

The Port of Portland Small Business Program Disparity Study 2018



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, and Ilene Grossman CHA Firm Administrator. CHA is certified as a Disadvantaged Business Enterprise, Minority-Owned Business Enterprise and a Woman-Owned Business Enterprise by numerous agencies.

F.M. Burch & Associates, owned by Faye M. Burch, specializes in contracting equity programs for minority- and woman-owned business and workforce development, public involvement programs, technical assistance and small business development, and project management. Ms. Burch works in the public, private, and non-profit arenas, bringing her talents and skills as a savvy business leader, public policy setter, and community activist to her projects. Her style and approach are creatively designed to fit the diverse needs of the client.

Acknowledgements

We wish to express special appreciation to Kimberly Mitchell-Phillips, Bobbi Matthews, Jim Kanoff, Raechell Chapman and the staff of the Port for their assistance in conducting this study.

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I. EXECUTIVE SUMMARY

Colette Holt & Associates (CHA) was retained by the Port of Portland (“Port”) to perform a study in conformance with 49 C.F.R Part 26 and 49 C.F.R. Part 23 to determine its utilization of Disadvantaged, Minority- and Women-Owned Business Enterprises (collectively “DBEs” or “D/M/WBES”) and Airport Concession disadvantaged Business Enterprises (“ACDBEs”); the availability of DBEs and ACDBEs in its market area; any disparities between its utilization and DBE availability; and evaluate whether the use of race-conscious measures is supported by the results of this analysis. We were also tasked with making recommendations for the DBE, ACDBE and small business development programs. We analyzed contract data for 2012 through 2016.

A. Study Methodology and Data

The methodology for this study embodies the constitutional principles of *City of Richmond v. Croson*, *Adarand v. Peña*, Ninth Circuit Court of Appeals case law, U.S. Department of Transportation (“USDOT”) guidance, and best practices for designing race- and gender-conscious and small business contracting programs. The CHA approach has been specifically upheld by the federal 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.

We determined the Department’s utilization of DBEs and ACDBEs, and the availability of DBEs and ACDBEs in the Port’s geographic and industry market area. We then compared utilization to availability to calculate disparity ratios between those two measures for Federal Aviation Administration (“FAA”)-funded contracts and non-FAA-funded contracts. We further analyzed disparities in the wider economy, where affirmative action is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. We gathered anecdotal data on DBEs’ and ACDBEs’ experiences with the agency’s programs. We examined race- and gender-based barriers throughout the economy through a public meeting and focus groups with business owners and stakeholders, and interviews with agency staff. We also evaluated the Port’s DBE, ACDBE and SBE programs for their effectiveness and conformance with strict constitutional scrutiny, the DBE and ACDBE program regulations and national standards for contracting equity programs.

Based on the results of these extensive analyses, we make recommendations for the Port’s small business development programs.

B. Study Findings

1. The Port of Portland’s Small Business Development Programs

a. Overview of Programs

The Port’s Small Business Development Program (“SBDP”) facilitates opportunities for small businesses in the region to compete for and participate in Port contracts. The Program has three major components: the Port’s Disadvantaged Business Enterprise (“DBE”) Program; the Port’s Airport Concession Disadvantaged Business Enterprise (“ACDBE”) Program; and the Port’s Minority, Women, Service-Disabled Veteran, and Emerging Small Business (“SBE”) Program.¹ These programs are administered by the office of Small Business Development.

i. Disadvantaged Business Enterprise Program

As a recipient of US Department of Transportation (“USDOT”) funds through the Federal Aviation Administration (“FAA”), the Port is required as a condition of receipt to implement a DBE program in compliance with 49 C.F.R. Part 26.² The Department administers a DBE Program Plan based upon the

¹ The Port’s program for non-federally assisted contracts mirrors Part 26 in significant part.

² 49 C.F.R. §§ 26.3 and 26.21.

samples and guidance from USDOT. This Plan has been approved by FAA. As part of the Plan, the Port is required to submit a triennial DBE goal to FAA. For Federal Fiscal Years 2017-2019, the Portland International Airport's ("PDX") overall three-year goal is 11.95 percent. Of this amount, 9.84 percent is projected to be achieved by race-conscious contract goals. The balance of the goal, 2.11 percent, is to be achieved by race-neutral measures. As required by § 26.51, the Port sets contract goals to meet any portion of the overall DBE goal not projected to be met through race-neutral measures.

To set DBE contract goals, the Port considers the scope of work for the contract, the type of work, the location of the work, and the availability of ready, willing and able DBEs to perform work that lends itself to subcontracting. If no contract goal is used in the procurement vehicle, the Port generally includes language memorializing its commitment to increase DBE participation in FAA-funded Port contracts and encouraging bidders to consider how they can assist the Port with achieving its overall DBE participation goals.

The Port participates in the Unified Certification Program ("UCP") administered by the State of Oregon Department of Transportation and Business Oregon, the state's economic development agency. The statewide DBE directory is maintained by the Certification Office of Business Inclusion and Diversity ("COBID"), which conducts DBE certifications in the manner prescribed by Part 26.

The Port provides detailed instructions to bidders concerning Part 26 requirements for solicitations containing DBE provisions. Port contractors must use specified forms for payment requests and for DBE compliance. Contracts are awarded to the lowest responsive and responsible bidder who either documents its commitment to meet the goal by submitting the Port's DBE Goal Compliance Report and attendant Confirmation of Participation forms, or who, following a request from the Port, submits adequate evidence that it made Good Faith Efforts ("GFEs") to meet the goal.

A non-exhaustive list of DBE GFEs is set forth in the specifications, the content of which is derived from Appendix A of Part 26. The Port's instructions also refer bidders to a sample checklist and contact log available on the Port's public website at: www.portofportland.com. The Port treats GFE submissions as a matter of bidder responsibility.

The Port conducts regular reviews to ensure that DBEs are performing a Commercially Useful Function ("CUF") as defined in § 26.55. Compliance monitoring continues through the life of the contract. The Port reviews employees, performance, and equipment during the CUF review. The Port also complies with the prompt payment and retainage provisions of Part 26.

Since 1995, the Port has administered a nationally recognized Mentor Protégé Program that focuses on business development. To date, more than 120 firms have participated in this Port initiative. The Port is currently in the process of expanding this Program to ACDBE concessionaires.

To meet the requirement in § 26.39, Small Business Participation, the Port has established a race-neutral Emerging Small Business Program. To qualify, a firm must be either certified as an Emerging Small Business ("ESB") by COBID; an eligible participant of federal Small Business Administration ("SBA") programs;³ certified by another public entity; or meet the applicable SBA size standard. On a case by case basis, where the estimated contract amount is between \$5,000.00 and \$200,000.00, the Port may:

- Establish a race-neutral small business set-aside for prime contracts;⁴
- Divide prime contracts into smaller components within the financial resources and capacity of small business concerns; and

³ These include the 8(a) Business Development, Small Disadvantaged, and HubZone programs.

⁴ Section 26.43 of Part 26 prohibits set-asides unless needed to redress egregious instances of discrimination. However, a race-neutral small business is sanctioned since official DOT institutional guidance in the form of a question and answer includes this in sample measures to be undertaken by DOT recipients. The guidance explains that a small business set-aside is different since competition is limited only on the basis of business size, which is not a protected classification under strict constitutional scrutiny, as discussed in Chapter II.

- Require the prime contractor or consultant to identify business opportunities within the contract scope of work that small business subcontractors can perform, in lieu of the prime's self-performance of the work involved.⁵

Additional points for small business participation may be awarded when evaluating proposals for professional services on a case-by-case basis.

The Port also takes affirmative steps to encourage firms that may be eligible to become certified as small businesses through concerted outreach efforts, educational and informational programs, and direct contact.

b. Airport Concession DBE Program

As a large hub primary airport, the Port is required to have an Airport Concession Disadvantaged Business Enterprise ("ACDBE") program for PDX. Part 23 incorporates Part 26's provisions by reference. Part 23 differs from Part 26 in the size standards to establish the firm as a small business concern.

The Port establishes two overall ACDBE goals; one for car rentals and a second for concessions other than car rentals. Both are tracked and reported separately. For FFYs 2015 through 2017, the Port's overall three-year goal was 12.9 percent for non-car rental concessions, with 7.5 percent to be accomplished through race-conscious contract goals and 5.4 percent through race-neutral measures, and 1.3 percent for car rental concessions, to be attained solely by race-neutral means. To calculate this goal, the Port considered its market area to be businesses and concessionaires that register with the Port as potential vendors, suppliers, and concessionaires on the Port's website.

c. Small Business Enterprise Program

The Port has an overall small business participation goal of 20% of contract dollars awarded. The Port sets SBE goals on procurements over \$500,000.00. The Port may require a contractor to subcontract a portion of the contract to an ESB located or drawn from the workforce originating from economically distressed areas.

ESB participation is a mandatory criterion for all non-federally funded Port Requests for Proposals ("RFPs") that offer potential subcontracting for small businesses.

Firms must be certified by the State of Oregon's Certification Office for Business Inclusion and Diversity or the Washington State Office of Minority and Women's Business Enterprise. In addition to DBE or ACDBE certification, a firm is eligible if it is certified as a Minority Business Enterprise ("MBE"), a Women Business Enterprise ("WBE"), a Service-Disabled Veteran Business Enterprise ("SDVBE"), or an Emerging Small Business ("ESB").

2. Experiences with the Port's DBE and SBE Programs

To explore the impacts of the Port's DBE and SBE programs, we interviewed 228 individuals about their experiences and solicited their suggestions for changes.

Access to information and Port decision makers: Participants generally lauded the Small Business Development Program office. Although significantly short staffed, D/M/WBEs felt that they were able to access information through this department. However, several professional services firm owners wanted direct access to the decision makers in user departments. The Port uses the PlanetBids system to advertise opportunities. Some small firms found the system difficult to access.

Outreach to small and certified firms: Participants reported that while the Port attends many stakeholder groups' meetings, more outreach is needed about specific projects and for specific industries.

Technical assistance and supportive services: Help with navigating the Port's processes and requirements was suggested by many attendees. Access to capital was a major impediment to doing any public work.

⁵ Firms will be required to submit Small Business Compliance Reports provided by the Port.

Discrimination in the lending and housing markets reduces options for people of color. A bonding and financing program was another idea to assist small firms to do business with the Port.

Contracting processes and requirements: Airport projects are often very large and complex. This was reported to be a disincentive to small firms to seek Port contracts. Unbundling projects, providing longer lead times and simplifying requirements would assist these businesses to take on some Port work. Insurance requirements were another barrier to the ability of small firms to submit bids or proposals. Experience and qualification standards were sometimes seen as overly restrictive and unnecessarily high. Firms' experiences with obtaining information about why they were not selected for a specific procurement were mixed.

Payment: Complaints about slow payments came from all types of firms. This seemed to be a universal concern, mostly unrelated to race or gender status. Prime contractors reported that slow payment by the agency means they sometimes have to finance their subcontractors to ensure the prime meets its D/M/WBE goals. A solution that was enthusiastically embraced was increasing the payment schedule to perhaps twice monthly or a frontloaded payment schedule. Another approach would be for the Port to pay the prime contractor for the work the subcontractor has satisfactorily performed, even if all the other subs and/or the prime contractor cannot yet invoice for their work or the agency has not yet approved payment for those line items.

Obtaining work on Port projects: D/M/WBEs generally reported that the programs work well and are essential to their ability to obtain Port contracts and associated subcontracts. Without contract goals, most stated they would be shut out of Port opportunities. Some participants had leveraged the program into other work. A few owners stated that being certified had not helped them obtain contracts or subcontracts. Services and goods contracts outside the construction and design industries were particularly hard to obtain. Some D/M/WBEs reported that although they were listed on on-call contracts, they received little or no work. A major issue for small construction contractors was the inability to obtain materials specified in the Port's solicitation. One answer is for the agency to insist that its material suppliers have a robust supplier diversity program.

Meeting contract goals: Although not always easy, most prime vendors reported they have been able to meet the Port's DBE or SBE goals. However, finding qualified certified firms is often challenging for prime contractors and consultants. The complexities of airport projects made it particularly difficult to find capable D/M/WBEs. Goals were especially hard to meet on small or limited scope contracts, as well as on-call contracts. Some prime contractors provided additional support to D/M/WBEs. The Port has been reasonable about permitting substitutions of certified firms that were not performing up to standards. Several large prime contractors stated that they have never tried to submit Good Faith Efforts when they could not meet the Port's contract goal. A lack of transparency about how contract goals are set was mentioned by several interviewees. Certified firm owners sometimes were frustrated that prime contractors tend to use the same firms over and over; some large prime vendors agreed. Some professional services consultants suggested they should receive credit towards meeting contract goals for the diversity of their own workforce.

Monitoring of program requirements and participation: Overall, there was general agreement that the Port monitors its programs to ensure that firms listed in the bid or proposal actually receive the work. The Port's recent acquisition of the B2GNow data collection and monitoring software system has eased the burden of complying with program reporting. Some MBEs stated that there are still many "front" companies that do not in fact meet program eligibility requirements.

Small business setasides: There was significant support for a race- and gender-neutral small business setaside to assist DBEs and small firms to work as prime contractors and consultants. On call contracts were pointed to as an excellent vehicle for this target market approach.

Mentor-protégé program: Most participants praised this initiative as very helpful to the development of their firms. Mentors also lauded the program and benefited from it. A few minority or women owners said the program does not work for them. Another approach would be to compensate prime consultants for working with the DBE protégé, either through direct payments or the awarding of extra evaluation points.

3. Experiences with the Port's ACDBE Program

Overall, both ACDBES and prime concessionaires praised the Port's program. ACDBEs believed that the program was necessary to open up opportunities at PDX. There have been challenges in meeting ACDBE contract goals. One suggestion for program enhancement was to have regular meetings of ACDBEs to discuss issues and work towards common solutions; non-ACDBEs agreed.

4. Utilization, Availability and Disparity Analyses for the Port

Strict constitutional scrutiny, Ninth Circuit case law and the DBE program regulations require that a recipient limit its race-based remedial program to firms doing business in its product and geographic markets. CHA therefore analyzed contract data for federal fiscal years ("FFYs") 2012 through 2016 for the Port's federal aid and non-FAA-funded contracts and concessions contracts. We analyzed 1130 FAA and non-FAA-funded contracts, with a total award amount of \$407,015,577, and 90 concession contracts with a total award amount of \$1,324,290,744. The three Final Contract Data Files were used to determine the geographic and product markets for the analyses, to estimate the utilization of DBEs and ACDBEs on those contracts, and to calculate DBE and ACDBE availability in the Port's marketplace.

We analyzed data by funding source, *i.e.*, Federal Aviation Administration ("FAA") funded contracts; non-FAA funded contracts; and concessions contracts. This delineation was to assist the Port with meeting its obligations for goal submission under 49 C.F.R. Part 26 and Part 23.

We first determined the Port's product market for each funding source. The following present the NAICS codes, the label for each NAICS code, and the industry percentage distribution of spending across NAICS codes, by type of contract. Chapter IV provides tables disaggregated by dollars paid to prime contractors and dollars paid to subcontractors on contracts with subcontracting opportunities.

a. FAA-Funded Contracts

Table A
Industry Percentage Distribution of Contracts by Dollars Paid for FAA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	58.7%	58.7%
238210	Electrical Contractors and Other Wiring Installation Contractors	15.4%	74.1%
236220	Commercial and Institutional Building Construction	3.9%	78.0%
488190	Other Support Activities for Air Transportation	3.7%	81.7%
238910	Site Preparation Contractors	3.3%	85.1%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.4%	87.5%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.3%	89.7%
541370	Surveying and Mapping (except Geophysical) Services	1.6%	91.4%
238990	All Other Specialty Trade Contractors	1.6%	93.0%
238290	Other Building Equipment Contractors	1.1%	94.1%
238310	Drywall and Insulation Contractors	1.0%	95.1%
TOTAL			100.0%⁶

Source: CHA analysis of Port data.

