing	1.0%	98.1%
238140	Masonry Contractors	1.0%	99.1%
484110	General Freight Trucking, Local	0.9%	100.0%

Source: CHA analysis of Illinois Tollway data.

C. The Tollway's Utilization of DBEs in Its Market Areas

The next essential step was to determine the dollar value of the Tollway's utilization of DBEs in its geographic and product market areas, as measured by payments to prime firms and subcontractors and disaggregated by race and gender. Because the Tollway was unable to provide us with full records for payments to prime contractors and subcontractors other than firms certified as DBEs, we contacted the prime vendors to request that they describe in detail their contract and subcontracts, including race, gender and dollar amount paid to date. We used the results of this extensive contract data collection process to assign minority or female status to the ownership of each firm in the contract data file.

Tables 6 presents data on the total contract dollars paid by the Tollway for each NAICS code and the share the contract dollars comprise of spending on construction and construction related services contracts.

Table 6: NAICS Code Distribution of Contract Dollars, Construction and Construction Related Services

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	\$153,956,988	9.1%
237110	Water and Sewer Line and Related Structures Construction	\$25,059,451	1.5%
237130	Power and Communication Line and Related Structures Construction	\$17,190,752	1.0%
237310	Highway, Street, and Bridge Construction	\$555,226,512	32.7%
238110	Poured Concrete Foundation and Structure Contractors	\$24,902,109	1.5%
238120	Structural Steel and Precast Concrete Contractors	\$8,062,504	0.5%
238140	Masonry Contractors	\$8,510,475	0.5%
238190	Other Foundation, Structure, and Building Exterior Contractors	\$70,831,710	4.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$52,416,185	3.1%
238910	Site Preparation Contractors	\$98,894,696	5.8%
238990	All Other Specialty Trade Contractors	\$58,599,402	3.5%

324121	Asphalt Paving Mixture and Block Manufacturing	\$222,516,188	13.1%
327320	Ready-Mix Concrete Manufacturing	\$8,866,253	0.5%
332322	Sheet Metal Work Manufacturing	\$11,033,581	0.7%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	\$12,764,028	0.8%
484110	General Freight Trucking, Local	\$7,558,328	0.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$15,540,628	0.9%
541310	Architectural Services	\$12,743,436	0.8%
541330	Engineering Services	\$323,445,413	19.1%
561730	Landscaping Services	\$9,112,423	0.5%
TOTAL		\$1,697,231,062	100.0%

Source: CHA analysis of Illinois Tollway data.

Tables 7 through 10 also present the paid contract dollars (total dollars and share of total dollars) by NAICS codes for the construction and construction related services. We do not include Native Americans in these tables because these firms received no dollars.

Table 7: Distribution of Contract Dollars by Race and Gender, Construction and Construction Related Services (total dollars)

NAICS	Black	Hispanic	Asian	White Female	Non-DBE
236220	0	14,985,524	825,974	750,466	137,395,024
237110	857,148	784,271	0	41,854	23,376,178
237130	0	12,806,864	4,083,081	0	300,806
237310	2,354,322	28,183,825	0	26,217,187	498,471,178
238110	5,532,226	0	0	7,700,699	11,669,184
238120	0	2,899,340	0	4,337,858	825,306
238140	0	8,365,566	0	0	144,909
238190	0	70,708,657	0	123,053	0
238210	750,000	458,508	0	950,502	50,257,174
238910	0	5,772,173	933,564	459,608	91,729,352
238990	0	0	189,861	3,384,063	55,025,478
324121	0	0	0	0	222,516,188
327320	0	7,124,866	0	0	1,741,387
332322	0	10,897,246	0	118,680	17,654
423510	0	0	12,586,539	0	177,489
484110	0	2,006,037	0	4,603,351	948,939
484220	95,500	15,414,828	0	0	30,300
541310	0	4,603,283	3,715,035	4,420,918	4,200
541330	9,582,765	6,722,427	51,381,742	9,605,762	246,152,717
561730	0	3,304,482	0	2,693,117	3,114,824
TOTAL	19,171,961	195,037,897	73,715,796	65,407,118	1,343,898,287

Source: CHA analysis of Illinois Tollway data.

**Table 8: Distribution of Contract Dollars by Race and Gender,
Construction and Construction Related Services
(total dollars)**

NAICS	Black	Hispanic	Asian	White Female	Non-DBE
236220	0.00%	9.73%	0.54%	0.49%	89.24%
237110	3.42%	3.13%	0.00%	0.17%	93.28%
237130	0.00%	74.50%	23.75%	0.00%	1.75%
237310	0.42%	5.08%	0.00%	4.72%	89.78%
238110	22.22%	0.00%	0.00%	30.92%	46.86%
238120	0.00%	35.96%	0.00%	53.80%	10.24%
238140	0.00%	98.30%	0.00%	0.00%	1.70%
238190	0.00%	99.83%	0.00%	0.17%	0.00%
238210	1.43%	0.87%	0.00%	1.81%	95.88%
238910	0.00%	5.84%	0.94%	0.46%	92.75%
238990	0.00%	0.00%	0.32%	5.77%	93.90%
324121	0.00%	0.00%	0.00%	0.00%	100.00%
327320	0.00%	80.36%	0.00%	0.00%	19.64%
332322	0.00%	98.76%	0.00%	1.08%	0.16%
423510	0.00%	0.00%	98.61%	0.00%	1.39%
484110	0.00%	26.54%	0.00%	60.90%	12.55%
484220	0.61%	99.19%	0.00%	0.00%	0.19%
541310	0.00%	36.12%	29.15%	34.69%	0.03%
541330	2.96%	2.08%	15.89%	2.97%	76.10%
561730	0.00%	36.26%	0.00%	29.55%	34.18%
TOTAL	1.13%	11.49%	4.34%	3.85%	79.18%

Source: CHA analysis of Illinois Tollway data.

**Table 9: Distribution of Contract Dollars by Race and Gender,
Construction and Construction Related Services
(MBE, White Female, Non-DBE)
(total dollars)**

NAICS	MBE	White Female	Non-DBE	Total
236220	15,811,498	750,466	137,395,024	153,956,988
237110	1,641,419	41,854	23,376,178	25,059,451
237130	16,889,945	0	300,806	17,190,752
237310	30,538,147	26,217,187	498,471,178	555,226,512
238110	5,532,226	7,700,699	11,669,184	24,902,109
238120	2,899,340	4,337,858	825,306	8,062,504
238140	8,365,566	0	144,909	8,510,475
238190	70,708,657	123,053	0	70,831,710
238210	1,208,508	950,502	50,257,174	52,416,185
238910	6,705,737	459,608	91,729,352	98,894,696
238990	189,861	3,384,063	55,025,478	58,599,402
324121	0	0	222,516,188	222,516,188
327320	7,124,866	0	1,741,387	8,866,253

332322	10,897,246	118,680	17,654	11,033,581
423510	12,586,539	0	177,489	12,764,028
484110	2,006,037	4,603,351	948,939	7,558,328
484220	15,510,328	0	30,300	15,540,628
541310	8,318,318	4,420,918	4,200	12,743,436
541330	67,686,934	9,605,762	246,152,717	323,445,413
561730	3,304,482	2,693,117	3,114,824	9,112,423
TOTAL	287,925,654	65,407,118	1,343,898,287	1,697,231,062

Source: CHA analysis of Illinois Tollway data.

Table 10: Distribution of Contract Dollars by Race and Gender, Construction and Construction Related Services (total dollars)

NAICS	Black	Hispanic	Asian	White Female	Non-DBE
541511	\$0	\$0	\$272,683	\$273,199	\$359,692
541512	\$0	\$3,612,491	\$7,558,301	\$0	\$13,871,052
541611	\$2,906,016	\$0	\$0	\$3,203,413	\$35,726,337
561311	\$0	\$0	\$0	\$13,866,245	\$0
561990	\$10,317	\$0	\$0	\$0	\$27,444,309
TOTAL	\$2,916,333	\$3,612,491	\$7,830,984	\$17,342,857	\$77,401,390

Source: CHA analysis of Illinois Tollway data.

D. The Availability of Disadvantaged Business Enterprises in the Illinois Tollway Markets

1. Methodological Framework

Estimates of the availability of minority- and women-owned firms in the Tollway’s market area are a critical component of the analysis of possible barriers to equal opportunities to participate in the Tollway’s contracting activities. These availability estimates are compared to the utilization percentage of dollars received by Disadvantaged Business Enterprises (“DBEs”), Minority-Owned Business Enterprises (“MBEs”) and Woman-Owned Business Enterprises (“WBEs”), collectively, “DBEs” or “M/WBES,” to examine whether DBEs receive parity.¹⁵⁶ Availability estimates are also crucial for the Tollway to set narrowly tailored contract goals.

¹⁵⁶ For our analysis, the terms “DBE” and “M/WBE” include firms that are agencies recognized by the Tollway and firms that are not certified. As discussed in Chapter II, the inclusion of all DBEs in the pool casts the broad net approved by the courts that supports the remedial nature of the programs. See *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007) (The “remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net.”).

We applied the “custom census” approach to estimating availability. As recognized by the National Model Disparity Study Guidelines,¹⁵⁷ this methodology 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 Disadvantaged Business Enterprises) and the denominator (*e.g.*, registered vendors).
- Next, by examining a comprehensive group of firms, it “casts a broader net” beyond those known to the agency. As recognized by the Seventh Circuit, this comports with the remedial nature of the DBE program by seeking to bring in businesses that have historically been excluded. A custom census is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in the agency’s markets areas that have not been able to access its opportunities.
- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications and experience are all elements of business success where discrimination would be manifested. Most courts have held that the results of discrimination— which impact factors affecting capacity— should not be the benchmark for a program designed to ameliorate the effects of discrimination. They have acknowledged that minority and women firms may be smaller, newer, and otherwise less competitive than non-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.¹⁵⁸
- Fourth, it has been upheld by every court that has reviewed it, including in the successful defenses of the Illinois Department of Transportation’s DBE program,¹⁵⁹ and the M/WBE construction program for the City of Chicago.¹⁶⁰

2. Estimation of DBE Availability

To conduct the custom census for the Tollway, we took the following steps:

1. Created a database of representative, recent, and complete Tollway contracts;
2. Identified the Tollway’s relevant geographic market by counties;

¹⁵⁷ “Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program,” the National Cooperative Highway Research Program Report 644, Transportation Research Board of the National Academy of Sciences (hereinafter “National Study Guidelines”), pp.57-58.

¹⁵⁸ For a detailed discussion of the role of capacity in disparity studies, see the National Disparity Study Guidelines, Appendix B, “Understanding Capacity.”

¹⁵⁹ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).

¹⁶⁰ *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003).

3. Identified the Tollway's relevant product market by 6-digit NAICS codes;
4. Counted all businesses in the relevant markets using Dun & Bradstreet/Hoovers databases;
5. Identified listed minority-owned and women-owned businesses in the relevant markets; and
6. Assigned ownership status to all other firms in the relevant markets.

As described in sections B and C of this Chapter, we first determined the Tollway's market area and its utilization of firms by 6-digit NAICS codes, aggregated industries and total dollars spent. Based on these results, the share of total dollars spent in each NAICS code for firms in the market area was used to create the overall DBE availability estimate for each NAICS code, the availability estimates for each aggregated industry and the availability estimates for all industries.

We purchased the firm information from Hoovers for the firms in the NAICS codes located in the Tollway's market area. Hoovers, a Dun & Bradstreet company, maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including location and detailed industry codes, and is the broadest publicly available data source for firm information.

In past years, the data from Hoovers (then Dun & Bradstreet) contained detailed information on the racial identity of the owner(s) of firm. However, recently Hoovers changed its practice and currently, the data simply identify a firm as being minority-owned.¹⁶¹ This change required us to revise our approach to determining the racial identity of firms' ownership so as to provide narrowly tailored and accurate analyses concerning possible disparity in an agency's contracting practices.

To provide race detail and improve the accuracy of the race and sex assignments, we created a Master D/M/WBE Directory that combined the results of an exhaustive search for directories and other lists containing information about minority and women-owned businesses. This included the State of Illinois Unified Certification Program, the City of Chicago, Cook County, Central Management Services, the Small Business Administration and many others. In total, we contacted 115 organizations for this Study and received 33 useable directories. All of the directories were keypunched and/or cleaned as necessary regarding firm names, contact information and race and gender. The directories were merged into one master list that eliminated duplicate listings of firms while maintaining all relevant information for each firm. The resulting list of minority- and women-owned firms is comprehensive and provides data to supplement the Hoovers database by disaggregating the broad category of "minority-owned" into specific racial groupings. The list of these groups is provided in Appendix A.

We used information from the Master Directory to estimate the specific racial identity of firms in the Hoovers database that are listed as minority-owned. The process involved the following steps:

¹⁶¹ The variable is labeled: "Is Minority Owned" and values for the variable can be either "yes" or "no".

1. Sort Hoovers by the 6-digit NAICS codes that comprise the Tollway’s product market area;
2. Identify the number of minority-owned firms in these NAICS codes;
3. Sort the Master Directory by each 6-digit NAICS code in the Tollway’s product market area;
4. Determine the number of firms in each NAICS code that are minority owned (some firms in the Master Directory are woman-owned firms);
5. Determine the percentage of the minority-owned firms that are owned by:
 - a. Blacks
 - b. Hispanics
 - c. Asians
 - d. Native Americans; and
6. Apply these percentages to the number of minority-owned firms in Hoovers.

Below is an example of how this process works after Hoovers and the Master Directory have been sorted and the number of minority-owned firms in each NAICS code has been identified in Hoovers:

1. Hoovers data base (basic counts in original)

NAICS	Is Minority Owned	Total Firms (Overall)
99999	200	2000

2. Master Directory (basic count in original)

NAICS	Black	Hispanic	Asian	Native American	Total
99999	40	20	4	16	80

3. Master Directory (percentages)

NAICS	Black	Hispanic	Asian	Native American	Total
99999	50%	25%	5%	20%	100%

4. Hoovers data base (with Master Directory percentages applied)

NAICS	Black	Hispanic	Asian	Native American	Is Minority-Owned	Total Firms (Overall)
99999	100	50	10	40	200	2000

An important element to determining availability is to properly assign a race and gender label to each firm owner. As discussed above, we took the answers that Hoovers provides to two broad questions (“Is the firm minority-owned” and “Is the firm female-owned”) and disaggregated the responses to the “minority owned” question into specific racial categories. However, another concern is that firm ownership has been racially misclassified. There can be three sources of the misclassification: 1. A firm that has been

classified as non-DBE owned is actually DBE owned. 2. A firm that has been classified as DBE owned is actually non-DBE owned. 3. A firm that has been classified as a particular type of DBE firm (e.g., Black) is actually another type of DBE firm (e.g., Hispanic).

The best way to address these potential sources of misclassification is through a telephone survey of a stratified random sample of firms. To ensure an “apples to apples” comparison, we used the classification adjustments from the Tollway’s Availability Study, discussed in Chapter VI.¹⁶²

Based upon the results of these classifications and further assignments, we estimated the availability of DBEs as a percentage of total firms. DBE unweighted availability is defined as the number of DBEs divided by the total number of firms in the Tollway’s market area. Table 10 presents data on the unweighted availability by race and gender and by NAICS codes for all industries, the construction and construction related services sector and other services in the product market.

**Table 10: Unweighted Availability,
Construction and Construction Related Services**

NAICS	Black	Hispanic	Asian	Native American	White Female	DBE	Non-DBE	TOTAL
236220	12.05%	6.20%	4.81%	0.42%	11.41%	34.89%	65.11%	100.00%
237110	7.37%	4.16%	3.01%	0.29%	17.36%	32.20%	67.80%	100.00%
237130	21.15%	6.68%	6.73%	0.39%	20.03%	54.97%	45.03%	100.00%
237310	10.20%	5.61%	3.34%	0.25%	10.50%	29.90%	70.10%	100.00%
238110	9.51%	4.78%	3.34%	0.17%	7.73%	25.53%	74.47%	100.00%
238120	14.11%	6.82%	5.02%	0.35%	19.95%	46.24%	53.76%	100.00%
238140	7.46%	4.43%	3.37%	0.15%	8.00%	23.41%	76.59%	100.00%
238190	12.03%	6.42%	4.24%	0.48%	19.04%	42.20%	57.80%	100.00%
238210	8.40%	4.29%	3.56%	0.17%	10.29%	26.72%	73.28%	100.00%
238910	7.36%	4.29%	3.14%	0.24%	9.23%	24.25%	75.75%	100.00%
238990	6.59%	3.96%	3.18%	0.18%	7.83%	21.73%	78.27%	100.00%
324121	4.89%	3.97%	2.52%	0.13%	10.61%	22.12%	77.88%	100.00%
327320	5.16%	4.24%	2.70%	0.15%	8.28%	20.52%	79.48%	100.00%
332322	7.86%	6.56%	4.16%	0.35%	16.57%	35.50%	64.50%	100.00%
423510	7.05%	4.22%	3.70%	0.16%	7.34%	22.47%	77.53%	100.00%
484110	8.13%	4.84%	3.87%	0.20%	6.97%	24.02%	75.98%	100.00%
484220	13.76%	15.26%	3.05%	0.13%	15.50%	47.71%	52.29%	100.00%
541310	7.29%	4.33%	4.25%	0.17%	10.10%	26.14%	73.86%	100.00%
541330	8.81%	4.64%	6.81%	0.14%	8.64%	29.03%	70.97%	100.00%
561730	6.88%	4.13%	3.06%	0.17%	7.41%	21.66%	78.34%	100.00%
TOTAL	8.35%	4.80%	3.91%	0.20%	9.07%	26.33%	73.67%	100.00%

Source: CHA analysis of Illinois Tollway data.

¹⁶² *Race, Sex, and Business Enterprise: Evidence from the State of Illinois and the Chicago Metropolitan Area*, NERA Economic Consulting, 2006.

To further meet the constitutional requirement that the availability estimates that will be used to set goals are narrowly tailored, we then weighted the availability estimate for each of the aggregated industries in the NAICS codes by the share of the agency's spending in each code. Table 11 presents these weights and Table 12 presents the final estimates of the weighted averages of all the individual 6-digit level availability estimates in the Tollway's market area.

Table 11: Share of Tollway Spending by NAICS Code, Construction and Construction Related Services

NAICS	NAICS Code Description	Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	9.1%
237110	Water and Sewer Line and Related Structures Construction	1.5%
237130	Power and Communication Line and Related Structures Construction	1.0%
237310	Highway, Street, and Bridge Construction	32.7%
238110	Poured Concrete Foundation and Structure Contractors	1.5%
238120	Structural Steel and Precast Concrete Contractors	0.5%
238140	Masonry Contractors	0.5%
238190	Other Foundation, Structure, and Building Exterior Contractors	4.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	3.1%
238910	Site Preparation Contractors	5.8%
238990	All Other Specialty Trade Contractors	3.5%
324121	Asphalt Paving Mixture and Block Manufacturing	13.1%
327320	Ready-Mix Concrete Manufacturing	0.5%
332322	Sheet Metal Work Manufacturing	0.7%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.8%
484110	General Freight Trucking, Local	0.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.9%
541310	Architectural Services	0.8%
541330	Engineering Services	19.1%
561730	Landscaping Services	0.5%
TOTAL		100.0%

Source: CHA analysis of Illinois Tollway data.

**Table 12: Aggregated Weighted Availability,
Construction and Construction Related Services**

Black	Hispanic	Asian	Native American	White Female	DBE	Non-DBE	Total
9.12%	5.16%	4.10%	0.23%	10.63%	29.24%	70.76%	100.00%

Source: CHA analysis of Illinois Tollway data.

E. Analysis of Race and Gender Disparities in the Illinois Tollway’s Utilization of Disadvantaged Business Enterprises

To meet the strict scrutiny requirement that the Tollway consider evidence of disparities to establish its compelling interest in remedying discrimination in its market area, we next calculated disparity ratios for total DBE utilization compared to the total weighted availability of DBEs, measured in dollars paid. Tables 13a through 13c provide the results of our analysis.

A “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80 percent of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.¹⁶³ A statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone. A more in depth discussion of statistical significance is provided in Appendix D.

Table 13 presents the results of this disparity analysis by demographic group. Blacks, Native Americans and White females, and DBEs as a group, continue to suffer large disparities in utilization on all industry sectors combined, and on construction and construction-related contracts, even with the application of the Tollway’s remedial efforts. These results support the inference that barriers based on race and gender continue to impede opportunities on the full range of Tollway projects for DBEs. Without the continued implementation of race- and gender-conscious measures, it is likely that these identified disparities would continue and worsen, suggesting that the Tollway would then function as a passive participant in marketplace discrimination.

**Table 13: Disparity Ratios by Demographic Group,
Construction and Construction Related Services**

Demographic Group	Disparity Ratio
Black	13.41%*
Hispanic	213.31%
Asian	110.07%
Native American	0.00%*

¹⁶³ See U.S. Equal Opportunity Employment Commission regulation, 29 C.F.R. § 1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

White Female	43.10%*
DBE	72.91%*
Non-DBE	111.19%

Source: CHA analysis of Illinois Tollway data.

* Indicates substantive significance

V. Analysis of Disparities in the Illinois Construction Economy

A. Introduction

Nobel 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.¹⁶⁴

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

A key element to determine the need for government intervention through contract goals in the sectors of the economy where the Tollway procures goods and services is an analysis of the extent of disparities in those sectors independent of the agency's intervention through its contracting affirmative action programs. The courts have repeatedly held that analysis of disparities in the rates at which M/WBEs in the government's markets form businesses compared to similar non-M/WBEs, their earnings from such businesses, and their access to capital markets are highly relevant to the determination whether the market functions properly for all firms regardless of the race or gender of their ownership.¹⁶⁵ These analyses contributed to the successful defense of Chicago's construction program.¹⁶⁶ As explained by the Tenth Circuit, this type of evidence

¹⁶⁴Arrow, Kenneth J., "What Has Economics to say about racial discrimination?", *Journal of Economic Perspectives*, (1998), 12(2), pp. 91-100.

¹⁶⁵ See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs.