⁶ Agency spending across other NAICS codes comprised 4.9% of all spending.

To determine the relevant geographic market area for each funding source, we applied the well accepted standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.⁷ Location was determined by ZIP code and aggregated into counties as the geographic unit.

Spending in the state of Oregon and two counties in Washington (King County – the home county of Seattle, and Clark County – a county within the Portland metropolitan area) accounted for 90.6% of all contract dollars paid in the Port’s unconstrained product market for FAA-Funded contracts. Therefore, Oregon and the two Washington counties constituted the geographic market area from which we drew our availability data. Table B presents data on how the contract dollars were spent across states.

Table B
Distribution of Contracts in Port of Portland’s Product Market
for FAA-Funded Contracts

State/County	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
Oregon	73.5%	73.5%
King County, WA	16.3%	89.9%
Clark County, WA	0.7%	90.6%
TOTAL		100.0%⁸

Source: CHA analysis of Port of Portland data.

Having determined the Port’s product and geographic market area for FAA-funded contracts (and, therefore, the agency’s *constrained* product market), the next step was to determine the dollar value of the agency’s utilization of DBEs⁹ as measured by payments to prime firms and subcontractors and disaggregated by race and gender. The Port did not collect data for all non-DBE subcontractors, as well as other records critical for the study. We therefore had to obtain missing data from prime vendors, a lengthy process, as well as reconstruct other contract records, including researching the race and gender ownership of subcontractors and assigning NAICS codes to those firms.

Table C presents the distribution of contract dollars by all industry sectors. This estimate (and the data presented in Tables D and E) deletes NAICS code 238210, because of the unusual circumstances regarding that scope of work, as discussed in Chapter IV. Chapter IV provides detailed breakdowns of these results.

Table C
Distribution of FAA-Funded Contract Dollars
by Race and Gender
- without NAICS Code 238210
(share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.00%	0.00%	0.00%	0.00%	1.20%	1.20%	98.80%	100.00%
237310	0.00%	0.00%	0.00%	0.00%	13.20%	13.20%	86.80%	100.00%
238220	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238290	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%

⁷ National Disparity Study Guidelines, p. 49.

⁸ Agency spending across other states comprised 9.4% of all spending.

⁹ We use the term “DBEs” to include firms owned by racial or ethnic minorities and white females that are not certified as DBEs under 49 C.F.R. Part 26. This casts the “broad net” required by the courts, as discussed in Chapter II. See also footnote 11.

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
238310	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%	0.00%	100.00%
238390	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238910	0.00%	3.50%	0.00%	1.00%	79.10%	83.50%	16.50%	100.00%
238990	0.00%	0.00%	0.00%	0.00%	26.90%	26.90%	73.10%	100.00%
484220	2.60%	0.00%	0.00%	0.00%	83.40%	86.00%	14.00%	100.00%
488190	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541370	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
TOTAL	0.08%	0.16%	0.00%	0.04%	17.49%	17.77%	82.23%	100.00%

Source: CHA analysis of Port of Portland data.

Using the “custom census” approach to estimating availability and the further assignment of race and gender using the Master Directory and other sources, we determined the aggregated availability of DBEs, weighted by the Port’s spending in its geographic and industry markets, to be 13.0 % for FAA-funded contracts. Table D presents the weighted availability data for all product sectors combined for the racial and gender categories.

Table D
Aggregated Weighted Availability for FAA-Funded Contracts
- without NAICS Code 238210

Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
0.8%	1.7%	1.5%	1.1%	8.1%	13.0%	87.0%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

To meet the Ninth Circuit’s test that all groups must have suffered discrimination in the Port’s markets to be eligible for credit towards meeting DBE contract goals, we next calculated disparity ratios comparing the Port’s utilization of DBEs as prime contractors and subcontractors to the availability of these firms in its market areas. Table E presents these results for FAA-funded contracts.

Table E
Disparity Ratios by Demographic Group
FAA-Funded Contracts
- without NAICS Code 238210

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	10.14%	9.57%	0.00%	3.78%	217.25%‡	136.48%‡	94.54%‡

Source: CHA analysis of Port of Portland data.

‡ Indicates substantive significance

We performed similar analyses for non-FAA funded contracts; car rental concession contracts; and non-car rental concessions contracts, as detailed in the tables below.

b. Non-FAA-Funded Contracts

Table F
Industry Percentage Distribution of Contracts by Dollars Paid for
Non-FAA-Funded Contracts,
All Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	17.7%	17.7%
541330	Engineering Services	8.4%	26.2%
541310	Architectural Services	8.4%	34.6%
485999	All Other Transit and Ground Passenger Transportation	7.6%	42.2%
236220	Commercial and Institutional Building Construction	7.2%	49.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	6.5%	56.0%
238220	Plumbing, Heating, and Air-Conditioning Contractors	4.4%	60.4%
238910	Site Preparation Contractors	3.6%	64.0%
561320	Temporary Help Services	3.0%	66.9%
423220	Home Furnishing Merchant Wholesalers	2.3%	69.2%
541512	Computer Systems Design Services	1.7%	70.9%
541611	Administrative Management and General Management Consulting Services	1.7%	72.6%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	1.5%	74.1%
238160	Roofing Contractors	1.4%	75.6%
238120	Structural Steel and Precast Concrete Contractors	1.4%	77.0%
561612	Security Guards and Patrol Services	1.4%	78.4%
562910	Remediation Services	1.3%	79.7%
541511	Custom Computer Programming Services	1.0%	80.6%
TOTAL			100.0%¹⁰

Source: CHA analysis of Port of Portland data.

¹⁰ Agency spending across other NAICS codes comprised 19.4% of all spending.

Table G
Distribution of Contracts in Port of Portland's Product Market
for Non-FAA-Funded Contracts

State/County	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
Oregon	75.8%	75.8%
King County, WA	4.4%	80.2%
Clark County, WA	4.3%	84.5%
TOTAL		100.0%¹¹

Source: CHA analysis of Port of Portland data.

Table H
Distribution of Non-FAA-Funded Contract Dollars¹²
by Race and Gender
(share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.4%	0.0%	0.2%	0.0%	15.9%	16.5%	83.5%	100.0%
237310	0.6%	0.6%	0.0%	0.0%	11.5%	12.7%	87.3%	100.0%
238120	0.0%	0.0%	0.0%	0.0%	15.5%	15.5%	84.5%	100.0%
238160	0.0%	0.0%	0.0%	0.0%	1.3%	1.3%	98.7%	100.0%
238220	0.0%	0.5%	0.1%	0.0%	4.1%	4.7%	95.3%	100.0%
238290	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238310	12.5%	0.0%	0.0%	0.0%	80.7%	93.1%	6.9%	100.0%
238330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238910	5.4%	12.1%	0.0%	9.0%	13.6%	40.2%	59.8%	100.0%
327320	0.0%	0.0%	0.0%	0.0%	71.0%	71.0%	29.0%	100.0%
332322	0.0%	0.0%	0.0%	0.0%	19.6%	19.6%	80.4%	100.0%
423220	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
485999	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
517911	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541310	9.5%	0.0%	0.0%	0.1%	0.5%	10.1%	89.9%	100.0%
541330	0.6%	0.9%	0.0%	0.1%	4.0%	5.6%	94.4%	100.0%
541511	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541512	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541611	3.2%	8.0%	0.0%	0.0%	25.2%	36.3%	63.7%	100.0%
541620	0.0%	6.4%	0.0%	0.0%	0.4%	6.8%	93.2%	100.0%
561320	35.1%	6.7%	1.6%	0.0%	0.7%	44.1%	55.9%	100.0%
561612	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%

¹¹ Agency spending across other states comprised 15.5% of all spending.

¹² This estimate deletes NAICS code 238210.

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
561730	0.0%	0.1%	0.0%	0.0%	61.7%	61.8%	38.2%	100.0%
562112	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
562910	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
922160	0.0%	0.0%	0.0%	0.0%	8.1%	8.1%	91.9%	100.0%
Total	3.1%	1.3%	0.1%	0.5%	8.7%	13.6%	86.4%	100.0%

Source: CHA analysis of Port of Portland data.

Table I
Aggregated Weighted Availability for Non-FAA-Funded Contracts¹³

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
1.9%	3.0%	1.9%	1.8%	10.5%	19.1%	80.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

Table J
Disparity Ratios by Demographic Group, Non-FAA-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	164.3% [‡]	43.2%	4.8%	26.9%	83.4% [‡]	71.7%	107.0% ^{**‡}

Source: CHA analysis of Port of Portland data

[‡] Indicates substantive significance

^{**}Indicates statistical significance at the 0.01 level

c. Car Rental Concession Contracts

We performed a similar analysis for car rental concession contracts. During the study period, the Port awarded only 11 contracts for Car Rental Concessions (NAICS Code 532111 – Passenger Car Rental). All 11 contracts were included in this analysis; consequently, there was not a need to determine a product market for these contracts. All of the contracts were to firms located in Oregon; therefore, Oregon was the geographic market for this analysis. Table K presents the dollar value of these contracts.

Table K
Industry Percentage Distribution of Contracts by Dollars Paid for Car Rental Concession Contracts

NAICS	NAICS Code Description	Total Contract Dollars
532111	Passenger Car Rental	\$833,243,090.74
TOTAL		\$833,243,090.74

Source: CHA analysis of Port of Portland data.

Table L represents the results of our analysis of the agency's utilization by contract dollars for Car Rental Concessions.

¹³ M/WBE availability consists of minority- and women-owned firms. The Port's SBE program does include small white male-owned firms; these firms are included in the non-M/WBE category.

Table L
Distribution of Car Rental Concessions Contract Dollars
by Race and Gender
(share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
532111	0.0%	0.0%	0.0%	0.0%	0.1%	0.1%	99.9%	100.0%
Total	0.0%	0.0%	0.0%	0.0%	0.1%	0.1%	99.9%	100.0%

Source: CHA analysis of Port of Portland data.

Table M
Aggregated ACDBE Weighted Availability for Car Rental Concession Contracts
(total dollars)

Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
0.0%	0.0%	0.0%	0.0%	2.1%	2.1%	97.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

Similar to the analysis of DBE availability in the constrained product market, shaped by the spending of FAA and non-FAA-funded dollars, we built a database of available firms in the car rental concessions market. Table M presents data on the weighted availability. Because there is only one NAICS code, there is not a need to weight the data. These weighted availability estimates can be used by the Port to set its ACDBE goals for car rental concessions. We did not perform disparity testing on concession contracts because it is not required under 49 C.F. R. Part 23.

d. Non-Car Rental Concession Contracts

We followed a similar approach for non-car rental concession contracts. Because there were only 79 contracts let to non-car rental concessions, all of the associated NAICS codes were included in the unconstrained product market. Table N presents these data

Table N
Industry Percentage Distribution of Contracts by Dollars Paid for Non-Car Rental Concession Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
722511	Full-Service Restaurants	28.605%	28.605%
453220	Gift, Novelty, and Souvenir Stores	26.448%	55.053%
722513	Limited-Service Restaurants	16.754%	71.807%
722515	Snack and Nonalcoholic Beverage Bars	7.772%	79.579%
448120	Women's Clothing Stores	4.002%	83.581%
448140	Family Clothing Stores	3.821%	87.402%
523130	Commodity Contracts Dealing	3.697%	91.100%
451211	Book Stores	2.803%	93.903%
443142	Electronics Stores	2.685%	96.588%
541810	Advertising Agencies	1.091%	97.679%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
488119	Other Airport Operations	0.636%	98.314%
812199	Other Personal Care Services	0.588%	98.902%
445310	Beer, Wine, and Liquor Stores	0.265%	99.167%
522110	Commercial Banking	0.224%	99.391%
611699	All Other Miscellaneous Schools and Instruction	0.130%	99.522%
448310	Jewelry Stores	0.123%	99.645%
812112	Beauty Salons	0.122%	99.767%
448130	Children's and Infants' Clothing Stores	0.119%	99.886%
561431	Private Mail Centers	0.085%	99.971%
517919	All Other Telecommunications	0.029%	99.999%
812320	Dry cleaning and Laundry Services (except Coin-Operated)	0.001%	100.000%
TOTAL			100.0%

Source: CHA analysis of Port of Portland data.

Table O presents the distribution of the contract dollars by state. All of the dollars spent in Washington were with firms located in Clark County. Consequently, this analysis used Oregon and Clark County, Washington as the geographic market; this captured 92.5% of the non-car rental concessions dollars in the unconstrained product market.

Table O
Distribution of Contracts in Port of Portland's Product Market for Non-Car Rental Concession Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
OR	87.96%	87.96%
WA	4.54%	92.50%
NY	2.97%	95.47%
NH	1.16%	96.63%
CA	1.10%	97.73%
NV	1.09%	98.82%
MN	0.64%	99.45%
NC	0.27%	99.72%
VA	0.13%	99.85%
MD	0.12%	99.97%
NE	0.03%	100.00%
TOTAL		100.0%

Source: CHA analysis of Port of Portland data.

Table P presents the Port's utilization for non-car rental concessions by contract dollars.

Table P
Distribution of Non-Car Rental Concession Contract Dollars
by Race and Gender
(share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
443142	0.0%	0.0%	0.0%	0.0%	64.0%	64.0%	36.0%	100.0%
445310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
448120	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
448140	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
448310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
451211	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
453220	0.0%	0.0%	27.9%	0.0%	7.1%	35.1%	64.9%	100.0%
522110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
523130	0.0%	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
722511	0.0%	12.1%	0.0%	0.0%	16.5%	28.6%	71.4%	100.0%
722513	0.7%	3.5%	3.5%	0.0%	61.4%	69.2%	30.8%	100.0%
722515	3.9%	0.0%	0.0%	0.0%	0.0%	3.9%	96.1%	100.0%
812112	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
812199	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
812320	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.5%	5.0%	8.3%	0.0%	24.4%	38.2%	61.8%	100.0%
Total	0.5%	5.0%	8.3%	0.0%	24.4%	38.2%	61.8%	100.0%

Source: CHA analysis of Port of Portland data

Table Q summarizes the weighted DBE availability to perform on non-car rental concession contracts.

Table Q
Aggregated Weighted Availability for Non-Car Rental Concession Contracts
(total dollars)

Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
0.7%	0.9%	2.2%	0.1%	13.1%	17.1%	82.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

5. Analysis of Economy-Wide Race and Gender Disparities in the Port's Market

We explored the Census Bureau data and literature relevant to how discrimination in the Port's industry market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the Port's prime contract and subcontract opportunities.

We analyzed the following data and literature:

Data from the Census Bureau's Survey of Business Owners indicate very large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms.

Data from the Census Bureau's American Community Survey ("ACS") indicate that Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men.

The 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.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall marketplace discrimination without some type of affirmative intervention. Taken together with anecdotal data, this is the type of proof that addresses whether, in the absence of DBE contract goals, the Port will be a passive participant in the discriminatory systems found throughout its industry market. These economy-wide analyses are relevant and probative to whether the agency may 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 Barriers in the Port's Market

In addition to quantitative data, the courts and the DBE regulations look to anecdotal evidence of firms' marketplace experiences to evaluate whether the effects of current or past discrimination continue to impede opportunities for DBEs such that race-conscious measures are supportable.

To explore this type of anecdotal evidence, we interviewed 228 participants. Most reported that, while progress has been made in reducing barriers on the basis of race and gender, significant inequities and obstacles remain to full and fair opportunities. Race- and gender-neutral approaches alone were described as unlikely to ensure a level playing field for Port contract opportunities.

Many minority and female owners reported that they still suffer from biased perceptions and stereotypes about their competency and professionalism. Several interviewees reported that sexism and unconscious bias limit their opportunities and adversely affect their businesses. Sexual harassment remains a problem for women, regardless of their industry. Younger women reported that blatant sexism has subsided. Most participants reported that becoming certified as a DBE or M/WBE helped to reduce these barriers. Some firms, especially consultants, felt that larger prime vendors do not use them to their full capabilities.