¹⁶⁶ *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) (holding City of Chicago's M/WBE program for local construction contracts met compelling interest using this framework).

demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.... The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.¹⁶⁷

Business discrimination studies and lending studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. "Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts."¹⁶⁸ Despite the contentions of plaintiffs that possibly dozens of factors might influence the ability of any individual to succeed in business, the courts have rejected such impossible tests and held that business formation studies are not flawed because they cannot control for subjective descriptions such as "quality of education," "culture" and "religion."

For example, in unanimously upholding the USDOT DBE Program, the courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.¹⁶⁹ The Eighth Circuit Court of Appeals took a "hard look" at the evidence Congress considered, and concluded that the legislature had

¹⁶⁷ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1169 (10th Cir. 2000), *cert. granted*, 532 U.S. 941, *then dismissed as improvidently granted*, 534 U.S. 103 (2001) ("*Adarand VII*").

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *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*").

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.¹⁷⁰

To conduct this type of court-approved economy-wide analysis, we utilized U.S. Bureau of the Census datasets to address the central question whether construction and CRS firms owned by non-Whites and White women face disparate treatment in the Tollway's marketplace.¹⁷¹

We explored the existence of any disparities by analyzing two datasets, each of which permits examination of the issue from a unique vantage point.

- The Census Bureau's *Survey of Business Owners* allows us to examine disparities using individual firms as the basic unit of analysis.
- The Census Bureau's *American Community Survey* allows us to examine disparities using individual entrepreneurs as the basic unit of analysis.

Using both data sets, we found disparities for minorities and women across indices in Tollway's construction and CRS marketplace.

B. Summary of Findings

1. Disparities in Firm Sales and Payroll

One way to measure equity is to examine the share of total sales and/or payroll a group has relative to its share of total firms in that sector. Parity would be represented by the ratio of sales or payroll share over the share of total firms equaling 100% (*i.e.*, a group has 10% of total sales and comprises 10% of all firms.) A ratio that is less than 100% indicates an underutilization of a demographic group, and a ratio of more than 100% indicates an overutilization of a demographic group. Tables 1 and 2 present data from the Census Bureau's Survey of Business Owners ("SBO") that indicate underutilization of non-White firms when examining all three measures of firm utilization in the construction

¹⁷⁰ *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *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.").

¹⁷¹ While this is often described as a "private sector analysis," a more accurate description is an "economy-wide" analysis because expenditures by the public sector are included in the Census databases.

and professional, scientific, and technical services industries.¹⁷² White women were underutilized when examining all three measures except for the ratio of sales to the number of firms for all firms in the construction industry.¹⁷³

**Table 1. Disparity Ratios of Firm Utilization Measures
Construction**

	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
Non-Whites	34.2%	71.4%	91.3%
White Women	102.6%	81.4%	97.2%
Not Non-White/Not White Women	108.7%	103.7%	100.9%

Source: CHA Calculations from Survey of Business Owners

**Table 2. Disparity Ratios of Firm Utilization Measures
Professional, Scientific, and Technical Services**

	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
Non-White	57.2%	91.8%	96.3%
White Women	50.4%	59.2%	80.2%
Not Non-White/Not White Women	129.1%	110.9%	103.5%

Source: CHA Calculations from Survey of Business Owners

2. Disparities in Business Formation

A second method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. We developed these business formation rates for construction and CRS using data from the U.S. Bureau of the Census' American Community Survey ("ACS").¹⁷⁴ Tables 3 and 4 present these results. These

¹⁷² The SBO does not break out construction related services separately.

¹⁷³ The SBO data available via American Fact Finder do not permit the use of regression analysis on these results.

¹⁷⁴ In contrast to the SBO data, data from the ACS provides sufficient detail to identify the construction related services industry.

tables indicate that White men have higher business formation rates compared to non-Whites and White women. Tables 5 and 6 explore the same question but utilize multiple regression analysis. Multiple regression statistical techniques allowed us to examine the impact of race and gender on economic outcome while controlling for other factors, such as education, that might impact outcomes.¹⁷⁵ These tables indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men. For instance, Blacks are 8.0% less likely to form a business compared to White men after other explanatory variables are controlled in the construction industry. These tables reinforce the finding that there are significant differences in the rate of non-Whites and White women to form business compared to the rate of White men. These differences support the inference that M/WBEs suffer major barriers to equal access to entrepreneurial opportunities in the Illinois construction and CRS sectors.

**Table 3. Business Formation Rates
Construction**

Demographic Group	Business Formation Rates
Black	19.0%
Latino	11.1%
Native American	22.3%
Asian/Pacific Islander	18.2%
Other	1.5%
Non-White	13.2%
White Women	6.9%
Non-White Male	13.7%
White Male	22.6%

Source: CHA calculations from the American Community Survey

**Table 4. Business Formation Rates
Construction Related Services**

Demographic Group	Business Formation Rates
Black	4.6%
Latino	4.2%
Native American	0.0%

¹⁷⁵ See Section D and Appendix B for more information on multiple regression statistical analysis.

Asian/Pacific Islander	3.9%
Other	0.0%
Non-White	4.1%
White Women	8.3%
Non-White Male	6.3%
White Male	10.9%

Source: CHA calculations from the American Community Survey

Table 5. Business Formation Probability Differentials for Selected Groups Relative to White Men Construction

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-8.0%***
Latino	-7.7%***
Native American	-8.5%***
Asian/Pacific Islander	-0.8%***
Other	-3.0%***
White Women	-2.3%***

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

Table 6. Business Formation Probability Differentials for Selected Groups Relative to White Men Construction Related Services

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-6.2%***
Latino	-1.3%***
Native American	---
Asian/Pacific Islander	-5.5%***
Other	---
White Women	-0.2%***

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

3. Disparities in Wages and Business Earnings

A third way to measure equity is to examine how the economic utilization of particular demographic groups compares to White men. Using multiple regression techniques and data from the ACS, we found that Blacks, Latinos, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men: controlling for other factors relevant to business success, wages and business earnings were lower for these groups compared to White men for the construction and CRS industries.¹⁷⁶ We report wages and business earnings because disparities in wages and business earnings can lead to disparities in business outcomes. These findings are presented in Tables 7 and 8. For example, when the table indicates that the wage differential between Blacks and White men in construction is -51.0%, this means that wages received by Blacks are 51.0% less than wages received by similar White men. Because of these disparities, the rates at which these groups formed businesses were lower than the business formation rate of similarly-situated White men.

**Table 7. Economic Outcome Differentials of Minorities and White Women Relative to White Males
Construction**

Demographic Group	Wages Differentials Relative to White Men (% Change)	Business Earnings Relative to White Men (% Change)
Black	-51.0%***	-26.3%*
Latino	-13.3%***	-6.1%***
Native American	-36.0%***	-25.8%***
Asian/Pacific Islander	-51.5%***	-10.0%**
Other	-13.3%***	0.0%
White Women	-45.0%**	-19.4%**

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

** indicates statistical significance at the 0.01 level

* indicates statistical significance at the 0.005 level

¹⁷⁶ There were a few exceptions in examining business earnings where the coefficient was 0.0%.

**Table 8. Economic Outcome Differentials of Minorities and White Women Relative to White Males
Construction Related Services**

Demographic Group	Wages Differentials Relative to White Men (% Change)	Business Earnings Relative to White Men (% Change)
Black	-49.2%**	-57.7%***
Latino	-20.2%***	0.0%
Native American	-28.1%***	0.0%
Asian/Pacific Islander	-19.0%***	-222.6%*
Other	-13.0%*	0.0%
White Women	-33.8%***	-60.8%***

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

** indicates statistical significance at the 0.01 level

* indicates statistical significance at the 0.005 level

Overall, the results of our analyses of the Illinois construction and CRS economy demonstrate that minorities and White women continue to face race- and gender-based barriers to equal opportunities as firm owners, and to equal opportunities to earn wages and salaries that impact their ability to form firms and to earn income from those firms. While not dispositive, this suggests that absent some affirmative intervention in the current operations of the Illinois marketplace, the Tollway will function as a passive participant in these potentially discriminatory outcomes.¹⁷⁷

C. Disparate Treatment in the Marketplace: Evidence from the Census Bureau’s 2007 Survey of Business Owners

Every five years, the Census Bureau administers the *Survey of Business Owners* (“SBO”) to collect data on particular characteristics of businesses that report to the Internal Revenue Service receipts of \$1,000 or more.¹⁷⁸ The 2007 SBO was released on August 16, 2012, so our analysis reflects the most current data available. The SBO

¹⁷⁷ Various appendices to this Chapter contain additional data and methodological explanations. Appendix A provides a “Further Explanation of the Multiple Regression Analysis.” Appendix B provides a “Further Explanation of Probit Regression Analysis.” Appendix C discusses the meaning and role of “Significance Levels.” Appendix D provides detailed “Additional Data from the Analysis of the Survey of Business Owners.” Appendix E provides “Additional Data from the Analysis of American Community Survey.”

¹⁷⁸ See <http://www.census.gov/econ/sbo/about.html> for more information on the Survey.

collects demographic data on business owners disaggregated into the following groups:^{179,180}

- Non-Hispanic Blacks
- Latinos
- Non-Hispanic Native Americans
- Non-Hispanic Asians
- Non-Hispanic White Women
- Non-Hispanic White Men
- Firms Equally Owned by Non-Whites and Whites
- Firms Equally Owned by Men and Women
- Firms where the ownership could not be classified
- Publicly-Owned Firms

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.

To examine those sectors in which the Tollway purchases, we analyzed economy-wide SBO data on the construction and professional, scientific and technical services sectors. However, the nature of the SBO 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 2-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’s contract data in Chapter IV, where we are able to determine sectors at the 6-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.¹⁸¹ We therefore report 2-digit data.

Table 9 presents information on which NAICS codes were used to define each sector. Data are not available at the sub-state level.

¹⁷⁹ Race and gender labels reflect the categories used by the Census Bureau.

¹⁸⁰ 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 Latino.

¹⁸¹ Even with these broad sector definitions, there was an insufficient number of Native American owned firms to perform our analysis on this demographic group.

Table 9. 2-Digit NAICS Code Definition of Sector

SBO Sector Label	2-Digit NAICS Codes
Construction	23
Professional, Scientific, and Technical Services ¹⁸²	54

The balance of this Chapter section reports the findings of the SBO analysis. For each sector, we present data describing the sector and report disparities within the sector.

1. Construction

The first analysis examines data for businesses in the construction industry in the state of Illinois. Table 10 presents data on the percentage share that each group has of the total of each of the following six business outcomes:

- The number of all firms
- The sales and receipts of all firms
- 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 employers firms

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

- Black
- Latino
- Native American
- Asian

Panel B of Table 10 presents data for six types of firm ownership:

- Non-White
- White Women
- White Men
- Equally non-Whites and Whites
- Equally women and men
- Firms that are publicly owned or not classifiable

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

¹⁸² 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.

equally owned by non-Whites and Whites and equally owned by men and women are classified as equally owned by non-Whites and Whites.¹⁸³

**Table 10. Demographic Distribution of Sales and Payroll Data
– All Firms
Construction, 2007**

	Total Number of Firms (All Firms)	Sales & Receipts - All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	3.5%	0.9%	0.8%	0.8%	1.0%	0.9%
Latino	6.0%	1.8%	3.2%	1.6%	2.6%	2.1%
Native American	0.4%	0.1%	0.2%	0.1%	0.1%	0.1%
Asian	1.0%	0.5%	0.8%	0.5%	0.6%	0.6%
Panel B: Distribution of All Firms						
Non-White	10.9%	3.2%	4.6%	2.9%	4.0%	3.6%
White Women	7.5%	6.5%	9.2%	6.5%	9.3%	8.8%
White Men	66.0%	65.5%	62.8%	65.5%	63.5%	64.6%
Equally Non-White & White	---	---	---	---	---	---
Equally Women & Men	13.0%	7.9%	17.5%	7.0%	9.9%	7.8%
Firms Not Classifiable	2.1%	16.8%	5.8%	18.0%	13.1%	15.0%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

Since the central issue is the possible disparate treatment of non-White and White women firms, Table 11 removes the non-classifiable firms and re-aggregates the three groups– White men; equally non-White and White; and equally women and men; – into one group: Not Non-White/Not White Women.¹⁸⁴

¹⁸³ Some of the figures in Panel B may not correspond to the related figures in Panel A because of discrepancies in how the SBO reports the data.

¹⁸⁴ While a cumbersome nomenclature, it is important to remain clear that this category includes firms other than those identified as owned by White men.

**Table 11. Demographic Distribution of Sales and Payroll Data
All Classifiable Firms
Construction**

	Total Number of Firms (All Firms)	Sales & Receipts - All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	3.6%	1.1%	0.9%	1.0%	1.1%	1.1%
Latino	6.1%	2.1%	3.4%	1.9%	3.0%	2.5%
Native American	0.4%	0.2%	0.2%	0.1%	0.1%	0.1%
Asian	1.0%	0.7%	0.8%	0.6%	0.7%	0.7%
Panel B: Distribution of All Firms						
Non-Whites	11.1%	3.8%	4.9%	3.5%	4.6%	4.2%
White Women	7.6%	7.8%	9.7%	7.9%	10.7%	10.4%
Not Non-White/Not White Women	81.3%	88.4%	85.4%	88.6%	84.6%	85.4%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

We then present the shares each group has of the six indicators of firm utilization. These data were then used to calculate three disparity ratios, presented in Table 12:

- 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.

For example, the disparity ratio of sales and receipts share for all firms over the share of total number of all firms for Black-owned firms is 30.6% (as shown in Table 12). This is derived by taking the Black share of sales and receipts for all firms (1.1%) and dividing it by the Black share of total number of all firms (3.6%) that are presented in Table 11. If Black-owned firms earned a share of sales equal to their share of total firms, the disparity would have been 100%. An index less than 100 percent 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 percent" rule that a

ratio less than 80 percent presents a *prima facie* case of discrimination.¹⁸⁵ Except for the Black ratio of payroll to the number of employer firms, all disparity ratios for non-White firms and White women firms are below this threshold.¹⁸⁶

Of the 15 disparity ratios for non-White firms and White women firms presented in Table 12, 9 fall under the 80% threshold. Of the 3 disparity ratios for White women firms, none fall under the 80% threshold.

**Table 12. Disparity Ratios – Aggregated Groups
Construction**

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
Panel A: Disparity Ratios for Non-White Firms			
Black	30.6%	111.1%	100.0%
Latino	34.4%	55.9%	83.3%
Native American	50.0%	50.0%	100.0%
Asian	70.0%	75.0%	100.0%
Panel B: Disparity Ratios for All Firms			
Non-White	34.2%	71.4%	91.3%
White Women	102.6%	81.4%	97.2%
Not Non-White/Not White Women	108.7%	103.7%	100.9%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

2. Professional, Scientific and Technical Services

Tables 13 and 14 present the basic data for firms in the Professional, Scientific, and Technical Services industry.¹⁸⁷

¹⁸⁵ 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.”).

¹⁸⁶ Because the data in Tables 12 and 15 are presented for descriptive purposes, significance tests on these results are not conducted.

¹⁸⁷ The values of “S” in Tables 13 – 15 reflect that the SBO did not publish data in these instances because it was “withheld because estimate did not meet publication standards”. See the Disclosure section under Methodology at <http://www.census.gov/econ/sbo/methodology.html>.

**Table 13. Demographic Distribution of Sales and Payroll Data
All Firms
Professional, Scientific, and Technical Services**

	Total Number of Firms (All Firms)	Sales & Receipts - All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	4.9%	0.8%	1.3%	0.7%	0.9%	0.7%
Latino	3.2%	0.9%	1.7%	0.8%	1.0%	0.6%
Native American	S	S	S	S	S	S
Asian	5.5%	2.6%	5.1%	2.4%	2.4%	2.4%
Panel B: Distribution of All Firms						
Non-White	14.2%	4.3%	7.8%	3.7%	4.2%	3.7%
White Women	23.0%	6.2%	16.4%	5.1%	6.6%	4.8%
White Men	48.3%	37.3%	57.5%	36.0%	37.8%	36.2%
Equally Non-White & White	1.3%	0.2%	0.4%	0.2%	0.2%	0.1%
Equally Women & Men	10.7%	3.8%	9.7%	3.1%	3.8%	2.4%
Firms Not Classifiable	2.5%	48.3%	8.2%	51.9%	47.4%	52.8%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

**Table 14. Demographic Distribution of Sales and Payroll Data
All Classifiable Firms
Professional, Scientific, and Technical Services**

	Total Number of Firms (All Firms)	Sales & Receipts - All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	5.1%	1.6%	1.5%	1.4%	1.8%	1.5%
Latino	3.3%	1.7%	1.9%	1.6%	1.9%	1.4%
Native American	S	S	S	S	S	S
Asian	5.7%	5.1%	5.6%	4.9%	4.7%	5.0%
Panel B: Distribution of All Firms						
Non-Whites	14.5%	8.3%	8.5%	7.8%	8.1%	7.8%
White Women	23.6%	11.9%	17.9%	10.6%	12.6%	10.1%
Not Non-White/Not White Women	61.8%	79.8%	73.6%	81.6%	79.3%	82.1%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

Table 15 presents disparity ratios in this sector. Because of the dearth of Native American-owned firms in this sector, no analysis is provided for this demographic group. Of the 15 available disparity ratios for non-White firms and White women firms presented in Table 15, 6 are under the 80% threshold.

**Table 15. Disparity Ratios – Aggregated Groups
Professional, Scientific, and Technical Services**

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
Panel A: Disparity Ratios for Non-White Firms			
Black	31.4%	93.3%	83.3%
Latino	51.5%	84.2%	73.7%
Native American	S	S	S
Asian	89.5%	87.5%	106.4%
Panel B: Disparity Ratios for All Firms			

Non-White	57.2%	91.8%	96.3%
White Women	50.4%	59.2%	80.2%
Not Non-White/Not White Women	129.1%	110.9%	103.5%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

D. Disparate Treatment in the Marketplace: Evidence from the Census Bureau’s 2007-2011 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 DBE program.

In the previous section, we explored this question using SBO data. In this section, we use the Census Bureau’s American Community Survey (“ACS”) data to address other aspects of this question. One analysis addresses whether there exist demographic differences in the wage and salary income received by private sector workers. Beyond the issue of bias in the incomes generated in the private sector, this exploration is important for the issue of possible variations in the rate of business formation by different demographic groups. One of the determinants of business formation is the pool of financial capital at the disposal of the prospective entrepreneur. The size of this pool is related to the income level of the individual either because the income level impacts the amount of personal savings that can be used for start-up capital or the income level affects one’s ability to borrow funds. If particular demographic groups receive lower wages and salaries then they would have access to a smaller pool of financial capital, and thus reduce the likelihood of business formation.

ACS Public Use Microdata Sample (“PUMS”) is useful in addressing these issues. The ACS is an annual survey of 1% of the population and the PUMS provides detailed information at the individual level. In order to obtain robust results from our analysis, we use the file that combines data for 2007 through 2011.¹⁸⁸ With this rich data set, our analysis can establish with greater certainty any causal links between race, gender and economic outcomes.

Often, the general public sees clear associations between race, gender, and economic outcomes and assumes this association reflects a tight causal connection. However, economic outcomes are determined by a broad set of factors, including, but extending beyond, race and gender. To provide a simple example, two people who differ by race or gender may receive different wages. This difference may simply reflect that the

¹⁸⁸ For more information about the ACS PUMS, please see <http://www.census.gov/acs/>.

individuals work in different industries. If this underlying difference is not known, one might assert the wage differential is the result of the race or gender difference. To better understand the impact of race or gender on wages, it is important to compare individuals of different races or genders who work in the same industry. Of course, wages are determined by a broad set of factors beyond race, gender, and industry. With the ACS PUMS, we have the ability to include a wide range of additional variables such as age, education, occupation, and state of residence.

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

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

With respect to the second result of regression analysis, this technique also allows us to determine the statistical significance of the relationship between the dependent variable and independent variable. For example, the relationship between gender and wages might exist but we find that it is not statistically different from zero. In this case, we are not confident that there is not any relationship between the two variables. If the relationship is not statistically different from zero, then a variation in the independent variable has no impact on the dependent variable. The regression analysis allows us to say with varying degrees of statistical confidence that a relationship is different from zero. If the estimated relationship is statistically significant at the 0.05 level, that indicates we are 95% confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.01 level, that indicates we are 99% confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.001 level, that indicates we are 99.9% confident that the relationship is different from zero.¹⁸⁹

¹⁸⁹ Most social scientists do not endorse utilizing a confidence level of less than 95%. Appendix C explains more about statistical significance.

In the balance of this section, we report data on the construction and CRS sectors.

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

1. The Construction Industry in Illinois

a. Business Formation Rates

Table 16 presents business formation rates in the construction industry in the Illinois economy by demographic groups.

Table 16. Business Formation Rates, Illinois Construction

Demographic Group	Business Formation Rates
Black	19.0%
Latino	11.1%
Native American	22.3%
Asian/Pacific Islander	18.2%
Other	1.5%
Non-White	13.2%
White Women	6.9%
Non-White Male	13.7%
White Male	22.6%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than Non-White males. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed.¹⁹⁰ The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

¹⁹⁰ Probit is a special type of regression technique where the dependent variable only has two possible values: 0 or 1. For instance, the unit of observation is an individual and he/she forms a business or does not form a business. In the former case, the value of the dependent variable would be 1 while in the latter case, the value of the dependent variable would be 0. This is in contrast to the multiple

Table 17 presents the results of the probit analysis for the construction industry in Illinois.

**Table 17. Business Formation Probability
Differentials for Selected Groups Relative to White Men
Construction**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-8.0%***
Latino	-7.7%***
Native American	-8.5%***
Asian/Pacific Islander	-0.8%***
Other	-3.0%***
White Women	-2.3%***

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

The analysis indicates that Non-Whites and White women in Illinois are less likely to form construction businesses compared to White men even after controlling for key factors. The reduction in probability ranges from 0.8% to 8.5%. These estimates are statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 18 presents the findings from the wage and salary income regression analysis examining the construction industry in Illinois. This indicates the wage differential for selected demographic groups in Illinois relative to White men.

regression technique discussed earlier where the dependent variable such as wages might have any non-negative value. For a more extensive discussion of probit regression analysis, see Appendix B.