We also conducted an electronic survey of firms in the Port's market area about their experiences in obtaining work, marketplace conditions and the agency's contracting equity programs. The results were similar to those of the interviews. Almost a quarter of D/M/WBEs reported they still experience barriers to equal contracting opportunities; questioning of their competency because of their race or gender; less access to business networks and information. Ten percent reported job-related sexual or racial harassment or stereotyping.

II. LEGAL STANDARDS FOR DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

A. Summary of Constitutional Equal Protection Standards

To be effective, enforceable, and legally defensible, a race-based program for public contracts, regardless of the funding source, must meet the judicial test of constitutional “strict scrutiny.” Strict scrutiny is the highest level of judicial review. The test 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.¹⁴

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 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 to seeking contracts with the agency, comparable to the “disparate treatment” analysis used in employment discrimination cases.¹⁵ Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

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.
- 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.¹⁶

In *Adarand v. Peña*,¹⁷ 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 (which applies to the Port of Portland).¹⁸ Just as in the local government context, the national legislature 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.¹⁹ However, appellate courts have applied strict

¹⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁵ *Id.* at 509.

¹⁶ *United States v. Paradise*, 480 U.S. 149, 171 (1987).

¹⁷ *Adarand v. Peña*, 515 U.S. 200 (1995).

¹⁸ 49 C.F.R. Part 26.

¹⁹ *Cf. United States v. Virginia*, 518 U.S. 515 (1996).

scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program,²⁰ or held that the results would be the same under strict scrutiny.²¹

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.²² In contrast to strict scrutiny, rational basis means the governmental action must only be “rationally related” to a “legitimate” government interest. Thus, preferences for persons with, for example, disabilities or veteran status, may be enacted with vastly less evidence than that required for 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 its race-conscious program.²³ 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.²⁴ “[W]hen the proponent of an affirmative action plan produces sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”²⁵

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”²⁶ 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.”²⁷ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.²⁸ 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.²⁹

To meet strict scrutiny, studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of minority- and women-owned firms and their actual utilization compared to White male-owned businesses. Quality studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored. The following is a detailed discussion of the parameters for conducting studies leading to a defensible program for recipients of U.S. Department of Transportation (“USDOT”) in the Ninth Circuit.

B. Elements of Strict Scrutiny

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

²⁰ Northern Contracting, Inc. v. Illinois Department of Transportation, 473 F.3d 715, 720 (7th Cir. 2007) (“Northern Contracting III”).

²¹ Western States Paving Co., Inc. v. Washington State Department of Transportation, 2013 WL 1607239 at *13, fn. 6 (9th Cir. 2013).

²² *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

²³ *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).

²⁴ *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).

²⁵ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997).

²⁶ *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”).

²⁷ *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

²⁸ *Coral Construction Co. v. King County*, 941 F.2d. 910 921 (9th Cir. 1991); *Engineering Contractors II*, 122 F.3d at 916.

²⁹ *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).

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 that was at least 51 percent owned and controlled by minorities 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 active participation in discrimination:

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment... [I]f the City could show that it had essentially become a “passive participant” in a system of racial exclusion...[it] could take affirmative steps to dismantle such a system.³⁰

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 highly suspect tool.³¹ 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.

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.

³⁰ 488 U.S. at 491-92.

³¹ 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.”).

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.”³²

The foregoing analysis was applied only to Blacks. The Court then emphasized that there was “absolutely no evidence” of discrimination against other minorities. “The random inclusion of racial groups that, as a practical matter, may have never suffered from discrimination in the construction industry in Richmond, suggests that perhaps the City’s purpose was not in fact to remedy past discrimination.”³³

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.³⁴

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 discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.³⁵

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.³⁶ 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.³⁷

³² *Id.* at 510.

³³ *Id.*

³⁴ *See Grutter*, 529 U.S. at 336-337 (quotas are not permitted; race must be used in a flexible, non-mechanical way).

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

³⁶ *Id.* at 502.

³⁷ *See, e.g., Northern Contracting III*, 473 F.3d at 723.

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*.³⁸

Further, Richmond made no attempt to narrowly tailor a goal for the procurement at issue that reflected the reality of the project. Arbitrary quotas, and the unyielding application of those quotas, did not support the stated objective of ensuring equal access to City contracting opportunities. The *Croson* Court said nothing about the constitutionality of flexible 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 C.F.R. Part 26 "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."³⁹

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 the DBE Program

In *Adarand v. Peña*,⁴⁰ 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.⁴¹

To comply with *Adarand*, Congress reviewed and revised the Disadvantaged Business Enterprise (DBE) Program statute⁴² and implementing regulations⁴³ for federal-aid contracts in the transportation industry. The program governs the Port's receipt of federal funds from the Federal Aviation Administration. To date, every

³⁸ 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").

³⁹ *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).

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

⁴¹ *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.

⁴² Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178 (b)(1), 112 Stat. 107, 113.

⁴³ 49 C.F.R. Part 26.

court that has considered the issue has found the regulations to be constitutional on their face, including the Ninth Circuit Court of Appeals.⁴⁴ These cases provide important guidance to the Port about how to narrowly tailor its DBE program.

All courts have held that Congress had strong evidence of widespread race discrimination in the construction industry. The Ninth Circuit held that “[i]n 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.”⁴⁵

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.⁴⁶

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 highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.⁴⁷

Next, the regulations were facially narrowly tailored. Unlike the prior program,⁴⁸ 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

⁴⁴ See, e.g., *Western States*, 407 F.3d at 994; *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*”).

⁴⁵ See also *Western States*, 407 F.3d at 993.

⁴⁶ See *id.*, 407 F.3d at 992-93.

⁴⁷ *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.”).

⁴⁸ 49 C.F.R. Part 23.

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.⁴⁹

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. The Port must also estimate the portion of the goal it predicts will be met through race-neutral and race-conscious measures (*i.e.*, contract goals).⁵⁰ This requirement has been central to the holdings that the DBE regulations meet narrow tailoring.⁵¹ Further, 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.

However, narrow tailoring does not require that every race-neutral approach must be implemented and then proven ineffective before race-conscious remedies may be utilized.⁵² 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.”⁵³ Relying upon *Grutter v. Bollinger*, the Eighth Circuit held that while “[n]arrow tailoring does not require the exhaustion of every conceivable race-neutral alternative...it does require serious, good faith consideration of workable race-neutral alternatives.”⁵⁴

The DBE Program is also flexible. Eligibility is limited to small firms owned by persons whose net worth is under a certain amount.⁵⁵

Goals are to be 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 *Croson*.”⁵⁶

It is imperative that remedies not operate as fixed quotas.⁵⁷ 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.⁵⁸ Further, firms that meet the goals cannot be favored over those who made good faith efforts. Part 26 contains extensive provisions regarding the standards and processes for establishing good faith efforts.⁵⁹ This feature has been central to the holding that the DBE program meets the narrow tailoring requirement.⁶⁰

Further, a recipient must evaluate whether the program unduly burdens non-DBEs.⁶¹ The burden of compliance need not be placed only upon those firms directly responsible for the discrimination. “Innocent”

⁴⁹ *Sherbrooke*, 345 F.3d. at 973.

⁵⁰ 49 CFR § 26.45(f)(3).

⁵¹ See, e.g., *Sherbrooke*, 345 F.3d. at 973

⁵² *Grutter*, 529 U.S. at 339.

⁵³ *Coral Construction*, 941 F.2d at 923.

⁵⁴ *Id.* at 972.

⁵⁵ 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).

⁵⁶ 345 F.3d.at 972.

⁵⁷ See 49 C.F.R § 26.43 (quotas are not permitted and set-aside contracts may be used only in limited and extreme circumstances “when no other method could be reasonably expected to redress egregious instances of discrimination”).

⁵⁸ In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the DBE program. 488 U.S. at 508; see also *Adarand VII*, 228 F.3d at 1181; *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.”).

⁵⁹ 49 C.F.R. § 26.53 and Appendix A.

⁶⁰ See, e.g., *Sherbrooke*, 345 F.3d at 972.

⁶¹ 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).

parties can be made to share some of the burden of the remedy for eradicating racial discrimination.⁶² 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.⁶³ “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.”⁶⁴

To address this factor, the DBE regulations specifically provide that if a grantee determines that DBEs are “so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.”⁶⁵

The courts require that race-based programs must have duration limits and “not last longer than the discriminatory effects it is designed to eliminate.”⁶⁶ The DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.⁶⁷ If the Port determines it will exceed its goal, it must reduce or eliminate the use of contract goals to the extent necessary to ensure that their use does not result in exceeding the overall goal.⁶⁸

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.”⁶⁹

49 C.F.R. Part 26 operationalizes these standards. The Port must use a two-step goal setting process to establish its overall triennial DBE goal for FAA-funded contracts. This is a distinct inquiry from that required by the Ninth Circuit that the recipient have evidence of the need to use narrowly tailored race-conscious contract goals to meet the overall, annual goal.

The annual goal must be based upon the relative availability of DBEs and reflect the level of DBE participation that would be expected absent the effects of discrimination.⁷⁰ Step 1 is to determine the base figure for DBE availability, and one approved method is to use data from a disparity study.⁷¹ Step 2 is to examine evidence available in the recipient’s jurisdiction to determine whether to adjust the base figure. The Port must consider the current capacity of DBEs as measured by the volume of work DBEs have performed in recent years.⁷² The agency may consider evidence from related fields such as statistical evidence of disparities in financing, bonding and insurance and data on employment, self-employment, etc.⁷³ “If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought”.⁷⁴ The final result

⁶² *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.”).

⁶³ 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).

⁶⁴ *Western States*, 407 F.3d at 995.

⁶⁵ 49 C.F.R. § 26.33(a).

⁶⁶ *Adarand III*, 515 U.S. at 238.

⁶⁷ See *Western States*, 407 F.3d at 995.

⁶⁸ 49 C.F.R. § 26.51(f)(2).

⁶⁹ *Id.* at 973.

⁷⁰ 49 C.F.R. § 26.45(b).

⁷¹ 49 C.F.R. § 26.45(c)(3).

⁷² 49 C.F.R. § 26.45(d)(1)(i).

⁷³ 49 C.F.R. § 26.45(d)(2).

⁷⁴ 49 C.F.R. § 26.45(d)(3).

is to be expressed as a percentage of all FHWA and FTA funds (exclusive of funds to be used for the purchase of transit vehicles). The “overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.”⁷⁵ Public participation and public notice are mandated.

Goal setting, however, is not an absolute science.⁷⁶ “Though the underlying estimates may be inexact, the exercise requires the state 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*.”⁷⁷

In addition to the overall annual goal, the Port must set narrowly tailored goals on specific contracts where appropriate. As recently held by the Seventh Circuit, “[t]he necessity of relief [through narrowly tailored DBE contract goals] overlaps our analysis of IDOT’s and the Tollway’s strong basis in evidence for believing their programs were needed to remedy lingering effects of discrimination.”⁷⁸

It is settled case law that goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets. The Port must set contract 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.⁷⁹ Not only is contract goal setting legally mandated,⁸⁰ 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.

One marker of the need to use contract goals to meet the annual goal is the results of solicitations without contract goals. This is excellent evidence of whether, in the absence of affirmative market intervention, DBEs would receive dollars in proportion to their availability. 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”⁸¹ markets provides an important indicator of what level of actual DBE participation can be expected in the absence of goals.⁸² The court in the City of 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 in employing race- and gender-conscious measures.⁸³

D. Narrowly Tailoring the Port of Portland’s Disadvantaged Business Enterprise Program

Airports that receive FAA grants for airport planning or development, who will award prime contracts the cumulative total value of which exceeds \$250,000 in a fiscal year, must have a DBE program and meet related requirements as a condition of receiving these funds. Therefore, the Port must adopt a DBE program in conformance with 49 C.F.R. Part 26.

The Ninth Circuit has gone beyond the DBE regulatory and legal framework and added the requirement that a recipient must provide additional evidence beyond the record upon which Congress relied in enacting the DBE program in order to narrowly tailor the agency’s DBE program. In *Western States*, the court was persuaded by USDOT’s argument that race-conscious goals can only be applied by recipients in those localities where the effects of discrimination are present. “As the United States correctly observed in its brief and during oral

⁷⁵ 49 C.F.R. § 26.45(h).

⁷⁶ 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).

⁷⁷ *Sherbrooke*, 345 F.3d. at 972.

⁷⁸ *Midwest Fence*, 840 F.3d at 953.

⁷⁹ 49 C.F.R. § 26.51(e)(2).

⁸⁰ *See id*; *Coral Construction*, 941 F.2d at 924.

⁸¹ “Unremediated market” means “markets that do not have race- or gender-conscious subcontracting goals in place to remedy discrimination.” *Northern Contracting II*, at *36.

⁸² *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).

⁸³ *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.

argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present.”⁸⁴ In addition, each group sought to be included in race-conscious relief must have suffered discrimination in the agency’s market area.⁸⁵

The state put on no evidence at the summary judgment stage to address the question whether “the effects of discrimination [are] present in the Department’s markets.”⁸⁶ The court was proffered no statistical or anecdotal data similar to that presented to the court in the *Sherbrooke* case.⁸⁷ “The record is therefore devoid of any evidence suggesting that minorities currently suffer—or have ever suffered—discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington’s application of TEA-21 conflicts with the guarantees of equal protection because the State’s DBE program is not narrowly tailored to further Congress’s remedial objective.”⁸⁸

In response to this interpretation of Part 26, the General Counsel of USDOT issued Guidance in the form of “Questions and Answers Concerning Response to *Western States Paving Co. v. Washington State Department of Transportation*.”⁸⁹ Recipients in the Ninth Circuit that lacked a study should conduct a “study or other appropriate evidence-gathering process to determine the existence of discrimination or its effects in the recipient’s market.” The Guidance specifically points to the studies in the *Sherbrooke* and *Northern Contracting* cases. Such research should include:

- Evidence for each racial and ethnic group and white women.
- An assessment of any anecdotal and complaint evidence of discrimination.
- Evidence of barriers in obtaining bonding and financing and disparities in business formation and earnings.
- Disparity analyses between DBE utilization by the agency and the availability of DBEs to perform in its markets.
- Comparison of DBE utilization on contracts with goals to utilization on contracts without goals.

As discussed in the USDOT Guidance, a disparity study is the preferred method in the Ninth Circuit to determine the availability of DBEs to perform in the recipient’s market.⁹⁰ To perform Step 1—estimating the base figure of DBE availability—the study must conduct the following analyses. First, it must empirically establish the geographic and product dimensions of its contracting and procurement market area. This is a fact driven inquiry; it may or may not be the case that the market area is the government’s jurisdictional boundaries.⁹¹ A commonly accepted definition applied in this Report of geographic market area for disparity studies, and the methodology recommended in the Transportation Research Board’s Disparity Study Guidelines (“National Disparity Study Guidelines”) is the locations that account for at least 75 percent of the agency’s contract and subcontract dollar payments.⁹² 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.⁹³ Second, the study must calculate the availability of DBEs in the Port’s market area.

In the Ninth Circuit, recipients must take the further step of ensuring that only those groups that have suffered discrimination in its marketplace are eligible for race-conscious relief. In practice, that means that a firm owned by a member of an otherwise presumptively socially disadvantaged group may not be credited toward meeting

⁸⁴ 407 F.3d at 998.

⁸⁵ 407 F.3d at 999.

⁸⁶ 407 F.3d at 996.

⁸⁷ Minnesota and Nebraska had conducted studies. CHA served as counsel to the Minnesota DOT report.

⁸⁸ 407 F.3d at 999.

⁸⁹ <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/western-states-paving-company-case-qa>.