**Table 18. Wage Differentials for Selected Groups
Relative to White Men
Construction**

Demographic Group	Wages Relative to White Men (% Change)
Black	-51.0%***
Latino	-13.3%***
Native American	-36.0%***
Asian/Pacific Islander	-51.5%***
Other	-13.3%***
White Women	-45.0%**

Source: CHA calculations from the American Community Survey
 *** indicates statistical significance at the 0.001 level
 ** indicates statistical significance at the 0.01 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Illinois earn less than White men in the construction industry. The differential ranges between 13% less and 52% less. Estimates of the coefficients for Black, Latino, Native American, Asian/Pacific Islander, and Other are statistically significant at the 0.001 level. Estimates of the coefficients for White Women are statistically significant at the 0.01 level.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by Non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 19 presents these findings.

Table 19. Business Earnings Differentials for Selected Groups Relative to White Men Construction

Demographic Group	Earnings Relative to White Men (% Change)
Black	-26.3%*
Latino	-6.1%***
Native American	-25.8%***
Asian/Pacific Islander	-10.0%**
Other	0.0%
White Women	-19.4%**

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

** indicates statistical significance at the 0.01 level

* indicates statistical significance at the 0.005 level

With the exception of the estimated coefficient for Other, the estimates of the coefficients for these variables were found to be statistically significant at the 0.001, 0.01, or 0.005 levels. The differentials in business earnings received by Non-Whites and White women compared to White males ranged from 6% less to 26% less. For the estimated coefficient for Other, the results were not found to be significantly statistically different from zero.

d. Conclusion

Using descriptive analysis, Table 16 shows that differentials exist between the business formation rates by Non-White males and White males. Table 17 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 18 and 19 present data indicating differentials in wage and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect Non-Whites and White women entrepreneurs.

3. The Construction-Related Services Industry in Illinois

a. Business Formation Rates

Table 20 presents business formation rates in the construction-related services industry in Illinois for selected demographic groups.

**Table 20. Business Formation Rates, Illinois
Construction Related Services**

Demographic Group	Business Formation Rates
Black	4.6%
Latino	4.2%
Native American	0.0%
Asian/Pacific Islander	3.9%
Other	0.0%
Non-White	4.1%
White Women	8.3%
Non-White Male	6.3%
White Male	10.9%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than Non-White males. (There were zero reported Native American or Other entrepreneurs in the construction-related services industry.) However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 21 presents the results of the probit analysis for the construction industry in Illinois.

**Table 21. Business Formation Probability
Differentials for Selected Groups Relative to White Men
Construction Related Services**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-6.2%***
Latino	-1.3%***
Native American	---
Asian/Pacific Islander	-5.5%***

Other	---
White Women	-0.2%***

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

The analysis indicates that compared to White men, Non-Whites and White women in Illinois are less likely to form construction-related services businesses even after controlling for key factors. The reduction in probability ranges from 0.2% less to 6.2% less. Once again, these estimates are statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 22 presents the findings from the wage and salary income regression analysis examining the construction-related services industry in Illinois. This indicates the wage differential for selected demographic groups in Illinois relative to White men.

**Table 22. Wage Differentials for Selected Groups
Relative to White Men
Construction Related Services**

Demographic Group	Wages Relative to White Men (% Change)
Black	-49.2%**
Latino	-20.2%***
Native American	-28.1%***
Asian/Pacific Islander	-19.0%***
Other	-13.0%*
White Women	-33.8%***

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

** indicates statistical significance at the 0.01 level

* indicates statistical significance at the 0.05 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Illinois earn less than White men in the construction-related services industry. The differential ranges between 13% less and 49% less. Estimates of the coefficients for, Latino, Native American, Asian/Pacific Islander, and White Women are statistically significant at the 0.001 level. Estimates of the coefficients for Black are statistically significant at the 0.01 level. The estimated coefficient for Other is statistically significant at the 0.05 level.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by Non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 23 presents these findings.

Table 23. Business Earnings Differentials for Selected Groups Relative to White Men Construction Related Services

Demographic Group	Earnings Relative to White Men (% Change)
Black	-57.7%***
Latino	0.0%
Native American	0.0%
Asian/Pacific Islander	-222.6%*
Other	0.0%
White Women	-60.8%***

Source: CHA calculations from the American Community Survey

*** indicates statistical significance at the 0.001 level

* indicates statistical significance at the 0.005 level

The estimates of the coefficients for Black and White Women were found to be statistically significant at the 0.001 level. The estimated coefficient for Asian/Pacific Islander was statistically significant at the 0.05 level. The differentials in business earnings received by these three demographic groups were less than White males ranging from 57% to 222%. (The proper interpretation of the estimated coefficient for Asian/Pacific Islanders is that White men earn 222.6% more than similarly situated Asian/Pacific Islanders.) The estimated coefficients for Latino, Native American, and Other were not found to be significantly statistically different from zero.

d. Conclusion

Using descriptive analysis, Table 20 shows that differentials exist between the business formation rates by Non-White males and White males. Table 21 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 22 and 23 present data indicating differentials in wage and business earnings after controlling for possible explanatory

factors. These analyses support the conclusion that barriers to business success do affect Non-Whites and White women entrepreneurs.

VI. QUALITATIVE EVIDENCE OF RACE AND GENDER DISPARITIES IN THE TOLLWAY'S MARKET

To explore anecdotal evidence of possible discrimination against minorities and women in the Tollway's markets, we conducted five group interviews and one public meeting, totaling 123 participants. We met with business owners from a broad cross section of the industries from which the Tollway purchases. Firms ranged in size from large national businesses to decades-old family-owned firms to new start-ups. Owners' backgrounds included individuals with decades of experience in their fields and entrepreneurs beginning their careers. We sought to explore their experiences in seeking and performing public and private sector prime contracts and subcontracts, both with ISHTA and in the private sector. We also elicited recommendations for improvements to ISHTA's current Disadvantaged Business Enterprise ("DBE") program for construction and construction-related professional services and its Business Enterprise Program ("BEP") program for goods and services procurements.

The following are summaries of the issues discussed. Quotations are indented, and have been edited for readability. They are representative of the views expressed by participants.

A. Exclusion from Industry and Information Networks

Exclusion from the industry networks necessary for success was a recurrent theme for many minorities and women. Relationships are key to obtaining work from the agency as well as from prime vendors as subcontractors, subconsultants or suppliers.

Longstanding relationships between majority-owned firms and white males were cited as barriers to access.

It is a good old boy network.

[There is] the classic old boy network where you leave or retire and you come back easily as a consultant while other people who aren't in the network aren't getting the chance ... these are the barriers that you don't see but you know they're there.

Women in particular reported that the "good ole boy" network remains a barrier to their opportunities.

[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.

The [Tollway] networking sessions are great but if you don't get the people that make the decisions at the networking sessions, they're a waste of time. We all sit there and we talk to each other, which is wonderful, but we don't get the [CEO] or the guys that really make the decisions. And I use the word guys because most of them are.

B. Discriminatory Attitudes and Negative Perceptions of Competence

Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications and capabilities.

There's still the perception that if you're a minority or a woman, you can't perform.... That's there's something wrong with you, you know, there's something lacking.... They stick with the good old boys.

I've been in business a long time. I bid a transportation job, probably about three years ago, to a company that I've done a lot of work for over the years and I consider a friend, another transportation prime contractor. And they said to me, just not on this job, this job is complex, this job is that, this job is the other. And I'm thinking to myself, I've done jobs for you people that I think are complex. We did [a large public project]. I mean it was a huge labor job. I was floored.

The agency will use a prequalification as a cover for either giving work or not giving work.

Women reported the continuing effects of stereotypes about gender roles and sexist attitudes from male colleagues and clients.

My biggest problem is I can't walk in a room, or any woman, I'm somebody's wife. I mean my husband has never worked for me in my whole life. He's a carpenter. I'm somebody's wife. 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.

It's an invisible barrier that nobody can actually see. We know it's there. You can hold your head up as high as you want, do the best you possibly can do with the work. But if you were not a certified DBE, WBE, MBE, small business, whatever, they're not going to call you. I've been to that bar at two o'clock in the morning. I've been with them boys. I'm not going to deny I haven't because anybody sitting here will tell me I have but it still doesn't make a difference.

If it's a man in construction, my experience has been they want to dictate to me what I will make, when I will show up. They'd rather pay a penalty than have me do the work.

When I go to meetings with the other contractors in my industry, they think I get work because I'm a DBE. Oh, you're one of them.... I've been in that industry for 35 years. I think I've earned some stripes. I do know how to do the work. I know how to process it. I know how to run a business.... [Construction is] a male dominated industry and they think because I'm not an ironworker out there setting the steel that I'm an idiot or I don't own the business.

Ask the male company owner how many times they've been asked if their wife works for the company. Because as a woman, how many of us have been asked that almost every time somebody finds out you're the owner of your company, oh, is your husband involved?

I had an alderman ask me that one time. And I said, I haven't had one of those since 1981.

One Black male reported that he experienced more barriers than Black women.

I actually didn't start making myself visible until probably ten years ago in my business. Before then I would have a [Black] woman represent my trucking company. She could actually get more information. She would be invited in more to the meetings and stuff like that than I would.... There was one that had a contract that she was just going to switch over to me. She was going out of business and she wanted me to meet the prime contractor and I was like, no, I don't want to meet him ... because if I meet him it's going to change. And she didn't believe me so I came and met with the gentleman. He said oh no, I could just switch everything over.... The numbers are the same, everything is fine. I went home, got that call Monday morning, our purchasing agent is not going to be able to switch everything over in time so we're just going to go with somebody else the we had already in the system.

That minority- and women-owned businesses were perceived to lack the capacity to do additional work or more complex work was another barrier to their success.

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.

Some DBEs felt that sometimes non-DBEs were resentful about what was perceived as others taking "their" work.

I've been in business for almost 27 years in the [specialty trade] industry for my whole life. It's relationships and unfortunately we can't get those relationships, no matter what we look like, what we do, wherever we go. Because we are, in their minds we're stealing their work. They have their own workforce. We're just something they have to put up with. And although I have a lot of friends that are in

the [specialty trade] industry, they wouldn't call me for a private job if their life depended on it.

If we're going to take on their work, they're not going to give me any more work.

C. Obtaining Work on an Equal Basis

There was almost universal agreement among minority and women owners that the DBE program remains essential to reduce barriers to equal contracting opportunities.

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 kind of work that the Tollway does 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. So that was a good thing

If there's a 20 percent goal, guess what? They do 20 percent minority and female participation. They don't do 22. They don't do 19. They do 20. They make us fit into that number usually.

What helps with goals is that it forces these big companies ... to go and find the other DBEs and MBEs to work with and carve a piece out for the newer companies and the smaller companies that would no way have a chance at that. So, I think it needs to come from higher up to tell them this is what we need from you.

We're doing the [City of Chicago project] overbuild. Right now, today, we're working on that job for [prime contractor]. [Prime contractor] would no more want to hire me than drop dead. They have their own ironworkers. They gave me that piece of the job. Now, keep in mind, there's a fifty story building going up that [prime contractor is] doing right next to my [City of Chicago project] overbuild. Do I get a chance at that building? Absolutely not. They met their TIF money goal with me doing the [City of Chicago project] overbuild and that's it.

We do [supplying] for construction as well as transportation. And the minute they reach their cap they go back to their old [non-DBE] supplier.

That's just the way it is. And there was a [local government] contract that for years had a large goal on it and it was rebid without the goal just this year for various reasons, and we're off the job. And so I mean there's a direct correlation. There's no doubt about it. All my customers, that's why they buy from me.

Without that DBE program, it's over for my business, that's for sure. And I know a lot of [majority prime] contractors but, when the DBE participation's over, they're done. And that's from Chicago to St. Louis because I work all through the state.

So, it doesn't make any difference. Without that DBE program, I'd be lost and I'm sure some of these other contractors would as well.

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.

In 29 years, I have never had a majority corporation call me, fax me, walk into my office and say, we want to do business with you because it's the right thing to do. We have a project coming up, there's absolutely no inclusion goal, and we just want to do business with you because you're valid, viable, very credit worthy, very professional, you've got the skillsets.... [When the Chicago Transit Authority stopped setting a DBE goal on the contracts,] every manufacturer we called to get a quote on the same contracts we had had and worked with them on for years said, there's no DBE participation anymore. Click. Those are the ones that were nice enough to be gracious to at least speak to me to my face and tell me that. Everybody else didn't even call us back. So if there is not a mandate, there is not a program.

If the company's doing something private, I never get a whiff of those projects.

Some firms were successful in obtaining private sector or "no goals" work.

[I have one company that will] call me on whatever project it is, goals or no goals. But most of the other companies [don't].

We get work from our primes that are not DBE or MBE related or have any goals. But here's why; [it] is because when we win prime contracts— and I have two companies that both of them have prime contracts— I use everybody else on those as well. So, I have some of my own DBE subs even though I'm DBE, just kind of people I keep in the queue. And then I also have those [non-DBE prime consultants] who have helped me in the past.... if the DBE program went away all of my relationships would probably go away too. Let's be very clear that even though it's a reciprocal thing and everyone plays nice, if there were no DBE goals all of our businesses in here would drop no less than 50, 60 percent.... [The DBE program is] necessary, it's needed. Let's be clear about that.

D. Obtaining Prime Contracts

Many owners stressed that they would like to obtain prime contracts directly with the Tollway and that more focus on creating new opportunities was needed.

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 percent.... 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.

“Unbundling” contracts into smaller scopes or lower dollar thresholds was repeatedly recommended.

The small business initiative [should be geared towards contracts] in the million dollar range where we can bid it and bond it and things of that nature.

They got to break it out of the package.

Nobody really wants to grow their competition in any way, shape or form so it is going to be racism and it's going to be economics.... Which is why I think we should fight for more and more breaking of the contracts down so that there are more prime opportunities at a smaller level and those big boys have all tried to get these contracts to be larger and larger, you know, stressing economies of scale, which are not true.

E. Conclusion

Consistent with other evidence reported in this Study, anecdotal interview information strongly suggests that minorities and women continue to suffer discriminatory barriers to full and fair access to Tollway and private sector contracts and subcontracts. While not definitive proof that the Tollway needs to continue to implement race- and gender-conscious remedies for these impediments, the results of the personal interviews and the public meetings are the types of evidence that, especially when considered alongside the numerous pieces of statistical evidence assembled, the courts have found to be highly probative of whether ISTHA would be a passive participant in a discriminatory market area without affirmative interventions and whether race-conscious remedies are necessary to address that discrimination.

VII. RECOMMENDATIONS FOR THE ILLINOIS TOLLWAY'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

The quantitative and qualitative data presented in this Study provide a thorough examination of the evidence regarding the experiences of minority- and women-owned firms operating in the Illinois Tollway's geographic market area and its industry markets. As required by strict scrutiny, we analyzed evidence of such firms' utilization by ISTHA as measured by dollars spent on construction and construction related professional services, as well as DBEs' experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the evidence necessary to determine whether there is a strong basis in evidence that barriers to full and equal contracting opportunities exist on the basis of race or gender in the Tollway's market area, and if so, what narrowly tailored remedies are appropriate. The Study results fully support the Tollway's continuing compelling interest in implementing its DBE program. The statistical data and the anecdotal testimony provide a sufficient basis for remedial race- and gender-based measures to ensure full and fair access by all firms to Tollway prime contracting and associated subcontracting opportunities.

The following recommendations conform to strict scrutiny and national best practices for DBE programs. We suggest enhancements to the agency's existing measures and new initiatives to increase opportunities for DBEs and other small businesses.

A. Ensure Bidder Non-Discrimination and Fairly Priced Subcontractor Quotations

Concerns about bid shopping were expressed by several DBEs in the construction industry. General contractors were reported to share subcontractor quotes with other firms to justify using non-DBEs on the basis of price. On the other hand, some prime contractors reported that using certified firms increases their costs and risks and that DBEs provide high quotes, either because they believe they must be utilized to get the contract or their actual costs are higher.

To investigate these claims, the Tollway should require bidders to maintain information on pricing and date of receipt on all subcontractor quotes received on larger projects for a specified minimum time period, such as three years from the date of bid opening or statement of interest submission. The prices, scopes and timing can then be evaluated by the Tollway to determine whether bidders are in fact soliciting and contracting with subcontractors on a non-discriminatory basis and if DBEs cost more than White-male owned firms. Reviews could be done on a random basis or for larger contracts or some combination, and in response to any allegations of price gouging or bid shopping. A similar program element was part of IDOT's court-approved DBE plan.¹⁹¹ Recent

¹⁹¹ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at * 87 (Sept. 8, 2005) ("IDOT requires contractors seeking prequalification to maintain and produce solicitation records on all projects... Such evidence will assist IDOT in investigating and evaluating discrimination complaints.").

amendments to the DBE program regulations now require that bidders provide such information if they do not meet the contract goal.¹⁹²

B. Increase Training Opportunities for Prime Contractors

General contractors were sometimes unaware or unsure of the program's detailed requirements. Several large contractors seemed unsure or confused about, for example, the process for amending a utilization plan based upon a change in circumstances. Another area of confusion was whether second tier or lower subcontracting participation can be counted (all tiers are eligible).

We therefore recommend at least semi-annual seminars on DBE program compliance to discuss in detail the program's policies and procedures and address questions and concerns.

C. Continue to Review Contract Sizes and Scopes

The Tollway has made strides to "unbundle" some construction contracts into smaller segments by dollars and scopes of work to provide fair access to its projects on a race- and gender-neutral basis. In conjunction with reduced insurance and bonding requirements where possible, unbundled contracts have permitted smaller and firms new to the Tollway to participate on projects. This promising approach should be expanded to include design contracts and goods and services procurements, with a focus on identifying prime contracting possibilities.

D. Review Experience Requirements

Many interview participants expressed concern that specifications require levels of experience unlikely to be met by small firms. The Tollway should review these requirements beyond basic prequalification standards to ensure that DBEs and small firms are not unfairly disadvantaged and that there is adequate competition for projects. For example, equivalent experience— especially that gained by working for other government agencies— should be permitted to increase access for small firms and guard against unfair incumbent advantages.

E. Revise Contract Retainage Procedures

Many firms mentioned the holding of retainage from prime contractors, who in turn hold it from subcontractors, as a burden on cash flow, especially for small firms. Rereleasing retainage on a rolling basis is a race-neutral measure that would assist all firms doing business with the Tollway. Rolling release is a common agency practice that balances the government's need to ensure that work is correctly completed with the vendor's need for payment as work is performed.

¹⁹² 49 C.F.R. §26.53(b)(2)(vi).

F. Expand the Small Business Initiative

This Initiative is an important program element, both because it is a race-neutral measure that assists all small firms and provides opportunities for firms to work as prime vendors. We recommend expanding the use of the Small Business Initiative's contract setaside element to contracts outside construction, to the extent permitted by law.

It will be critical to keep complete race and gender information on bidders, awards and payments for all contracts in the Initiative, including those with small business contract goals on construction contracts, to evaluate whether this is an effective race- and gender-neutral measure to reduce barriers.

G. Continue to apply race- and gender-conscious measures to appropriate contracts

The Study found large disparities for many groups on various industry categories. The courts have held that there is no requirement to find the same quantum of evidence of discrimination in order to support overall, flexible remedial program elements. To ensure that the Tollway is not functioning as a passive participant in market area discrimination, we recommend that it continue its narrowly tailored DBE Program.

H. Use the Study to Set DBE Contract Goals

Strict scrutiny requires that contract goals be narrowly tailored to the specifics of the project. The detailed availability estimates in the Study can serve as the starting point for contract goal setting. This methodology involves four steps.

1. Weigh the estimated dollar value of the scopes of the contract by industry codes as determined during the process of creating the solicitation. To increase understanding and compliance, these industry codes could be listed in the solicitation as a guide to how the goal was determined and where the Tollway expects bidders to seek DBE participation. Good faith efforts could be defined as, among several other elements, an adequate solicitation of firms certified in these codes.
2. Determine the availability of DBEs in those scopes as estimated in the Study.
3. Calculate a weighted goal based upon the scopes and the availability of firms.
4. Adjust the resulting percentage based on current market conditions.

We urge the Tollway to bid some contracts that it determines have significant opportunities for DBE participation without goals. Similar to the evidence developed as part of the record in the *Northern Contracting* litigation, 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, will be probative of whether the DBE program remains needed to level the playing field for minorities and women.

I. Enhance and Expand the Mentor-Protégé Program

The current Mentor-Protégé Program (“MPP”) was generally described by interviewees as successful in developing DBEs’ abilities to undertake engineering professional services work in new areas and perform more complex projects.

We therefore recommend the Tollway consider expanding MPP to construction firms. As is common with many agencies, the Study revealed that DBEs are receiving few contracts in several industry codes, especially in construction subindustries.¹⁹³ A properly designed and administered MPP is one way to increase DBEs’ capacities. Skill sets such as estimating, understanding of and adherence to specifications, billing and scheduling, accounting, safety, marketing, and meeting prequalification standards are possible areas of focus.

The Mentor-Protégé Guidelines in Appendix D to 49 C.F.R. Part 26 should be the starting point. The General Counsel’s Office at USDOT has provided some additional guidance¹⁹⁴, and USDOT’s Office of Small Disadvantaged Business Utilization had adopted a pilot program¹⁹⁵ and created sample documents¹⁹⁶. Careful screening of participants and close, real time oversight of the progress towards goals and objectives is key to meaningful results and the prevention of fraud. The following elements reflect these guidelines and best practices, and an expanded program should include at least these formal program guidelines:

- A description of the qualifications of the Mentor, including the firm’s number of years of experience as a highway construction contractor; the agreement to devote a specified number of hours per month to working with the Protégé; and the qualifications of the lead individual responsible for implementing the plan.
- A description of the qualifications of the Protégé, including the firm’s number of years of experience as a highway construction contractor; the agreement to devote a specified number of hours per month to working with the Mentor; and the qualifications of the DBE owner(s)
- A Tollway-approved written development plan, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement, a schedule for meetings and development of plans, and the services and resources to be provided by the Mentor to the Protégé. The assistance provided by the Mentor must be detailed and directly relevant to Tollway work. The development targets should be quantifiable and verifiable, and reflect objectives to increase the Protégé’s capacities and expand its business areas and expertise. Targets for improvement must be specified, such as increased bonding

¹⁹³ See Table C, Executive Summary.