⁹⁰ An availability study using a methodology similar to that of this Report was recently upheld as the basis for the Illinois Department of Transportation’s DBE program, as well as the Illinois Tollway’s program for non-federally-funded contracts.

⁹¹ *Concrete Works II*, 36 F.3d at 1520 (to confine data to strict geographic boundaries would ignore “economic reality”).

⁹² “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”).

⁹³ *Id.* at pp. 50-51.

contract goals.⁹⁴ Further, the availability of any group found not to have experienced discrimination and that now enjoys a level playing field for Port prime contracts and subcontracts cannot be part of the analysis for the purpose of setting contract goals.

Guidance on the application of this test has been provided by courts in the Ninth Circuit in the wake of *Western States*. In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, the Ninth Circuit affirmed the district court's judgment that CalTrans program was sufficiently narrowly tailored.⁹⁵ CalTrans properly relied upon a disparity study to determine whether there was evidence of discrimination in California's contracting industry. For federal-aid contracts, the study provided estimates of DBE availability; examined DBE utilization over a four-year period; and calculated disparity ratios. It further compared similar data on state-funded contracts, which did not include DBE contracts goals. The study also gathered extensive anecdotal information through public meetings and comments, and stakeholder and business owner interviews.

CalTrans decided that the record failed to establish discrimination against Hispanic-owned firms. It therefore submitted a request to USDOT for a waiver of the DBE program's regulatory requirement that all presumptively socially disadvantaged groups be included for goal credit. The request was granted.⁹⁶

The court held that the evidence presented in the study meets the criteria in *Western States*. "In contrast [to *Western States*], Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry. ... Caltrans can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry."⁹⁷

Most recently, the district court in *Mountain West Holding Co., Inc. v. Montana*,⁹⁸ rejected the plaintiff's argument that the Montana Department of Transportation's DBE goal-setting program unlawfully required prime contractors to give preference to minority and female subcontractors competing to work for primes contracting with the state. Following the Ninth Circuit decision in the *CalTrans* case, the district court found that Montana established sufficient evidence to demonstrate discrimination in the Department's transportation contracting industry and granted summary judgment in favor of the State. Following Mountain State's appeal, the Ninth Circuit determined that the claims for injunctive and declaratory relief were moot, since Montana does not currently employ gender-or race-conscious goals, and the goals in issue were several years old.

As discussed in Chapter VI of this report, there is no requirement that anecdotal evidence be verified. The *CalTrans* case specifically rejects such a test. Further,

AGC also discounts the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ole boy" network of contractors. However, federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. [citations omitted] Moreover [sic], AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. Caltrans does not claim, and the anecdotal evidence does not need to prove, that every minority-

⁹⁴ No case has whether a firm certified under the individual consideration of social and economic disadvantage criteria set out in Appendix E to Part 26 can be counted towards contract goals.

⁹⁵ 713 F. 3d 1187 (9th Cir. 2013).

⁹⁶ However, a subsequent study after Hispanics were dropped for goal credit did provide sufficient proof that this group suffers discrimination in the California highway industry and all groups dollars re now eligible for credit towards meeting contract goals.

⁹⁷ 713 F. 3d 1187.

⁹⁸ 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum Opinion (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014),

owned business is discriminated against. It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination.⁹⁹

Even where an agency has established its right to employ race-conscious contract goals on appropriate solicitations, the recipient must use race-neutral measures to the maximum feasible extent.¹⁰⁰ There is no requirement that an agency must try all possible race-neutral approaches and prove they failed before it can implement contract goals.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 Port 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 It was precisely these types of race-neutral remedies applied by CalTrans that the Ninth Circuit pointed to in holding its program to meet strict scrutiny.¹⁰⁴

Programs based upon studies similar to this "custom census" methodology employed for this Report have been repeatedly upheld. This includes 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. For example, the Illinois Department of Transportation's (IDOT's) DBE program was upheld based this approach, combined with other economy-wide and anecdotal evidence. The USDOT Guidance refers to this case approvingly. 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.¹⁰⁵

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,

⁹⁹ *Id.* at *9; see also *Mountain West Holding Co. v. Montana Department of Transportation*, 2014 WL 6686734 (D. Mont 2014) (study uncovered substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network."); *H.B. Rowe v. Tippet*, 615 F3d 233, 261 (4th Circuit 2010) ("such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action.").

¹⁰⁰ 49 C.F.R. § 26.51(a).

¹⁰¹ 2013 WL 1607239 at *10.

¹⁰² *Id.*

¹⁰³ *Croson*, 488 U.S. at 503 n.3.

¹⁰⁴ 2013 WL 1607239 at *10.

¹⁰⁵ *Northern Contracting II*, at *82 (internal citations omitted); see *Croson*, 488 U.S. at 492.

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.¹⁰⁶

Most recently, the Seventh Circuit affirmed the district court and upheld the Illinois Tollway's DBE program for non-federal-aid contracts based upon a CHA study applying this methodology.¹⁰⁷ Plaintiff's main objection to the defendant's evidence was that it failed to account for "capacity" when measuring DBE availability and underutilization. However, as is well established, "Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant. or presenting contrasting statistical data. [citation omitted]. Plaintiff "fail[ed] to provide any independent statistical analysis or make this showing here."¹⁰⁸ Midwest offered only conjecture about how the defendants' studies' supposed failure to account for capacity may or may not have impact other evidence demonstrating actual bias."

Recently, the DBE program and regulations were again upheld in a criminal case of DBE program fraud.¹⁰⁹ The court rejected the defendant's challenge to USDOT's authority to promulgate the federal regulations and determined that the regulatory legislative history and executive rulemaking were made under the broad grant of rights authorized by Congressional statutes.

E. Narrowly Tailoring the Port of Portland's Airport Concessions Disadvantaged Business Enterprise Program

The Airport Concessionaire Disadvantaged Enterprise ("ACDBE") Program¹¹⁰ applies to primary/commercial service airports that receive Airport Improvement Program funding and that have concession revenues of \$200,000 or more for either car rental or non-car rental concessions. Part 23 incorporates 49 C.F.R. Part 26's provisions by reference. Part 23 differs from Part 26 in the size standards to establish the firm as a small business concern¹¹¹.

The Port must establish two overall ACDBE goals; one for car rentals and another for concessions other than car rentals. An airport follows the two-step goal setting procedures of § 23.51. As with 49 C.F.R. § 26.45, after determining the total gross receipts for the concession activity, the first step is to determine the relative availability of ACDBEs in the market area, "base figure". The second step is to examine all relevant evidence reasonably available in the sponsor's jurisdiction to determine if an adjustment to the Step 1 "base figure" is necessary so that the goal reflects as accurately as possible the ACDBE participation the sponsor would expect in the absence of discrimination. Evidence may include, but is not limited to past participation by ACDBEs, a disparity study, evidence from related fields that affect ACDBE opportunities to form, grow, and compete (such as statistical disparities in ability to get required financing, bonding, insurance; or data on employment, self-employment, education, training and union apprenticeship).

¹⁰⁶ *Id.*

¹⁰⁷ *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932 (7th Cir. 2016) ("the Tollway Defendants have provided persuasive evidence of discrimination in the Illinois road construction industry").

¹⁰⁸ *See Midwest Fence Corp. v. U.S. Department of Transportation*, 84 F. Supp. 3d 705 (N.D. Ill. 2015).

¹⁰⁹ *United States v. Taylor*, 232 F. Supp. 3d 741 (W.D. Penn. 2017).

¹¹⁰ 49 C.F.R. Part 23.

¹¹¹ The ACDBE's gross receipts, averaged over the firm's previous three fiscal years, cannot exceed \$56.42 million, with the exceptions of banks (\$1 billion in assets); car rental companies (\$75.23 millions average annual gross receipts over the firm's three previous fiscal years, as adjusted by the Department for inflation every two years from April 3, 2009); pay telephones (1,500 employees); and automobile dealers (350 employees). USDOT adjusts the numbers for ACDBEs that are not banks, pay telephones or automobile dealers using the U.S. Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment. *See* 49 C.F.R. § 23.33.

In our view, the constraints imposed on the DBE program for recipients in the Ninth Circuit do not apply to the ACDBE program regulations. As stated by USDOT, “the DOT-assisted contracts and concessions rules are based on different statutes. They apply to different kinds of businesses, and concern distinct types of relationships between recipients of DOT financial assistance and businesses. There are a number of substantive differences between the two regulatory schemes (e.g., business size standards).”¹¹² We therefore follow this approach by not performing disparity testing on concession contracts, as provided in Chapter IV.

¹¹² 14496 Fed. Reg., March 22, 2005.

III. PORT OF PORTLAND'S SMALL BUSINESS DEVELOPMENT PROGRAMS

This Chapter describes the Port's Disadvantaged Business Enterprise ("DBE") program for federal-aid contracts; its SBE program for non-federal contracts; and its Airport Concessions Disadvantaged Business Enterprise program for concession contracts. We first provide an overview of the elements of the programs. The second section presents the results of our interviews with businesses and stakeholders about the implementation of the programs.

A. Overview of the Port's Small Business Development Programs

The Port's Small Business Development Program ("SBDP") facilitates opportunities for small businesses in the region to compete for and participate in Port contracts. The Program has three major components: the Port's Disadvantaged Business Enterprise ("DBE") Program; the Port's Airport Concession Disadvantaged Business Enterprise ("ACDBE") Program; and the Port's Minority, Women, Service-Disabled Veteran, and Emerging Small Business ("SBE") Program.¹¹³ These programs are administered by the office of Small Business Development.

1. Disadvantaged Business Enterprise Program

The Port receives federal financial airport improvement assistance funds from the United States Department of Transportation ("DOT") through the DOT's relevant modal administration and the Federal Aviation Administration ("FAA"). These funds are authorized by 49 U.S.C. Section 47101, *et. seq.* The FAA is directly responsible for overseeing and monitoring the Port's compliance with the DBE program rules set forth in Title 49 C.F.R. Part 26 ("Part 26").

The Port administers its established DBE program in accordance with Part 26, for projects funded in whole or in part by the FAA. The Port's DBE program plan ("Plan") covers its three airports: the Portland International Airport, the Troutdale Airport, and the Hillsboro Airport. The program ensures DBEs have an equal opportunity to compete for and participate in contracts funded with federal dollars.¹¹⁴

The current Plan was submitted to the FAA for approval in 2014. Since then, the Port has submitted updates to this document and to its earlier-approved Plan.¹¹⁵ The Port's DBE Liaison Officer ("DBELO") ensures that the Port's DBE Program complies with all Part 26 requirements. Implementation of the Program is accorded the same deference as compliance with other legal obligations imposed on the Port. The DBELO works in tandem with Port Procurement, Engineering, and Legal personnel to administer and implement the DBE Program.¹¹⁶ Duties and responsibilities of the DBELO include the following:

- Collaborating with all Port departments to set and monitor triennial DBE goals.
- Reviewing third party contracts and purchase requisitions for compliance with the Program.
- Assisting with bid preparation.
- Facilitating bonding and insurance.
- Ensuring that bid notices and other competitive procurements are available to DBEs expeditiously.
- Establishing contract-specific goals and monitoring the results of solicitations.
- Participating in pre-bid meetings.
- Updating and advising the Port's Executive Director and Commission on DBE goals and DBE attainment.
- Assessing whether adequate good faith efforts were made by Port contractors.
- Developing program training and outreach.

¹¹³ The Port's program for non-federally assisted contracts mirrors Part 26 in significant part.

¹¹⁴ This Program is made part of the Port's Commission Policy Number 6.1.9 dated May 8, 2002 which states that Port contractors and subcontractors shall be required to comply with Part 26 in competing for and performing contracts funded in whole or in part with DOT-assistance.

¹¹⁵ The most recent updates address prompt payment and retainage.

¹¹⁶ The DBE program is implemented by recipients of DOT federal financial assistance. The Port is deemed a recipient by virtue of the definition contained in Part 26.

- Providing hands-on education.
- Serving as the Port's liaison to the statewide Uniform Certification Program ("UCP").
- Conducting outreach to DBEs and to community organizations.

As part of the Plan, the Port is required to set a triennial DBE goal for airport projects and concessions. For Federal Fiscal Years 2017-2019, the Portland International Airport's ("PDX") overall three-year goal is 11.95 percent. Of this amount, 9.84 percent is projected to be achieved by race-conscious contract goals. The balance of the goal, 2.11 percent, is to be achieved by race-neutral measures. As required by § 26.51, the Port sets contract goals to meet any portion of the overall DBE goal not projected to be met through race-neutral measures.

To set DBE contract goals, the Port considers the scope of work for the contract, the type of work, the location of the work, and the availability of ready, willing and able DBEs to perform work that lends itself to subcontracting. If no contract goal is used in the procurement vehicle, the Port generally includes language memorializing its commitment to increase DBE participation in FAA-funded Port contracts and encouraging bidders to consider how they can assist the Port with achieving its overall DBE participation goals.

The Port participates in the Unified Certification Program ("UCP") administered by the State of Oregon Department of Transportation and Business Oregon, the state's economic development agency. The statewide DBE directory is maintained by the Certification Office of Business Inclusion and Diversity ("COBID"), which conducts DBE certifications in the manner prescribed by Part 26.

In order for a firm to qualify as a DBE, it must be for-profit and must be 51% owned and controlled by one or more individuals who are socially and economically disadvantaged. The Port recognizes firms certified as DBEs in accordance with Part 26 by either COBID or by the Washington State Office of Minority and Women's Business Enterprises ("OMWBE"). Following certification, firms qualify for credit towards DBE goals so long as they continue to meet the DBE eligibility standards.

To participate in Port solicitations, all prospective vendors, including DBEs, must register as a vendor doing business with the Port. Following registration, firms can view available procurements, receive electronic notices of Port contracting opportunities, and download copies of solicitations.

The Port provides detailed instructions to bidders concerning Part 26 requirements for solicitations containing DBE provisions. Port contractors must use specified forms for payment requests and for DBE compliance. Contracts are awarded to the lowest responsive and responsible bidder who either documents commitment to meet the goal by submitting the Port's DBE Goal Compliance Report and attendant Confirmation of Participation forms, or who, following a request from the Port, submits adequate evidence that it made Good Faith Efforts ("GFEs") to meet the goal.

A non-exhaustive list of DBE GFEs is set forth in the specifications, the content of which is derived from Appendix A of Part 26. The Port's instructions also refer bidders to a sample checklist and contact log available on the Port's public website at: www.portofportland.com. Since Appendix A (IV) E (1) of Part 26 indicates that a bidder or prime contractor is not required to accept unreasonable quotes in order to satisfy contract goals but does not quantify this, the Port provides a frame of reference for its vendors. Bidders are advised that these documents are illustrative and are intended to help them to utilize and document their GFEs. In practice, GFEs are fact-specific and are determined by the Port at its sole discretion.

The Port treats GFE submissions as a matter of bidder responsibility.¹¹⁷ GFE documentation is due within two working hours of bid submission in the form of a "DBE Goal Compliance Report." Bidders must complete a Subcontractor Disclosure Form. The Port's DBELO determines whether a bidder that fails to meet the contract goal has documented sufficient GFEs to be considered as responsible. If the apparent lowest responsive and

¹¹⁷ The lowest responsive bidder is a qualified bidder with the lowest bid price whose business and financial capabilities, past performance, and reputation meet the required industry standards.

responsible bidder does not meet the DBE contract goal, it must submit adequate documentation to establish GFE within a twenty-four-hour period.

If the Port determines that the firm has not documented sufficient DBE participation, it affords the firm administrative reconsideration as required by Part 26.

GFE determinations are made throughout the life of the contract. If the contractor needs to replace a DBE on a contract, it must seek the Port's written consent and follow the strictures of § 26.63 (f). The prime contractor must notify the DBELO immediately of the DBE's inability or unwillingness to perform.