¹⁹⁴ <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers>.

¹⁹⁵ <http://www.dot.gov/osdbu/procurement-assistance/mentor-protege-pilot-program>.

¹⁹⁶ <http://cms.dot.gov/small-business/procurement-assistance/mentor-protege> program.

capacity, increased sales, increased areas of work specialty or prequalification, etc.

- A long term and specific commitment between the parties, *e.g.*, 12 to 36 months.
- Extra credit for the Mentor's use of the Protégé to meet a contract goal (*e.g.*, 1.25 percent for each dollar spent, with a limit on the total percentage that could be credited).
- A fee schedule to cover the direct and indirect cost for services provided by the Mentor for specific training and assistance to the Protégé. The use of any equipment or equipment rental must be detailed in the plan, and should be further covered by bills of sale, lease agreements, etc., and require prior written approval by the Tollway.
- Any financial assistance by the Mentor to the Protégé must be subject to prior written approval by the Tollway, and must not permit the Mentor to assume control of the Protégé.
- The Plan must contain a provision that it may be terminated by mutual consent or by ISTHA if the Protégé no longer meets the eligibility standards for DBE certification; either party desires to be removed from the relationship; either party has failed or is unable to meet its obligations under the plan; the Protégé is not progressing or is not likely to progress in accordance with the plan; the Protégé has reached a satisfactory level of self-sufficiency to compete without resort to the plan; or the plan or its provisions are contrary to legal requirements.
- Submission of quarterly reports by the parties indicating their progress toward each of the plan's goals.
- Regular review by the Tollway of compliance with the plan and progress towards meeting its objectives. Failure to adhere to the terms of the plan or to make satisfactory progress would be grounds for termination from the Program.

We recognize that this level of direction and oversight will require additional resources, but agencies such as the Missouri Department of Transportation¹⁹⁷ and the Ohio Department of Transportation¹⁹⁸ as well as USDOT¹⁹⁹ have reported success with such a USDOT- approved approach.

¹⁹⁷ www.modot.org/ecr.

¹⁹⁸ <http://www.fhwa.dot.gov/resourcecenter/teams/civilrights>.

¹⁹⁹ <http://www.dot.gov/osdbu/news/us-dots-first-mentor-protege-participants-reach-six-month-mark>.

J. Review DBE Contract Compliance Policies and Processes

The Tollway's DBE program compliance policies and procedures generally follow national best practices and the regulations at 49 C.F.R. Part 26. To make it easier for firms to follow the program rules, we recommend some enhancements.

First, there is no single overarching DBE program document. The various elements of the program, such as what certifications are accepted, how to meet requirements at bid or proposal submission, contract performance standards and procedures, documentation of compliance, etc., are in several documents. Collecting these provisions in one policy and procedures manual, in addition to specific documents such as the Special Provision, will make the rules more accessible and user friendly.

Next, more specific guidance, perhaps in the form of new policies, checklists, and "tips," will help prime contractors and subcontractors to understand best practices and comply with program requirements. For example, several interview participants expressed confusion or uncertainty about topics such as how to establish their good faith efforts to meet a contract goal, how to document the need to substitute a DBE subcontractor during contract performance, how much assistance is permissible without compromising a DBE's independence by, for example, loaning the DBE equipment or writing joint checks to the DBE and its supplier, and other concerns about compliance. Such written guidance, in addition to training sessions, will assist firms to meet specifications, and support the program's remedial objectives.

Third, in reviewing a bidder's request for a reduction or waiver of the contract goal, the Tollway should continue to provide a detailed explanation of the basis for the determination. This will not only ensure that standards are uniformly applied but also increase compliance as firms understand what will be required to support the request. One way to accomplish this would be to establish a waiver committee, consisting of the user department, the Diversity Department, the Legal Department and any other functions necessary to determine whether the bidder has made good faith efforts to meet the contract goal. This should also speed up the process, which ideally should take no longer than 7 days.

K. Consider measures to encourage prime contractors to utilize new DBEs

To encourage prime contractors to spread opportunities for DBEs across racial and ethnic groups and subindustries, ISHTA should consider providing extra credit towards meet a contract goal for contractors that employ DBE subcontractors that either they have not used previously on Tollway jobs or firms that have never participated in Tollway projects as either a prime contractor or a subcontractor. For example, a bidder could receive 1.25 percent credit for every dollar spent with a new firm. This will, we note, require the electronic monitoring system recommended below to ensure that credit is properly tracked and accounted for in reporting.

L. Implement an Electronic Contracting Data Collection and Monitoring System

A critical element of this Study and a major challenge was data collection of full and complete prime contract and associated subcontractor records. As is very common, the Tollway did not have all the information needed for the inclusion of subcontractor payments in the analysis. Moreover, beyond facilitating research, the lack of an electronic system makes it much harder to conduct outreach, track goal attainment, monitor compliance, stay in contact with firms and create reports for the Board and the public. Improved data gathering should be a major focus.

We therefore recommend the Tollway procure and implement an electronic data collection system with at least the following functionality:

- Full contact information for all firms, including email addresses, NAICS/NIGP (or NIPG) codes, and race and gender ownership.
- Contract/project-specific goal setting, using the data from this Study.
- Utilization plan capture for prime contractor's submission of subcontractor utilization plans, including real-time verification of DBE certification status and NAICS/NIGP (NIPG) codes, and proposed utilization/goal validation.
- Contract compliance for certified and non-certified prime contract and subcontract payments for all formally procured contracts for all tiers of all subcontractors; verification of prompt payments to subcontractors; and information sharing between the Tollway, prime vendors and subcontractors about the status of pay applications.
- Spend analysis of informal expenditures, such as those made with agency credit cards or on purchase orders, to determine the utilization of certified firms.
- Program report generation, including utilization by industries, race, gender, dollar amount, procurement method, Tollway departments, etc.
- An integrated email and fax notification and reminder engine to notify users of required actions, including reporting mandates and dates.
- Outreach tools for eBlasts and related communications and event management for tracking registration and attendance.
- Import/export integration with existing systems to exchange contract, payment, and vendor data.
- Access by authorized Tollway staff, prime contractors and subcontractors to perform all necessary activities.

M. Develop Performance Measures for DBE Program Success

The Tollway should develop quantitative performance measures for the overall success of the program to evaluate its effectiveness in reducing the systemic barriers identified by the Study. Possible benchmarks might be:

- The number of bids or proposals, and the dollar amount of the awards and the goal shortfall, where the bidder was unable to meet the goal and submitted good faith efforts to do so.
- The number and dollar amount of bids or proposals rejected as non-responsive for failure to make good faith efforts to meet the goal.
- The number, type and dollar amount of DBE substitutions during contract performance.
- Increased bidding by certified firms.
- Increased prime contract awards to certified firms.
- Increased diversification in the industries in which DBEs are awarded prime contracts and subcontracts.
- Increased “capacity” of certified firms working on Tollway projects, as measured by bonding limits, size of jobs, profitability, complexity of work, etc.

N. Conduct Regular DBE Program Reviews

To meet the requirements of strict constitutional scrutiny and ensure best practices in program administration continue to be applied, the Tollway should conduct a full and thorough review of the evidentiary basis for the Program approximately every five to seven years.

A sunset date for the DBE program, when it will end unless reauthorized, should be adopted to meet the narrow tailoring test that race-and gender-conscious measures be used only when necessary. A new disparity study or other applicable research should be commissioned in time to meet the sunset date.

Appendix A: Master M/W/DBE Directory

To supplement race and sex information in Dun & Bradstreet/Hoovers used to estimate D/M/WBE availability in ISTHA's market area, we identified 119 organizations that might have lists of minority, women and disadvantaged firms. We included national entities and organizations from neighboring states because of the possibility that firms on these lists might be doing business with Pace. These lists were used to supplement data on the race and sex of firms' ownership to improve the accuracy and coverage of race and sex assignments to estimate D/M/WBE availability.

In addition to ISTHA's list, we obtained lists from the following entities:

- Business Research Services
- Chicago Chinatown Chamber of Commerce
- Chicago Minority Supplier Development Council
- Chicago Rockford International Airport
- Chicago United
- Chicago Urban League
- City of Chicago
- City of Rockford
- Cook County
- Diversity Information Resources
- DuPage County
- Illinois Department of Central Management Services
- Illinois State Black Chamber of Commerce
- Illinois UCP
- National Organization of Minority Architects
- Small Business Administration/Central Contractor Registry
- Suburban Minority Contractors Association
- Black Contractors United
- Federation of Women Contractors
- Hispanic American Construction Industry
- Women Construction Owners & Executives

Central Illinois Regional Airport
Chicago Midway International Airport
Chicago O'Hare International Airport
Chicago Public Schools
Chicago Transit Authority
Greater Peoria Regional Airport
Illinois Department of Transportation
Illinois Tollway
METRA
Metropolitan Pier and Exposition Authority
University of Illinois
University of Illinois Willard Airport

The following entities either did not have a list of D/M/WBEs or the list did not include race and gender information:

American Indian Development Association
Champaign County
Chicago Black Pages
Village of Arlington Heights
City of Cicero
City of Elgin
City of Evanston
City of Joliet
City of Naperville
Village of Schaumburg
City of Waukegan
Decatur Airport
Hispanic Lawyers Association of Illinois
Illinois Hispanic Chamber of Commerce
Joliet Region Chamber of Commerce
Kane County
Kankakee County
Kendall County
Lake County
Marshall County
McHenry County
McLean County
Menard County
National Center of American Indian Enterprise Development
Rock Island County
Society of Taiwanese Americans
Tazewell County

The John Marshall Law School
Vermillion County
Williamson County Regional Airport
Rogers Park Business Alliance
Association of Asian Construction Enterprises
Taiwanese American Professionals Chicago

We were unable to obtain lists from the following entities:

Alliance of Business Leaders & Entrepreneurs
Arab American Bar Association of Illinois
Arquitectos - The Society of Hispanic Professional Architects
Asian American Alliance
Asian American Bar Association of the Greater Chicago Area
Asian American Institute
Asian American Small Business Association
Black Chamber of Commerce of Lake County
Chatham Business Association, Small Business Development
Chicago State University
Chicago Women in Architecture
Aurora Regional Chamber of Commerce
City of Aurora
City of Springfield
Coalition of African American Leaders
Cosmopolitan Chamber of Commerce
Enterpriz Cook County
Hispanic SMB
Illinois Department of Commerce and Economic Opportunity
Indian American Bar Association
MidAmerica St. Louis Airport
National Association of Women Business Owners
National Society of Hispanic MBAs - Chicago Chapter
Puerto Rican Bar Association of Illinois
Puerto Rican Chamber of Commerce
Quad City International Airport
Rainbow Push Coalition International Trade Bureau
Rockford Black Pages
St. Clair County
Tribal Procurement Institute PTAC
Will County
Women's Bar Association
Business Partners - The Chamber for Uptown
Philippine American Chamber of Commerce of Greater Chicago

Korea Business Association
Korean American Association of Chicago
Chicago Korean American Chamber of Commerce
Taiwanese American Chamber of Commerce of Greater Chicago
Taiwanese Chambers of Commerce of North America
Vietnamese American National Chamber of Commerce
West Ridge Chamber of Commerce
Arab American Association for Engineers & Architects
Chicago Minority Business Association
Association of Subcontractors & Affiliates

The following entities declined to provide either their list or the race and gender information in their list:

Aurora Hispanic Chamber of Commerce
Austin Chamber of Commerce
Black Women Lawyers of Greater Chicago, Inc.
Latin American Chamber of Commerce
Women's Business Development Center
African American Contractors Association

Appendix B: Further Explanation of the Multiple Regression Analysis

As explained in the Report, the multiple regression statistical techniques seek to explore the relationship between a set of independent variables and a dependent variable. The following equation is a way to visualize this relationship:

$$DV = f(D, I, O),$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu,$$

where C is the constant term; β_1 , β_2 and β_3 are coefficients, and μ is the random error term.