In addition to discharging its GFE responsibilities, the Port conducts regular reviews to ensure that DBEs are performing a Commercially Useful Function ("CUF") as defined in § 26.55. Compliance monitoring continues through the life of the contract. The Port reviews employees, performance, and equipment during the CUF review.

The Port also complies with the prompt payment and retainage provisions of Part 26. The Port requires prime contractors to pay their subcontractors for satisfactory performance of their contracts no later than 10 days from receipt of each payment the Port makes to the prime contractor. Further, the prime contractor must pay full retainage withheld from to the subcontractor within 10 days after the subcontractor's work is satisfactorily completed.

Since 1995, the Port has administered a nationally recognized Mentor Protégé Program that focuses on business development. The Program matches a given protégé with two established business mentors that assist with business planning, financial statements, marketing strategies, and business goals. Participation in this initiative includes professional membership fees to either the Associated General Contractors or the American Council of Engineering Companies of Oregon for the first two years. To date, more than 120 firms have participated in this Port initiative.¹¹⁸ The Port is currently in the process of expanding this Program to ACDBE concessionaires.

To meet the requirement in § 26.39 to foster small business participation, the Port administers an FAA-approved Small Business Element ("Element") that facilitates competition by small businesses.¹¹⁹

To ensure that all business concerns meet the definition set forth in § 26.5, a firm must be either certified as an Emerging Small Business ("ESB") by an eligible participant of federal Small Business Administration ("SBA") programs;¹²⁰ or certified by another public entity if that firm meets the SBE size standard, which must be among the criteria for certification or participation in the public entity's program. If a firm does not fall within any of these categories, it may still qualify for participation if it meets the applicable SBA size standard.

On a case by case basis, where the estimated contract amount is between \$5,000.00 and \$200,000.00, the Port may:

- Establish a race-neutral small business set-aside for prime contracts;¹²¹
- Divide prime contracts into smaller components within the financial resources and capacity of small business concerns; and

¹¹⁸ The FAA has expressed interest in reviewing this program.

¹¹⁹ The Element is intended to ensure that all small businesses, not just DBEs, are allowed to participate in the Port's and its counterpart's program (DBEs and non-DBEs alike) and are subject to the same size standards.

¹²⁰ These include the 8(a) Business Development, Small Disadvantaged, and HubZone programs.

¹²¹ Section 26.43 of Part 26 prohibits set-asides unless needed to redress egregious instances of discrimination. However, a race-neutral small business is sanctioned since official DOT institutional guidance in the form of a question and answer includes this in sample measures to be undertaken by DOT recipients. The guidance explains that a small business set-aside is different since competition is limited only on the basis of business size, which is not a protected classification under strict constitutional scrutiny, as discussed in Chapter II.

- Require the prime contractor or consultant to identify business opportunities within the contract scope of work that small business subcontractors can perform, in lieu of the prime's self-performance of the work involved.¹²²

Additional points for small business participation may be awarded when evaluating proposals for professional services on a case-by-case basis. Proposers may be required to respond to questions concerning the firm's experience in promoting small business opportunities and innovative measures they have undertaken to increase small business participation.

The Port also takes affirmative steps to encourage firms that may be eligible to become certified as small businesses through concerted outreach efforts, educational and informational programs, and direct contact.

2. Airport Concession DBE Program

As a large hub primary airport, the Port is required to have an Airport Concession Disadvantaged Business Enterprise ("ACDBE") program for PDX. Part 23 incorporates Part 26's provisions by reference. Part 23 differs from Part 26 in the size standards to establish the firm as a small business concern.

Under the ACDBE Program, ready, willing, and able ACDBEs run airport shops, restaurants and services, or provide goods and services to airport concessions and rental car companies. The definition of a concession is set forth in § 23.3.¹²³

To participate in the ACDBE Program, firms must meet the Part 26 eligibility standards, as well as the following Part 23 business size requirements:

- Concessionaire/goods or service provider: Three year averaged gross receipts under \$56.42 million
- Banks and financial institutions: Assets under \$1 billion
- Car rental companies: Three-year gross averaged gross receipts under \$75.23 million
- Pay telephone companies: 1,500 employees or fewer
- Automobile dealers: 350 employees or fewer.

The Port's Airport Concession DBE Liaison Officer ("ACDBELO") ensures implementation of all aspects of the ACDBE Program and has direct access to the Port's Executive Director.

The Port seeks ACDBE participation in all types of concession activities. A firm is certified as a DBE, an ACDBE, or both by COBID.¹²⁴

The Port establishes two separate overall ACDBE goals; one for car rentals and a second for concessions other than car rentals. Both are tracked and reported separately. For FFYs 2015 through 2017, the Port's overall three-year goal for non-car rental concessions was 12.9 percent, with 7.5 percent to be accomplished through race-conscious contract goals and 5.4 percent through race-neutral measures.¹²⁵ For the same FFYs, the overall three-year goal for car rental concessions was 1.3 percent, to be attained solely by race-neutral means. To calculate this goal, the Port considered its market area to be businesses and concessionaires that register with the Port as potential vendors, suppliers, and concessionaires on the Port's website.

The ACDBE operates very similarly to the Port's DBE program. A few differences are worth noting.

¹²² Firms will be required to submit Small Business Compliance Reports provided by the Port.

¹²³ A concession is one or more of the types of for-profit businesses that are either located on the airport and engaged in the sale of consumer goods or services to the public under an agreement with the recipient; or a business conducting one or more of the following covered activities, even if it does not maintain an office, store or other business location on an airport, as long as the activities take place on the airport premises; management contracts and subcontracts, a web-based or other electronic business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

¹²⁴ The Port presumes that a firm certified as a DBE under Part 26 is eligible to participate as an ACDBE.

¹²⁵ This was the latest goal submission available for review at the time of the study.

- If the proposed concessionaire is a joint venture, the Port requires the concessionaire to comply with Part 26 and Part 23 requirements, as well as with official institutional guidance issued by the FAA including the *Joint Venture Guidance* issued by FAA.
- The Port applies the FAA's principles for evaluating long-term, exclusive ("LTE") agreements. An exclusive lease is one in which an entire category of business opportunity is restricted to a single business entity. Since the FAA itself is responsible for overseeing and monitoring airport compliance with the ACDBE program, impacted FAA staff, Port staff, and stakeholders determine whether an agreement is an LTE agreement subject to the prohibition against such agreements in § 23.75.

3. Minority, Women, Service-Disabled Veteran and Emerging Small Business Program

In addition to the federal DBE and ACDBE programs, the Port administers its Minority, Women, Service-Disabled Veteran & Emerging Small Business ("SBE") Program for non-federally funded contracts.

The Port has an overall small business participation goal of 20% of contract dollars awarded. The Port sets SBE goals on procurements over \$500,000.00.

Firms must be certified by the State of Oregon's Certification Office for Business Inclusion and Diversity or the Washington State Office of Minority and Women's Business Enterprise. In addition to DBE or ACDBE certification, a firm is eligible if it is certified as a Minority Business Enterprise ("MBE"), a Women Business Enterprise ("WBE"), a Service-Disabled Veteran Business Enterprise ("SDVBE"),¹²⁶ or an Emerging Small Business ("ESB").¹²⁷ The Office for Business Inclusion and Diversity ("COBID") is the sole certification authority for the state of Oregon.

The Port may require a contractor to subcontract a portion of the contract to an ESB located or drawn from the workforce originating from economically distressed areas if: (a) its principal place of business is located in an area designated as economically distressed under administrative rules adopted by the Oregon Business Development Department; or (b) the contractor certifies that a substantial number of its employees or subcontractors that intend to manufacture or provide the goods or perform the services under the contract reside in an area designated as economically distressed. For purposes of making this determination, the Port determines what constitutes a "substantial number". When included as a selection criterion for proposals, the submission must be reviewed by the Port's Small Business Development Program Manager.

ESB participation is a mandatory criterion for all non-federally funded Port Requests for Proposals ("RFPs") that offer potential subcontracting for small businesses. The minimum weight for this criterion is 10% of total available points. If the RFP offers significant subcontracting opportunities for one or more ESBs, the criterion weight is increased above 10%.

B. Experiences with the Port's DBE and SBE Programs

To explore the impacts of race- and gender-neutral contracting policies and procedures and the implementation of the Port's DBE and SBE programs, we interviewed 228 individuals about their experiences and solicited their suggestions for changes. The following are summaries of the topics discussed. Quotations are indented and have been edited for readability. They are representative of the views expressed during the group interviews.

¹²⁶ A MBE, WBE or SDVBE must have gross receipts not exceeding \$23.98 million, averaged over three years; business owner must be a United States citizen or lawfully-admitted permanent resident; own and control 51 percent or more of the business; control and manage the day-to-day operations; possess the requisite license; and have made a contribution of capital. Recognized minority groups include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans.

¹²⁷ An ESB must be an Oregon business according to size, registered with the Oregon Secretary of State and not be a joint venture. The business owner must be properly licensed. The duration of certification cannot exceed 12 years.

1. Access to information and Port Decision Makers

Participants generally lauded the Small Business Development Program office. Although significantly short staffed, D/M/WBEs felt that they were able to access information through this department. However, several professional services firm owners wanted direct access to the decision makers in user departments.

Contracting officers don't make decisions. So, if we need to have meeting groups with the buyer, the actual decision makers, where they come and they hear, and we discuss problems and solutions in an informal setting, or a formal setting.... It does not feel like we have that connection that you've created that environment where a small business can make that phone call.

The person who knows the manager, or is working with the program manager is front and center on getting the contract. That's just the way the world works.

The information that comes down and says, we want to do business with you is not the people that are doing the business. And the people that are doing the business are hard to get to.

We reached out to the Port of Portland directly trying to get through the system, the phone system, to actually find someone who can get you in the right direction. Almost impossible. I found someone I knew in the HR department and it was almost prohibited. You know, secret information. I can't tell you that. I can't give you any information.

There's usually one person on that selection committee who's going to drive it. In this organization, unless you do some work for them for a while, it's hard to figure out how that works.

The Port uses the PlanetBids system to advertise opportunities. Some small firms found the system difficult to access.

I did find it really almost impossible to get straight forward, easy information on how to work with Port of Portland.

My experience with Planet Bids is that you have to go there. They don't, "Hey, there's a whole group of projects out there. You can look." They don't solicit you. You've got to go to their website and see what's coming up.

2. Outreach to Small and Certified Firms

Participants reported that while the Port attends many stakeholder groups' meetings, more outreach is needed about specific projects and for specific industries.

Most of the agencies we work with, they send project managers. Port of Portland- I haven't seen one.

I haven't seen [a matchmaking event for D/M/WBEs and prime contractors] with the Port. The city of Portland's done that.... I've never seen an invite [from the Port].

There are public agencies where they have these luncheon presentations, where the consultant or the vendor can present to all the decision makers. So, all the project managers in the room, and show them what you do. I think having a focused audience like that is much more effective than going to these fairs, because I've done these fairs, and I've stopped.

Maybe like the Port could sponsor some type of reception or meeting, maybe with the Port's internal architects because they must have some? That could maybe lead that conversation.

The A[merican I[nstitute of A[rchitects] and the Port can work together and do more.

3. Technical Assistance and Supportive Services

Help with navigating the Port's processes and requirements was suggested by many attendees.

The State of Oregon and Metro have had that problem, too, with people not replying to RFP's because they don't know how to put the proper stuff in RFP's. So now, they're doing classes. Here's what you need to look for, and I think maybe the Port should do that.... I'm sure that there's certain little bullet points in there that they're looking that we're not putting in, but we should.

What [if] the Port bought the equipment and the Port fronted a lot of that sort of stuff? On a small percentage, it's not like on everything and then they actually brought in some people to learn how to do the work, do the work, and not really have to worry about the risk right off, and slowly step them up in a process?

If they had some assistance through the Port or the City, it would help facilitate this and make it more successful by far.

Access to capital was a major impediment to doing any public work. Discrimination in the lending and housing markets reduces options for people of color.

To get a loan, to start this and they don't have a family issue where they can say my uncle has the house, my grandfather has a house I can get a loan against that.

A bonding and financing program was another idea to assist small firms to do business with the Port.

[Another agency had] assistance for bonding, construction bonding. I know a few years ago so maybe they can do something similar.

The big barrier is cost and the risk, okay? And if the city, if it's important to the city or any public entity to start to change the culture, you can't sit and say, well you can't do this. You have to do something different. Maybe it's a pilot.

If you want to give people a chance, let the Port have a risk.

4. Contracting processes and requirements

Airport projects are often very large and complex. This was reported to be a disincentive to small firms to seek Port contracts. Unbundling projects, providing longer lead times and simplifying requirements would assist these businesses to take on some Port work.

It would be great if the port can rewrite or craft the proposals in a way that would help smaller offices, firms. We need more than maybe just two weeks response time. It takes a long time. We don't have marketing partners, so three weeks would be better. And really think about the experience level.

Insurance requirements were another barrier to the ability of small firms to submit bids or proposals.

Especially insurances is a huge barrier.

The smaller businesses, it is expensive for them to meet those higher [limits] that are typically in those kinds of contracts.

Keep the insurance requirements in line with what we do.

Experience and qualification standards were sometimes seen as overly restrictive and unnecessarily high.

The Port tends to look at discipline 'X' and they ask for 55 things that they want you to be capable of doing. The reality is having done work for them for a significant amount of time is they really only use that contract for eight of those 55. The small fish would have no ability to be responsive.

Having a manager or someone at the Port and other agencies, who are really monitoring the really detailed language of how those [experience] sections are written could be very helpful and have a really big impact, because often what happens is that the experience is so specific, that an emerging small business could never possibly have it.

"On-call" or task order contracts sometimes did not lead to work for subcontractors. The large firm controls who gets the work, and some certified business owner stated they had been listed but never used.

If you're going to [issue in call contracts], rotate. If you don't have the work, nobody can blame you. But if there is the work, rather than just giving it to one of the people who won it, be sequential about, because they're all qualified.

Firms' experiences with obtaining information about why they were not selected for a specific procurement were mixed.

By far, the most clear, the most consistent review process has been through the port. We've won projects, we've lost projects, but we go back and we do a debriefing, the most consistent clear process has been through the Port.

You can see who has submitted for a project, and you can see how they were ranked. You can usually come in and ask for a debriefing, and find out what didn't you guys have, why weren't you selected. That's been very clear, and very helpful.

[The debriefing process] was a really good experience because she told us chapter and verse ... she was very specific on what we did well, specifically with our goals and how we stated things... We came out of there knowing exactly what we did well and exactly what we needed to do better on in order to have gotten into the winner's circle. That was extremely helpful, very transparent.

One participant disagreed.

I did not get a debrief. I was told that the person that would do the debrief would call me back. They never contacted me.

5. Payments

Complaints about slow payments came from all types of firms. This seemed to be a universal concern, mostly unrelated to race or gender.

The payroll in and of itself is a killer, and then if you are delayed 30, 40 days, you're dead.

I'm looking between a million and two and a half million. But I still need that same help. I'm not the same guy that started with a \$20,000 job. I grew, but my need is I can do bigger job. I have bigger capacity, but the need's still the same. I don't have enough to finance a two-million-dollar job for 90 days.

Prime contractors reported that slow payment by the agency means they sometimes have to finance their subcontractors to ensure the prime meets its D/M/WBE goals.

When there's a DBE out here that has 20-30 people, they can't make payroll, so we're paying for all of them. They hold you hostage, it's like, come on. You gotta be able to do half of it. "I can't do any of it. I need it all. I need it all right now. I gotta have it today", and they call at 10 o'clock, "I gotta have it today."

A lot of [certified firms] cannot wait 30 days. Well, I'm not saying they can't, but they're not. For whatever reason they don't.

[Joint checks] works, but it doesn't benefit. We'll do it, but there's no benefit anywhere.

Solutions that was enthusiastically embraced was increasing the payment schedule to perhaps twice monthly or a frontloaded payment schedule.

Cash flow is key, right? We tried on one of our projects to see if they would maybe go to a twice monthly billing so we could get folks in a cycle and get the paid. They weren't open to that at that time. I don't know how that's set up, but that was one of the things we talked to them about on multiple times.

It's attractive to people if you say in your RFP, "Hey we're going to have twice monthly billings." It's not 30, but once you get in the cycle you're gonna get something.

"I've got payroll to do. People won't show up unless I get paid. So, you have to pay me right now." So, we've had to, all right, fine, you check to make sure it's what they're owed, but we have to go for up to 30 days without payment. You've gotta keep that working so you help out. We've run into, mainly on truckers, all these independent truck drivers that have one or two trucks. We've had to go "you pay once a week". It's just the way it is. Then you get the trucks. This year out here we'd order 30 trucks from our DBE trucker, we'd get ten, "Where's the rest of them?" "I can't get them. They're not around." So, we always had to fill in, and it was tough for us.

I think [paying the prime contractor every two weeks] would be a great solution to the problem, and then not to be so hesitant, when a small company asks for mobilization to cover the cost and payroll and trust funds.

Mobilization can be critical for a small company. I've received it in the past and it worked very well.

One of the pieces that's very difficult for a lot of contractors, and it doesn't matter what level or size of business it is, is to fund the job.... Frontload [the] schedule.... Instead of 12 equal payments, you'd have the equivalent of two payments in the first month, maybe a payment and a half in the second month so that you're frontloading the cash like a retainer.... If you were to support in any one of these contractors' hands just enough money to keep paying off or pay their vendors, pay their subs, do all their activities, I would guarantee you that you would turn a quicker, faster, better project out in a shorter amount of time because they're paying for it in a front way.

Another approach would be for the Port to pay the prime contractor for the work the subcontractors has satisfactorily performed, even if all the other subs and/or the prime contractor cannot yet invoice for their work or the agency has not yet approved payment for those line items.

If the prime says, "You've done that work, we've approved it," that the agency could then cut a check for that amount and not have to wait for them to get all of the invoices together.

6. Obtaining Work on Port Projects

D/M/WBEs general reported that the programs work well and are essential to their ability to obtain Port contracts and associated subcontracts. Without contract goals, most stated they would be shut out of Port opportunities.

These companies working with minority contractors, they only do it when they have to. If the requirements were to go away, we would probably go away.

[Prime contractors] do not [use me on projects without goals].

They're still utilizing your golfing buddy or my tennis partner or somebody who's on that list. People that they're comfortable with. We've got to break in, shake some hands and kiss some babies.

We've been very fortunate. The general contractors have been very good to us. They put us on quicker pays because we're a minority firm. They call us for jobs and we tell them, "We're so busy right now we don't have time to bid. If you want you us to tell you this is a rate that we know we can survive on, if you want to write a contract for that you figure out how much steel is on it and we'll do it," and they do it.

We always prefer the person that looks like us. So, what you have to do is build relationships to get that set aside.

As an A[rchitecture and] E[ngineering] firm, I looked at [the DBE program] as a door opening, like anything else. You still have to go and prove yourself and you have to do excellent work.

We have done work with the Port with large general contractors as an ESB firm. Inquiring with them on other projects where it's not a public agency or public entity, the response sometimes has been we don't have a requirement for ESB so we're going to go with someone else. Which is, again, super frustrating.

If there's no goals, there have been times, at least in my experience with my company that they've said, "No. We don't need it."

The DBE certification helped, obviously, because a lot of [the prime firms] would put you on. You know, when I first got certified about eight years ago, they said they couldn't find a DBE. They used the word 'worth a darn' in the state of Oregon. I thought I'm going to change that.

All the other stuff you get from the relationships that you made because you got your foot in the door with the small ones.

We actually help the prime contractors get work offering them can we help you write the proposal? Can we do this? Can we do that? Can we go take some pictures? That has taken us to a different level, and that helped.

You can't even do any of that shit we're just talking about unless you get the contract. It's all in the frontend of having access to getting the work. If you get the work, you can bill any damn thing. If you have enough volume, if you have enough ability to have consistent work over time, you don't need nobody to be holding your hand and kissing your feet and rolling you around. And really, it becomes a matter of respect. Nobody respects you in the industry. Minority, they don't like this designation and all these minority, disadvantaged business crap. You need to be able to perform just like everybody else in this industry. That's the goal.... The goal is for us not to have a disadvantaged business program, but for us to get into this marketplace and compete just like white boys do. And absent the discrimination, that's the key ingredient to the reason why we need a program like this because there's racism and discrimination in the marketplace.

Some participants had leveraged the program into other work.

I haven't, at least on the business ownership and award of work site, observed any personal issues, due to my sex, or ethnicity, or any of those other things. The work that we get is primarily relationship-driven because of the qualifications-based selection, so I'd say at this point, our company is probably working on 60% of projects that are because there is a goal associated with it. The other 40% is due to our super strong relationships with agencies that don't have any goals at all. But we just have a really good resume with those particular agencies, so we're tacked on the team to help the prime flat out win the work.

A few owners stated that being certified had not helped them obtain work.

[Being certified] doesn't matter, where I'm situated. They don't even consider it.

[Some] contractors in town they give you, like you said, the last-minute notice. We'll like you to bid this project. You call their office for drawings something like that, they never call you back. They give you probably two or three days.

Services and goods contracts outside the construction and design industries were particularly hard to obtain.

The Port for legal services has basically used the same two firms for over 50 years. What happens is that attorneys from those two firms may switch and go to the other firm, but they're not really carving any legal services work out for anybody else. So, that's just the way it is. It's just real simple that all of the people that have always have done work continue to do work.

Some D/M/WBEs reported that although they were listed on on-call contracts, they received little or no work.

For the on-call projects and realizing we're not big enough to do some of these jobs, we've been asked to team with larger Portland firms. We agreed to do that, whenever these firms get the work, they wouldn't use us. They have that, like you said, a checked box. They've had an ESB firm on their team but no work. It might be a \$100,000 contract and you're supposed to have, I don't know, 20%, 15%, but no work has ever come our way with that. After about four or five times of doing that, I've just said I'm not, you're not going to use my ESB for your certificate anymore. That's been a frustration.

A major issue for small construction contractors was the inability to obtain materials specified in the Port's solicitation.

It's kind of institutionalized they'll do value added resellers in their spec. What this means is that if we're bidding a Port project, we have to go to our competition to install [materials], which we have the capability of doing. The value-add reseller refuses to certify the firm, our firm so they don't have any minority firms certified, or certified firms certified. So, that automatically puts us at a massive disadvantage when we're bidding. We literally have to go to our competition and ask for a price, and we've seen it with their price is greater than the [trade] value of the entire project.... If you looked at the way the Port has re: specifications, it's... on a number of different items where they sit there and plug it in. This allows for minorities or certified firms not to be able to compete on this work because they always have to go to another person to get just a product.... We've been trying to buy \$100,000 worth of stuff from [the manufacturer] for the last 10 years and they've literally refused, because they said, "We need to protect our majority firms that are in the system." That was the answer I was getting from them. So, it wasn't a matter that they felt like we were incapable of doing the work.

Some other subs I've heard in the past have had trouble with getting supplies and flat out being boxed out.... That's the institutional crap that holds us back.

It's just like catch 22. Where do we go? Why do I have to go to that specified one? Maybe just the equal that we know exactly it is the same product, right. But "No."

Proprietary specifications were explained as a way to limit the designers' risk. One answer is for the agency to insist that its material suppliers have a robust supplier diversity program.

When you do public work as an architect, you're often sued. You're always sued pretty much. The reason for that is that there's money in the process of finding something wrong with your specifications. So, a lot things have gone to proprietary specifications, like specifying a particular

[product], or particular thing. I'm not saying it's fair or right, and it's fascinating to hear this from this side. But I'd say that what happens is, it's often the client driving this, and you're trying to protect your own back. If you're going to spec up out that product, then you hold that product supplier at the same standards that the Port has. So, if the Port has a DBE program, that supplier needs to have a DBE program. It can't be all just majority firms doing the work. So, they basically said to the value-added reseller, the supplier, "Look if you do not look at utilizing minority firms we're going to then go with a different spec. We're going to get rid of your spec."

7. Meeting Contract Goals

Although not always easy, most prime vendors reported they have been able to meet the Port's DBE or SBE goals.

We have [met our goals]. You have to. So, you make it one way or another. All I want to say is the Port is probably the best agency to work for that we have found. They listen to you. They work with you. They try to help out.

I think the Port does a good job of trying to reach those goals in the contracting [area].

Finding qualified certified firms is often challenging for prime contractors and consultants.

We're so specific in our niche that there's sometimes harder to find contractors who are able to do the job that are also licensed.

There aren't enough qualified certified firms that they can bring on to these contracts.

Because there's so much work out there, we're having a hard time finding subs that wanna bid public work, versus just staying on the private work.

I can find ESB's that can do the work, but I can't always find the DBE that can do that work. So, that has been a challenge when it's purely a DBE and nothing else counts. Finding qualified, capable subs is extremely difficult, and the work we are getting is generally not good quality. We're having to increase fees to cover that, because it says it's being inefficiently done.

There's really only so many firms that are currently fulfilling these categories.

They're not there.

In the transportation planning, especially for specific services that are complimentary to ours and not competitiveness [it is difficult to find firms].

We want people to participate, but we quickly run out of blood.

[The DBEs] aren't gonna want to deal with all the extra paperwork and stuff.

There's a lack of capacity.

One of the challenges we have is that we're a licensed trade and so when you look at minorities or women they have to go through the apprenticeship program for five years, and they have to get licensed. So, it's not something that they can walk into and buy an existing business, they have to go through the training program..... [Our trade is] extremely white and we have generations of bias and all of that sort of stuff that comes along. So, our retention of those individuals sometimes ... because they don't feel socially connected to the group. So, then when you go through that, then to try to get them to go through five-year program, and then become a journey worker and then say, "I want to take the financial risk of owning a business," you just can't do it tomorrow.

The complexities of airport projects made it particularly difficult to find capable D/M/WBEs.

When it comes down to actually performing there's not support on the engineering side to hold the hands of those consultants and help them along to understand what the expectations are along the way.... Airports are hard to work for.

There are the core firms that have worked at the port for a long time that know how to make this finely tuned machine run, and know where the bar is. You need to have those firms on your team to score the qualifications points in the proposal. You better have those folks on, and that leaves a very small sliver to fill in with the XBEs.

It's very difficult for a lot of people to have the acumen and the ability to meet those standards.

When you get on a project ... you can have a kick off meeting to talk about expectations, but believe me, the Port is working at a whole different level. The finely tuned machine. It is not what the industry standard of performance is. It's higher. The consulting firm, the XBE, understanding what that expectation is, where that finish line is, it's very hard to get across. There's not a lot of free schedule time to screw up.

Goals were especially hard to meet on small or limited scope contracts.

On projects that we work on, they're anywhere from one to three people are gonna be doing the work for the length of the contract. It's almost impossible to subcontract out when it's such a small number of people doing it. So, if there could be some consideration to the scope of the project as to the length, duration, cost, and number of FTEs working [on the project].

That's just a straight pass through.

One of the things you'll see a lot of, or I've seen a lot of, is they want to use [us] as a passthrough. So, they want you to either buy a piece of equipment mark it up 3%, and we don't want any of your people on site. We just want you to buy a product. Buy light fixtures. I know this happens at the Port as well.

On-call contracts were a special challenge.

The reality is there's a lot of times where you're just providing pure labor directly to the Port.... We're doing the best we can to provide sub-contractors that are available that meet the XBE [goal].... They're just aren't people to use. We seek to use everybody we can.... In on-call, one of your challenges is that they want all these people that they may or may not need, and then you have to wait until they come out with a request or something like that.... It's client driven.... That's bad enough for us. It's awful for the DBE firms. They can't deal with that.

Right, it's client driven.

The struggle is on a project by project basis being able to say you hit the goal at every single project. I think from the perspective of contract basis, which tended not to have any issue meeting the requirements ... that may actually mean we're giving away civil engineering work and time, which that's part of the process. I think on the civil side it's doable because typically we do have a lot of the other disciplines that end up feeding in. I can see where on the environmental side, it'd be really difficult.

[The Port] order[s] the contract, and then we start work the next day. So, finding an outfit that can meet the schedule and also the demand is really difficult for us, because we need to start work quickly. The next day. We can't really wait for them to procure materials. That type of stuff, but we try really hard. We've tried to utilize diversity subs but reaching those goals have been a little

bit difficult for us based on the timeline. So, it's that type of stuff that really hinders us from using diversified subs and the smaller systems.

You're always running behind. So, the biggest thing would be to be able to say, "Here's a project. We're not gonna start it for four months, but we need your number today." So, then you have the time to go and get the mentorship working, get the partnership working, get all that stuff working, before you actually have to start. Usually by the time they figure out their funding, their design, you're pushed against the eleventh hour to say, "Get it started now." So, it's a long-term process, or you have to really go back to the start. Getting that additional time might help. Even then, if it's in that time you can do some of the training you wanna do. So that you're getting the person the first time, as supposed to having to wait until he's done three jobs before he's familiar to start moving as fast as you need him on something that's got that short of a duration or that short fuse.

Some prime contractors provided additional support to D/M/WBEs.

It's not necessarily a pre-qualification, but before the project we're gonna try to do a mini type boost there again where we invite subcontractors to come in. The smaller ones to ask the questions, and go through class, and let us know if there's anything else that we can do to try to help them.

The Port has been reasonable about permitting substitutions of certified firms that were not performing up to standards.

I had a sub to a sub whose project manager came in and said, "You're going to have to let them go. They're just not working. You can have your sub, who I know has that capacity, have them do it."

There's no good going back and saying that you're not meeting the goal. You have to meet it. So, we had to pull in other people, and then say, "Okay this trucking company couldn't fulfill it. So, I've got to substitute with this. Is that okay?" Then they approved all that, but you have to get all that approved ahead of time. Then it happened with the three projects. They let us move some to the other, because they just couldn't do it.

Several large prime contractors stated that they have never tried to submit Good Faith Efforts when they could not meet the Port's contract goal.

We have a condition of award goals. I've never known anyone who ever successfully got a good faith effort to do it. I think I've heard [name] did it one time, but I wouldn't even try. Because it's almost impossible. I would be arguing with an attorney who would say, "And you didn't do this, and that." It's a requirement that is so over the top that it's not even worth the effort. I wouldn't risk a job. If I was gonna bid a \$5 million job, I wouldn't even risk it.

A lack of transparency about how contract goals are set was mentioned by several interviewees.

They should probably start off being more clear on how they're setting the goal, cause then that's where we can have that conversation.... The Port's really good at letting us go in and say we need to remove this [scope of work].... But when you walk out the door with a goal, and a community understanding, and assuming the goal's gonna be here, and then you come back and you drop it that's where you cause some conflict.

It can be 5%, it can be 2%, it can be 15%. It doesn't always make sense. I can't see behind the curtain.... I don't know how the Port does it.

They can't be so rigid, because again a scope of work within an airport terminal is gonna be different than a scope of work out on an airfield. You can't just blanketly apply the same goals.

Certified firm owners sometimes were frustrated that prime contractors tend to use the same firms over and over.

Some folks have been very successful in getting contracts with the Port, because they have figured out the mechanism to make that happen, but if you look, it's the exact same people over and over again as compared to actually expanding the pool of people who have access to those resources.

They want to stick to who they know, and how comfortable they can be with these sources, period. That's that.

Some large prime vendors agreed that they tend to use the same certified firms repeatedly.