The statistical technique seeks to estimate the values of the constant term and the coefficients.

In order to complete the estimation, the set of independent variables must be operationalized. For demographic variables, the estimation used race, gender and age. For industry and occupation variables, the relevant industry and occupation were utilized. For the other variables, education and the state of residence were used.

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. An additional factor was included: because of our interest in the impact of race and gender on wages and earnings, we made the assumption that the impact of those variables might vary from state to state (*i.e.*, the impact of being Black on wages is different in Illinois than it is in Alabama). We therefore developed new variables that would show the interaction between race and gender and one particular state. Since this Report examined Illinois, that was the state employed. The coefficient for the new variable showed the impact of being a member of that race or gender in Illinois. Consequently, the impact of race or gender on wages or earnings had two components: the national coefficient and the state-specific impact.

Appendix C: Further Explanation of the Probit Regression Analysis

Probit regression is a special type of regression analysis. While there are many differences between the underlying estimation techniques used in the probit regression and the standard regression analysis, the main differences from the lay person's point of view lie in the nature of dependent variable and the interpretation of the coefficients associated with the independent variables.

The basic model looks the same:

$$DV = f(D, I, O),$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu,$$

where C is the constant term; β_1 , β_2 , and β_3 are coefficients, and μ is the random error term.

In the standard regression model, the dependent variable is continuous and can take on many values, in the probit model, the dependent variable is dichotomous and can take on only two values: zero or one. For instance, in the standard regression analysis, we may be exploring the impact of a change in some independent variable on wages. In this case, the value of one's wage might be any non-negative number. In contrast, in the probit regression analysis, the exploration might be the impact of a change in some independent variable on the probability that some event occurs. For instance, the question might be how an individual's gender impacts the probability of that person forming a business. In this case, the dependent variable has two values: zero, if a business is not formed; one, if a business is formed.

The second significant difference—the interpretation of the independent variables' coefficients—is fairly straight-forward in the standard regression model: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.²⁰⁰ However, in the probit model, the initial coefficients cannot be interpreted this way. One additional step --- which can be computed

²⁰⁰ The exact interpretation depends upon the functional form of the model.

easily by most statistical packages --- must be undertaken in order to yield a result that indicates how the change in the independent variable affects the probability of an event (e.g. business formation) occurs. For instance, using our previous example of the impact on gender on business formation, if the independent variable was WOMAN (with a value of 0 if the individual was male and 1 if the individual was female) and the final transformation of the coefficient of WOMAN was -0.12, we would interpret this to mean that women have a 12% lower probability of forming a business compared to men.

Appendix D: Significance Levels

Many tables in this report contain asterisks indicating a number has statistical significance at 0.001 or 0.01 levels and the body of the report repeats these descriptions. While the use of the term seems important, it is not self-evident what the term means. This appendix provides a general explanation of significance levels.

This report seeks to address the question whether non-Whites and White women received disparate treatment in the economy relative to White males. From a statistical viewpoint, this primary question has two sub-questions:

- What is the relationship between the independent variable and the dependent variable?
- What is the probability that the relationship between the independent variable and the dependent variable is equal to zero?

For example, an important question facing the Tollway as it explores the necessity of intervening in the marketplace to ensure it is not a passive participant in the continuation of historic and contemporary bias 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's say this analysis determines that non-Whites receive wages that are 35% less than White men after controlling for other factors, such as education and industry, which might account for the differences in wages. However, this finding is only an estimate of the relationship between the independent variable (*e.g.*, non-Whites) and the dependent variable (*e.g.*, wages) – the first sub-question. It is still important to determine how accurate is that estimation, that is, what is the probability the estimated relationship is equal to zero – the second sub-question.

To resolve the second sub-question, statistical hypothesis tests are utilized. Hypothesis testing assumes that there is no relationship between belonging to a particular demographic group and the level of economic utilization relative to White men (*e.g.*, non-Whites earn identical wages compared to White men or non-Whites earn 0% less than White men). This is sometimes called the null hypothesis. We then calculate a confidence interval to find and explore the probability that the observed relationship (*e.g.*, - 35%) is between 0 and minus that confidence interval.²⁰¹ The confidence interval will vary depending upon the level

²⁰¹ Because 0 can only be greater than -35%, we only speak of “minus the confidence level”. This is a one-tailed hypothesis test. If, in another example, the observed relationship could be

of confidence (statistical significance) we wish to have in our conclusion. Hence, a statistical significance of 99% would have a broader confidence interval than statistical significance of 95%. Once a confidence interval is established, if -35% lies outside of that interval, we can assert the observed relationship (*e.g.*, 35%) is accurate at the appropriate level of statistical significance.

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 E: Additional Data from the Analysis of the Survey of Business Owners²⁰²

Table E1. Demographic Distribution of Sales and Payroll Data
Construction,

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	3.5%	0.9%	0.8%	0.8%	1.0%	0.9%
Latino	6.0%	1.8%	3.2%	1.6%	2.6%	2.1%
Native American	0.4%	0.1%	0.2%	0.1%	0.1%	0.1%
Asian	1.0%	0.5%	0.8%	0.5%	0.6%	0.6%
Panel B: Distribution of All Firms						
Non-White	10.9%	3.2%	4.6%	2.9%	4.0%	3.6%
White Women	7.5%	6.5%	9.2%	6.5%	9.3%	8.8%
White Men	66.0%	65.5%	62.8%	65.5%	63.5%	64.6%
Equally Non-white & White	S	S	S	S	S	S
Equally Women & Men	13.0%	7.9%	17.5%	7.0%	9.9%	7.8%
Firms Not Classifiable	2.1%	16.8%	5.8%	18.0%	13.1%	15.0%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

²⁰² See Footnote 15 for an explanation of the reported value of “S”.

**Table E2. Demographic Distribution of Sales and Payroll Data – Aggregated Groups
Professional, Scientific, and Technical Services**

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	4.9%	0.8%	1.3%	0.7%	0.9%	0.7%
Latino	3.2%	0.9%	1.7%	0.8%	1.0%	0.6%
Native American	S	S	S	S	S	S
Asian	5.5%	2.6%	5.1%	2.4%	2.4%	2.4%
Panel B: Distribution of All Firms						
Non-White	14.2%	4.3%	7.8%	3.7%	4.2%	3.7%
White Women	23.0%	6.2%	16.4%	5.1%	6.6%	4.8%
White Men	48.3%	37.3%	57.5%	36.0%	37.8%	36.2%
Equally Non-white & White	1.3%	0.2%	0.4%	0.2%	0.2%	0.1%
Equally Women & Men	10.7%	3.8%	9.7%	3.1%	3.8%	2.4%
Firms Not Classifiable	2.5%	48.3%	8.2%	51.9%	47.4%	52.8%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

Appendix F: Additional Data from the Analysis of American Community Survey

Table F1. Partial Results from Log-linear Regression Analysis Construction

Dependent Variable: Logarithm of Wages	
Independent Variable	Coefficient
Black	-.387***
Latino	-.133***
Native American	-.36***
Asian/Pacific Islander	-.25***
Other	-.133***
White Women	-.38***
IL_Black	-.123***
IL_Latino	0.0214
IL_Native American	0.18
IL_Asian/Pacific Islander	-.265***
IL_Other	0.127
IL_White Women	-.0696**
Adjusted R-Squared	0.302
legend: * p<0.05; ** p<0.01; ***p<0.001	

Source: CHA calculations from the American Community Survey

Table F2. Partial Results from Log-linear Regression Analysis Construction,

Dependent Variable: Logarithm of Business Earnings	
Independent Variable	Coefficient
Black	-.492***
Latino	-.0612***
Native American	-.258***
Asian/Pacific Islander	-.1**
Other	0.0441
White Women	-.515***
IL_Black	.229*
IL_Latino	0.138
IL_Native American	0.0293
IL_Asian/Pacific Islander	-0.00983
IL_Other	0.976
IL_White Women	.321**
Adjusted R-Squared	0.158
legend: * p<0.05; ** p<0.01; ***p<0.001	

Source: CHA calculations from the American Community Survey

**Table F3. Partial Results from Probit Regression Analysis
Construction**

Dependent Variable: Probability of Forming a Business	
Independent Variable	Coefficient
Black	-0.299
Latino	-0.287
Native American	-0.316
Asian/Pacific Islander	-0.032
Other	-0.113
White Women	-0.085
IL_Black	0.172
IL_Latino	-0.122
IL_Native American	0.213
IL_Asian/Pacific Islander	0.000
IL_Other	-1.128
IL_White Women	0.010
Pseudo R-Square	0.11

Source: CHA calculations from the American Community Survey

**Table F4. Partial Results from Log-linear
Regression Analysis
Construction-related Services**

Dependent Variable: Logarithm of Wages	
Independent Variable	Coefficient
Black	-.248***
Latino	-.202***
Native American	-.281***
Asian/Pacific Islander	-.19***
Other	-.13*
White Women	-.338***
IL_Black	-.244**
IL_Latino	-0.0366
IL_Native American	-0.504
IL_Asian/Pacific Islander	0.0984
IL_Other	0.212
IL_White Women	-0.0293
Adjusted R-Squared	0.424
legend: * p<0.05; ** p<0.01; ***p<0.001	

Source: CHA calculations from the American
Community Survey

**Table F5. Partial Results from Log-linear
Regression Analysis
Construction-related Services**

Dependent Variable: Logarithm of Business Earnings	
Independent Variable	Coefficient
Black	-.577***
Latino	-0.0634
Native American	-0.386
Asian/Pacific Islander	-.206*
Other	-1.03
White Women	-.608***
IL_Black	0.558
IL_Latino	0.529
IL_Native American	(omitted)
IL_Asian/Pacific Islander	-2.02**
IL_Other	(omitted)
IL_White Women	-0.612
Adjusted R-Squared	0.094
legend: * p<0.05; ** p<0.01; ***p<0.001	

Source: CHA calculations from the American
Community Survey

**Table F6. Partial Results from Probit
Regression Analysis
Construction-related Services**

Dependent Variable: Probability of Forming a Business	
Independent Variable	Coefficient
Black	-0.375
Latino	-0.079
Native American	-0.048
Asian/Pacific Islander	-0.334
Other	-0.342
White Women	-0.009
IL_Black	-0.003
IL_Latino	-0.133
IL_Native American	(omitted)
IL_Asian/Pacific Islander	-0.124
IL_Other	(omitted)
IL_White Women	0.129
Pseudo R-Square	0.131

Source: CHA calculations from the American Community Survey