We're on the airfield, and you have to have competent people or the Port will escort us out.... So, the pool of people that are competent to do that for a general contractors is small, and it's just as small for the people that we have to hire to do sweeping, striping, draft and pull, and all the other things.... Once you have someone, you just keep going back. There's a big barrier for people, if you're on the outside looking in. We have timelines, too. We go right back to the same group of people that we think can do it. It's tough to go to this person who's never done it before, and we're out there striping on the runway in the middle of the night. We've gotta get something done, and we're not gonna take that risk.

It's easier when we can use the same sub again. They're familiar with the Port processes and paperwork alone. It's probably more than you would have on your average project.

Some consulting firms suggested they should receive credit towards meeting contract goals for the diversity of their own workforce.

One of the things that, a frustration on our part is that there's really ... why there's no recognition for NW ... minority, disadvantaged business, or historic communities within large firms. I mean we talk about large percentage ownership in our firm.... Why do we not get a credit for that?

8. Monitoring of Program Requirements and Participation

Overall, there was general agreement that the Port monitors its programs to ensure that firms listed in the bid or proposal actually receive the work.

I wanted to compliment the Port of Portland, because I did work on a large subcontract project. I did receive some monitoring feedback. They sent me several times feedback, to give feedback as a small, women owned business.

The biases that occur at those lower levels, they do have them, but I think overall, what I'm seeing, the port has been very successful, and they continue to monitor and try to improve things.

Our work with the Port has been monitored to a certain extent.

The Port's recent acquisition of the B2GNow data collection and monitoring software system has eased the burden of complying with program reporting.

It's a struggle [for the businesses we are trying to use] to get all the compliance stuff together.

B2G is covering the City of Portland now too. That's the one nice thing, but Tri-Met still has not.

If we could be all together and say, "Hey come on, let's use the same systems."

Some MBEs stated that there are still many “front” companies that do not in fact meet program eligibility requirements.

[There are] many front companies that are out here who put their name as a black contractor or a minority contractor and most of the people out here who work and see them operate in the atmosphere know that they're not really a minority contractor.

9. Small Business Setasides

There was significant support for a race- and gender-neutral small business setaside to assist small firms to work as prime contractors and consultants.

Let [D/M/WBEs] take the work that they have the capacity for. Leave the rest available for someone else].... But I think that if the Port was to implement something along the lines of this Sheltered Market Program, that would go a long ways.

We do a lot more work on [the] private [side as a general contractor] than we do on the public side.

It's very hard as a small general contractor to get any work with the Port.

Agencies should occasionally carve out relatively smallish jobs, and they should have a small contracts program. So, people who are normally subs, should be able to just compete for that. The reason agencies don't like that, is because their project managers don't want another project to manage. On the other hand, they get access to innovative approaches, new ideas, perspectives, and the small firms get the option to be primes. I think that is a barrier if agencies always cede to primes, you get to determine what subs get to work on your projects, and the agency, is in a way, abdicating their responsibility, because they are only semi-creating opportunities for small business.

The small business set aside is great, because it would directly let me establish a relationship with a client and prove myself to them, which is great. But it also means that it's gonna take at least five years of doing bathroom remodels to get to even a chance at getting a larger project, which is, I guess, not a negative in the abstract but is a negative, because then it creates a five-year gap of working on big projects.

One of the categories is experience, and you have to list five to six similar projects of the size and type that you've done, especially with the port. But if you never have the opportunity to work on a project, it's very hard to list those.

I much prefer to know that the Port's aspirations were to award a pool of work to small businesses than for us to spend the time to put a proposal together for something that wasn't what they were ultimately wanting.... [A] set aside would be definitely a worthwhile path to explore.

Carve out projects that are less than \$100,000, like City of Portland does.

It would also put the Port face to face. It would be direct. They need to help that firm be successful, because they're no longer a few steps away where they can just call you up and say, "They're off. Get someone else."

On call contracts, where the agency creates a list of contractors with whom it can contract quickly to get smaller jobs done, were pointed to as an excellent vehicle for the target market approach.

And if they found a way for us to get fit with the project managers, that would be maybe a way to better utilize that and allow for us to have an even shot, without having to go through that very tough process, of going to an on-call situation. And then once you've done a couple like that,

then you really have the stuff you can put in an on-call that says, yes, I've worked with the Port, because the Port process is complex and time consuming. The Port standards are fairly challenging, in terms of drafting and all the other pieces.

For each of their on-call contracts, they could vet through qualifications of small business firms that wanted to submit and get small business firms that we would know met minimum port requirements.

Create a rotating list of people, for example engineers ... next time they hire an architect they can just tell the architect you're using an engineer off this list.

Have a rotating list.

10. Mentor-Protégé Program

As discussed above, the Port has a long-standing Mentor-Protégé program. Most participants praised this initiative as very helpful to the development of their firms.

My experience with the mentor/protégé [program] here has been really positive. The people coming out of it, up into subcontractors that have gone through it have come out stronger. That's what we want.... [The Port's outside business consultant for the protégés] was really great, because I think that's one of the toughest things for them is to understand how to turn a profit.

It was a good program.

[I] learned a lot about businesses.

For me, the advantage was that I probably wouldn't have worked on the [large] project.

I think [mentorship] is even more powerful now than it was before. What it is, is it's giving the support that they need like training in QuickBooks. You get the entire system paid for by Port of Portland. If you need Excel spreadsheets, or Word Document or whatever, boom. They pay for you to go to class. If you need to develop a safety plan, you work with AIG, and all that other stuff.

The mentor protégé program within the Port of Portland it's an incredible program and I so much appreciate the resources. Not just the mentors, but the financial as well that they put behind our company and the support.... Ultimately you have more successful firms to choose from.

Mentors also lauded the program and benefited from it.

We want subs to be successful on our jobs. If they fail, we fail. So, it's important, and we have this goal. We need companies that can do the work that we need them to do. So, this program is key for us to be successful, we need them to be successful.

It's just huge. It's a three-year commitment, and [the protégés] work their asses off. Usually they are better for it.

One of the benefits I see in all this, is actually getting that behind the scenes look into their company. Which opened my eyes to all these companies, just how much help they really need.

They're good people they just don't have enough [resources].... That's what the sad part is. So, we end up paying it in, and it costs us a lot of money when they can't perform.

[The Port] recognize[s] that there are areas of work that there just aren't subs out there that are going to be able to do it. So, let's take that out of the equation and really focus in on the places where we can be successful and bring people on.

[The Port should] train these folks for us so that we can get them to work for us.

A lot of the small businesses that are in the program right now are really not fully prepared to do any work with the Port. So, it's getting them in that place.

A few minority or women owners said the program does not work for them.

What I hear is it's not worth it. You can get the same stuff elsewhere. Not that it's not a valuable program, but again one GC that has a contract with them. I can think of another that has gotten some work, but very clearly it was not worth the effort that I put into that to even think about getting any Port work from it. That's the overwhelming consensus I get from the Port's protégé program.

The program doesn't offer up any type of work with the Port, basically offers training to supposedly help businesses go to another level. My question with the program is, show their success story because if it's not working then they should try to make it work. In other words, if the majority of protégés, mentees are failing, if you take the life of the program and 70% of these businesses are no longer in business I would call that a failure, and I'd say, "What can we do to fix that?"

Working with some of the small businesses, some of them felt that they weren't matched properly with a mentor.... Their mentors really don't understand them, because they come from a really, really large firm.

Another approach would be to compensate prime consultants for working with the DBE protégé, either through direct payments or the awarding of extra evaluation points.

If it's backed up on the contract end with, "Okay," realizing that part of your proposal was to spend 100 hours over the course of this project mentoring this person. Then there's the dollars in the budget, in your contract that supports that 100 hours of work.... A business our size can't afford to just give away 100 hours over the course of a project.

Award a prime a ton of points if you were shadowing a DB or an MB or as SB firm and giving them that experience.

C. Experiences with the Port's ACDBE Program

Overall, both ACDBES and prime concessionaires praised the Port's program.

The team that works here, I think is very vested in this airport, and they really want to have a great customer experience, and part of that is ensuring that you have good concessionaires here. They like to have local concessionaires, so why it's very hard for an ACDBE to, in certain areas, I would say, to get in actual food and beverage is very hard.... PDX is great. They are probably a step ahead of most airports in really being involved in their diversity program. Making sure everything gets recorded properly, being automated ... there's not a lot of airports out there that do this.... I know who their diversity officer is. I know who I can talk to.

The solicitation process works well. I think it's been pretty clear as we've gone through that process as it pertains to ACDBEs.... From my standpoint as a business working with the airport and working with my ACDBEs, I think everything has been quite well.

They want to see their program be a success, and I think they appreciate the smallness of the small operator versus having the big guys.

We're very happy. We don't have any problems. If we need anything changed, [our non-ACDBE prime concessionaire will] work with us.

ACDBEs believed that the program was necessary to open up opportunities at PDX.

Without a program, you would have very few women and minorities having any type of business in an airport today.

I agree.... I know for a fact I would not have the business that I have today if it was not for the program.

There have been challenges in meeting ACDBE contract goals.

[Some services] are a little bit of a challenge to find ACDBEs certified.... If they make it a 20% ACDBE goal and it's based on sales, that is really hard for a company in my position for us to even make money. If you put it on goods and services, then it's, first of all, more relevant to what type of businesses that we can get into help us do these things. We need a maintenance person. We need a printer. Those fall under goods and services versus the overall sales of the business.... If our ACDBE goal is 20% and we're only holding 30% at an airport, that makes it very difficult to do that type of business.... Make sure the RFPs are written to be based, that the ACBDE participation is based on goods and services versus sales.

It's hard to get to show our good faith effort. It's hard to even solicit ACDBE certified vendors, or to even find them in the system for their stuff that we need to get done for [us].... Part of our good faith effort is we solicit our own vendors to try to get them to be certified ACDBE vendors, but they always come back with that's a lot of paperwork that they have to fill out, and they want to know everything about our company. It discourages them to be certified vendors.

I asked them, too, some of them, to get certified as ACDBE, and, yes, it's a lot of paperwork. Understand that [the Port had] better do this so that they are who [the certification applicants] say they are, but it's a lot of proprietary information, and it can take a very long time.

I do think a lot of it is just availability, and really educating those communities that the airport is another opportunity to grow your business and how to do it ... and it wasn't the easiest to find good, certified partners. I've been to every outreach and met with people and talked to people, and it's really got to be a commitment on behalf of the airport to say we're going to go out, and we are going to be almost business developers, right, in search of people because it takes ... From my airport experience, it could take two to three years to get a person or a business to a place where they can actually be a successful partner to any of us on this call. Just because they're certified doesn't mean that they're going to actually bring value to what we're trying to do, right, and to the spirit of the program because at the end of the day, we want to be great partners, too, even though we're a large company. We want it to be both ways. It's really got to be a commitment from the airports to really tell the story and get people excited and educated about what it means to be an ACDBE and the value and connect with the pride outside of large events.

One suggestion for program enhancement was to have regular meetings of ACDBEs to discuss issues and work towards common solutions.

The Port used to have monthly meetings with their rep that's on staff, and the other ACDBEs, or WBEs, and we haven't had that for, I don't know, several years now.... We'd talk about the struggles we were having, like one of the things that was coming up was it was hard for us who aren't associated with the big business partner to figure out a maintenance guy, like can we all come together and figure out a guy that could [perform those tasks]?... Also, what's going on in the airport? What projects are coming up?... Quarterly would probably be better.

Non-ACDBEs agreed that meetings of concessionaires to share ideas and potential ACDBEs would be useful.

We're talking about large, large expenses. Let's say there's a body shop, or let's say there is, small things, office supplies. That's not going to probably get anybody to the goals, but larger ticket items, like a body shop or a fuel supplier or something where if we know that those businesses are there, we'd love that opportunity to be able to purchase from them as long as the pricing is competitive.

D. Conclusion

Overall, the Port's small business development activities were reported to be helpful and properly administered. Certified firms have received work as a direct result of contract goals, and most stated that without the implementation of contract goals, their opportunities would be greatly diminished or non-existent. While prime vendors found it challenging to meet the goals, especially given the complexity and schedules for airport projects, most were able to include minority and women businesses on their contracts. The ACDBE program was especially lauded.

Areas for improvement include more outreach on a targeted basis for specific industries (*i.e.*, engineering) and opportunities to meet Port user departments ; adoption of a program to assist small firms with obtaining capital and bonding; review of insurance and experience requirements to ensure they are not more restrictive than necessary; accelerate payments; small business set-asides, with a focus on on-call contracts; and expansion of the existing Mentor-Protégé program to include opportunities for Port contracts and subcontracts.

IV. UTILIZATION, AVAILABILITY AND DISPARITY ANALYSES FOR PORT OF PORTLAND

A. Contract Data Overview

We analyzed contract data for 2012 through 2016 for the Port of Portland's Federal Aviation Administration ("FAA") and non-FAA funded contracts and concession contracts. To conduct this analysis, we constructed all the fields necessary for our analysis where they were missing in the Port's contract records (e.g., industry type; zip codes; NAICS codes of prime contractors and subcontractors; non-Disadvantaged Business Enterprise ("DBE") subcontractor information, including payments, race, gender; etc.). The resulting Final Contract Data File for analysis contained 1130 FAA and non-FAA-funded contracts with a total award amount of \$407,015,577, and 90 concession contracts with a total award amount of \$1,324,290,744. The Final Contract Data File was used to determine the geographic and product markets for the analyses, to estimate the utilization of DBEs on FAA funded and non-FAA-funded and Airport Concession Disadvantaged Business Enterprises ("ACDBE") on concession contracts, and to calculate DBE and ACDBE availability in the Port's marketplace by funding source and contract type.

B. Port of Portland's FAA-Funded Contracts

As discussed in Chapter II, a defensible disparity study must determine empirically the industries that comprise the Port's product or industry market. This is also a requirement under the DBE program

regulations official Guidance.¹²⁸ The accepted approach is to analyze those detailed industries, as defined by 6-digit North American Industry, Classification System ("NAICS") codes¹²⁹ that make up at least 75 percent of the prime contract and subcontract payments for the study period.¹³⁰ However, for this study, we went further, and applied a "1%" rule, whereby we analyzed NAICS codes for federally-funded contracts where the share of the total contract dollars (prime contracts and subcontract dollars combined) was at least 1%; where the share of the prime contract dollars was at least 1%; and where the share of subcontract dollars was at least 1%. We took this approach to assure a comprehensive analysis of the Port's activities.

1. Port of Portland's Unconstrained Product Markets for FAA-Funded Contracts

Tables 4.1 through 4.3 present the NAICS codes used to define the *unconstrained* product market for Port of Portland's Federal Aviation Administration ("FAA") contracts. These data were later constrained by the geographic market, discussed below. These contracts were disaggregated by level of contract (*i.e.*, was the firm receiving the contract as a prime vendor or as a subcontractor), the industry label for each NAICS code, and the industry percentage distribution of the number of contracts and spending across NAICS codes.

¹²⁸ https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf; see also 49 C.F.R § 26.45.

¹²⁹ www.census.gov/eos/www/naics.

¹³⁰ "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").

**Table 4.1 Industry Percentage Distribution of Contracts by Dollars Paid
for FAA-Funded Contracts
All Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	58.7%	58.7%
238210	Electrical Contractors and Other Wiring Installation Contractors	15.4%	74.1%
236220	Commercial and Institutional Building Construction	3.9%	78.0%
488190	Other Support Activities for Air Transportation	3.7%	81.7%
238910	Site Preparation Contractors	3.3%	85.1%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.4%	87.5%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.3%	89.7%
541370	Surveying and Mapping (except Geophysical) Services	1.6%	91.4%
238990	All Other Specialty Trade Contractors	1.6%	93.0%
238290	Other Building Equipment Contractors	1.1%	94.1%
238310	Drywall and Insulation Contractors	1.0%	95.1%
TOTAL			100.0% ¹³¹

Source: CHA analysis of Port of Portland data.

**Table 4.2 Industry Percentage Distribution of Contracts by Dollars Paid
for FAA-Funded Contracts
Prime Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	85.4%	85.4%
236220	Commercial and Institutional Building Construction	14.6%	100.0%
TOTAL			100.0%

Source: CHA analysis of Port of Portland data

**Table 4.3 Industry Percentage Distribution of Contracts by Dollars Paid
for FAA-Funded Contracts
Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	49.1%	49.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	21.0%	70.0%
488190	Other Support Activities for Air Transportation	5.0%	75.1%
238910	Site Preparation Contractors	4.6%	79.6%

¹³¹ Agency spending across other NAICS codes comprised 4.9% of all spending.

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238220	Plumbing, Heating, and Air-Conditioning Contractors	3.2%	82.9%
484220	Specialized Freight (except Used Goods) Trucking, Local	3.1%	86.0%
541370	Surveying and Mapping (except Geophysical) Services	2.2%	88.2%
238990	All Other Specialty Trade Contractors	2.2%	90.4%
238290	Other Building Equipment Contractors	1.5%	91.9%
238310	Drywall and Insulation Contractors	1.4%	93.3%
238390	Other Building Finishing Contractors	1.2%	94.5%
TOTAL			100.0% ¹³²

Source: CHA analysis of Port of Portland data

2. Port of Portland's Geographic Market for FAA-Funded Contracts

The courts and the DBE program regulations¹³³ require that a local government limit the reach of its race- and gender-conscious contracting program to its geographic market area.¹³⁴ This element of the analysis must be empirically established.¹³⁵

To determine the relevant geographic market area, we applied the standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.¹³⁶ Location was determined by ZIP code and aggregated into counties as the geographic unit.

As presented in Table 4.4, spending in the state of Oregon and two counties in Washington (King County – the home county of Seattle, and Clark County – a county within the Portland metropolitan area) accounted for 90.6% of all contract dollars paid in the Port's unconstrained product market for FAA-Funded contracts. Therefore, Oregon and the two Washington counties constituted the geographic market area from which we drew our availability data.

Table 4.4 Distribution of Contracts in Port of Portland's Product Market for FAA-Funded Contracts

State/County	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
Oregon	73.5%	73.5%
King County, WA	16.3%	89.9%
Clark County, WA	0.7%	90.6%
TOTAL		100.0% ¹³⁷

Source: CHA analysis of Port of Portland data.

¹³² Agency spending across other NAICS codes comprised 5.5% of all spending.

¹³³ https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf; see also 49 C.F.R. § 26.45.

¹³⁴ *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).

¹³⁵ *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").

¹³⁶ National Disparity Study Guidelines, p. 49.

¹³⁷ Agency spending across other states comprised 9.4% of all spending.

3. Port of Portland's Utilization of DBEs on FAA-Funded Contracts

Having determined the Port's product and geographic market area for FAA-funded contracts (and, therefore, the agency's *constrained* product market), the next step was to determine the dollar value of the agency's utilization of DBEs¹³⁸ as measured by payments to prime firms and subcontractors and disaggregated by race and gender. The Port did not collect data for all non-DBE subcontractors, as well as other records critical for the study. We therefore had to obtain missing data from prime vendors, a lengthy process, and reconstruct other contract records, including researching the race and gender ownership of subcontractors and assigning NAICS codes to those firms.

Tables 4.5 through 4.9 present data on the total contract dollars paid by the Port for each NAICS code in the constrained product market and the share the contract dollars comprise of all industries. It is important to note the contract dollar shares are equivalent to the weight of each NAICS code spending. These weights were used to transform data from unweighted availability to weighted availability, discussed below. After the initial presentation of the NAICS code distribution of contract dollars in Table 4.5, we present the data disaggregated by demographics with and without NAICS 238210 (Electrical Contractors and Other Wiring Installation Contractors). We do this because one Black contractor received an unusually high share of contract dollars going to this NAICS code and, given the weight of this code, its inclusion presents a distorted view overall Black utilization.

Table 4.5 NAICS Code Distribution of FAA-Funded Contract Dollars

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
336611	Ship Building and Repairing	\$25,169,681	50.00%
237990	Other Heavy and Civil Engineering Construction	\$7,580,981	15.06%
238320	Painting and Wall Covering Contractors	\$4,936,366	9.81%
485991	Special Needs Transportation	\$3,774,590	7.50%
541330	Engineering Services	\$2,584,536	5.13%
236220	Commercial and Institutional Building Construction	\$1,136,074	2.26%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$921,462	1.83%
237310	Highway, Street, and Bridge Construction	\$64,892,084.00	59.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$19,119,482.00	17.4%
236220	Commercial and Institutional Building Construction	\$4,964,281.50	4.5%
488190	Other Support Activities for Air Transportation	\$4,665,004.50	4.3%
238910	Site Preparation Contractors	\$4,120,333.75	3.8%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$3,009,914.25	2.7%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$2,885,094.50	2.6%
541370	Surveying and Mapping (except Geophysical) Services	\$2,032,505.12	1.9%
238310	Drywall and Insulation Contractors	\$1,281,747.38	1.2%
238390	Other Building Finishing Contractors	\$1,070,663.00	1.0%

¹³⁸ We use the term "DBEs" to include firms owned by racial or ethnic minorities and white females that are not certified as DBEs under 49 C.F.R. Part 26. This casts the "broad net" required by the courts, as discussed in Chapter II. See also footnote 11.

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
238990	All Other Specialty Trade Contractors	\$909,959.50	0.8%
238290	Other Building Equipment Contractors	\$744,990.62	0.7%
237310	Highway, Street, and Bridge Construction	\$64,892,084.00	59.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$19,119,482.00	17.4%
236220	Commercial and Institutional Building Construction	\$4,964,281.50	4.5%
488190	Other Support Activities for Air Transportation	\$4,665,004.50	4.3%
238910	Site Preparation Contractors	\$4,120,333.75	3.8%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$3,009,914.25	2.7%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$2,885,094.50	2.6%
541370	Surveying and Mapping (except Geophysical) Services	\$2,032,505.12	1.9%
238310	Drywall and Insulation Contractors	\$1,281,747.38	1.2%
238390	Other Building Finishing Contractors	\$1,070,663.00	1.0%
238990	All Other Specialty Trade Contractors	\$909,959.50	0.8%
238290	Other Building Equipment Contractors	\$744,990.62	0.7%
Total		\$109,696,060.12	100.0%

Source: CHA analysis of Port of Portland data.

**Table 4.6 Distribution of FAA-Funded Contract Dollars
by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$0	\$0	\$0	\$0	\$57,209	\$57,209	\$4,907,072	\$4,964,281
237310	\$0	\$0	\$0	\$0	\$8,591,861	\$8,591,861	\$56,300,222	\$64,892,083
238210	\$12,222,464	\$0	\$0	\$0	\$6,343,214	\$18,565,678	\$553,804	\$19,119,482
238220	\$0	\$0	\$0	\$0	\$0	\$0	\$3,009,914	\$3,009,914
238290	\$0	\$0	\$0	\$0	\$0	\$0	\$744,991	\$744,991
238310	\$0	\$0	\$0	\$0	\$1,281,747	\$1,281,747	\$0	\$1,281,747
238390	\$0	\$0	\$0	\$0	\$0	\$0	\$1,070,663	\$1,070,663
238910	\$0	\$143,211	\$0	\$39,587	\$3,257,956	\$3,440,754	\$679,580	\$4,120,334
238990	\$0	\$0	\$0	\$0	\$244,784	\$244,784	\$665,176	\$909,960
484220	\$75,895	\$0	\$0	\$0	\$2,406,167	\$2,482,062	\$403,032	\$2,885,094
488190	\$0	\$0	\$0	\$0	\$0	\$0	\$4,665,004	\$4,665,004
541370	\$0	\$0	\$0	\$0	\$0	\$0	\$2,032,505	\$2,032,505
Total	\$12,298,359	\$143,211	\$0	\$39,587	\$22,182,939	\$34,664,096	\$75,031,963	\$109,696,059

Source: CHA analysis of Port of Portland data.

**Table 4.7 Distribution of FAA-Funded Contract Dollars
by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.00%	0.00%	0.00%	0.00%	1.20%	1.20%	98.80%	100.00%
237310	0.00%	0.00%	0.00%	0.00%	13.20%	13.20%	86.80%	100.00%
238210	63.90%	0.00%	0.00%	0.00%	33.20%	97.10%	2.90%	100.00%
238220	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238290	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238310	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%	0.00%	100.00%
238390	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238910	0.00%	3.50%	0.00%	1.00%	79.10%	83.50%	16.50%	100.00%
238990	0.00%	0.00%	0.00%	0.00%	26.90%	26.90%	73.10%	100.00%
484220	2.60%	0.00%	0.00%	0.00%	83.40%	86.00%	14.00%	100.00%
488190	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541370	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
Total	11.20%	0.10%	0.00%	0.00%	20.20%	31.60%	68.40%	100.00%

Source: CHA analysis of Port of Portland data.

**Table 4.8 Distribution of FAA-Funded Contract Dollars – without NAICS Code 238210
by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$0	\$0	\$0	\$0	\$57,209	\$57,209	\$4,907,072	\$4,964,281
237310	\$0	\$0	\$0	\$0	\$8,591,861	\$8,591,861	\$56,300,222	\$64,892,083
238220	\$0	\$0	\$0	\$0	\$0	\$0	\$3,009,914	\$3,009,914
238290	\$0	\$0	\$0	\$0	\$0	\$0	\$744,991	\$744,991
238310	\$0	\$0	\$0	\$0	\$1,281,747	\$1,281,747	\$0	\$1,281,747
238390	\$0	\$0	\$0	\$0	\$0	\$0	\$1,070,663	\$1,070,663
238910	\$0	\$143,211	\$0	\$39,587	\$3,257,956	\$3,440,754	\$679,580	\$4,120,334
238990	\$0	\$0	\$0	\$0	\$244,784	\$244,784	\$665,176	\$909,960
484220	\$75,895	\$0	\$0	\$0	\$2,406,167	\$2,482,062	\$403,032	\$2,885,094
488190	\$0	\$0	\$0	\$0	\$0	\$0	\$4,665,004	\$4,665,004
541370	\$0	\$0	\$0	\$0	\$0	\$0	\$2,032,505	\$2,032,505
Total	\$75,895	\$143,211	\$0	\$39,587	\$15,839,724	\$16,098,417	\$74,478,159	\$90,576,576

Source: CHA analysis of Port of Portland data

**Table 4.9 Distribution of FAA-Funded Contract Dollars - without NAICS Code 238210
by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.00%	0.00%	0.00%	0.00%	1.20%	1.20%	98.80%	100.00%
237310	0.00%	0.00%	0.00%	0.00%	13.20%	13.20%	86.80%	100.00%
238220	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238290	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238310	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%	0.00%	100.00%
238390	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238910	0.00%	3.50%	0.00%	1.00%	79.10%	83.50%	16.50%	100.00%
238990	0.00%	0.00%	0.00%	0.00%	26.90%	26.90%	73.10%	100.00%
484220	2.60%	0.00%	0.00%	0.00%	83.40%	86.00%	14.00%	100.00%
488190	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541370	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
Total	0.08%	0.16%	0.00%	0.04%	17.49%	17.77%	82.23%	100.00%

Source: CHA analysis of Port of Portland data.

4. Availability of DBEs in Port of Portland's Markets: FAA-Funded Contracts

a. Methodological Framework

Estimates of the availability of disadvantaged, minority- and female-owned firms (collectively, “DBEs”) in the Port’s market area are a critical component of the analysis of possible barriers to equal opportunities to participate in the agency’s contracting activities. These availability estimates are compared to the utilization percentage of dollars received by DBEs to examine whether minority- and women-owned firms receive parity.¹³⁹ Availability estimates are also crucial for the Port to set narrowly tailored annual and contract goals on its FAA-funded contracts and concession contracts.

We generally applied the “custom census” approach with refinements to estimating availability. As recognized by the courts and the National Model Disparity Study Guidelines,¹⁴⁰ this methodology in general is superior to the other methods for at least four reasons.

- First, it provides an internally consistent and rigorous “apples to apples” comparison between firms in the availability numerator and those in the denominator. Other approaches often have different definitions for the firms in the numerator (e.g., certified DBEs or firms that respond to a survey) and the denominator (e.g., registered vendors or the Census Bureaus’ County Business Patterns data).
- Next, by examining a comprehensive group of firms, it “casts a broader net” beyond those known to the agency. As recognized by the courts, this comports with the remedial nature of contracting affirmative action programs by seeking to bring in businesses that have historically been excluded. Our methodology is less likely to be tainted by the effects of past and present discrimination than other

¹³⁹ For our analysis, the term “DBE” includes firms that are certified by government agencies and minority- and women-owned firms that are not certified. As discussed in Chapter II, the inclusion of all minority- and female-owned businesses in the pool casts the broad net approved by the courts and recommended by USDOT 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.”) https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DB_E_Program_20141106.pdf.

¹⁴⁰ National Disparity Study Guidelines, pp.57-58.

methods, such as bidders' lists, because it seeks out firms in the Port's market areas that have not been able to access the agency's opportunities.

- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. 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-M/WBEs because of the very discrimination sought to be remedied by race-conscious contracting programs. Racial and gender differences in these “capacity” factors are the *outcomes* of discrimination and it is therefore inappropriate as a matter of economics and statistics to use them as “control” variables in a disparity study.¹⁴¹
- Fourth, it has been upheld by every court that has reviewed it, including most recently in the successful defense of the Illinois State Toll Highway's DBE program, for which we served as testifying experts.¹⁴²

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

- The Port of Portland Final Contract Data File (described in Section A of this Chapter).
- A Master D/M/WBE Directory compiled by CHA.
- Dun & Bradstreet/Hoovers Database downloaded from the company's website.

The Master D/M/WBE Directory combined the results of an exhaustive search for directories and other lists containing information about minority and women-owned businesses. The resulting list of minority and women businesses is comprehensive. After compiling the Master D/M/WBE Directory, we limited the firms we used in our analysis to those operating within the Port's constrained product market.

We next developed a custom database from Hoovers, a Dun & Bradstreet company. Hoovers maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including location and detailed industry codes, and is the broadest publicly available data source for firm information. We purchased the information from Hoovers for the firms in the NAICS codes located in the Port's market area in order to form our custom Dun & Bradstreet/Hoovers Database. In the initial download, the data from Hoovers simply identify a firm as being minority-owned.¹⁴³ However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). We obtained this additional information from Hoovers by special request.¹⁴⁴

We merged these three databases to form an accurate estimate of firm availability to the agency. Tables 4.10 through 4.15 present data on:

- The unweighted availability by race and gender and by NAICS codes for FAA-funded contracts in the Port's constrained product markets;
- The weights used to adjust the unweighted numbers¹⁴⁵; and
- The final estimates of the weighted averages of the individual 6-digit level availability estimates in the Port's market areas. These weighted availability estimates can be used by the agency to set its DBE goals for FAA-funded projects under 49 C.F.R. § 26.45(c). We present the estimates with and without NAICS code 238210.

¹⁴¹ For a detailed discussion of the role of capacity in disparity studies, see the National Disparity Study Guidelines, Appendix B, “Understanding Capacity.”

¹⁴² *Midwest Fence, Corp. v. U.S. Department of Transportation et al*, 840 F.3d 932 (2016); see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), cert. denied, 137 S.Ct. 2292 (2017).

¹⁴³ The variable is labeled: “Is Minority Owned” and values for the variable can be either “yes” or “no”.

¹⁴⁴ Hoovers was able to provide the detailed information for 75% of the firms. We used the available information to estimate the detailed information for the firms where the data was not provided.

¹⁴⁵ These weights are equivalent to the share of contract dollars presented in the previous section.

- We recommend that the estimate with NAICS code 238210 be used for goal setting, as that best represents the firms ready, willing and able to perform Port contracts and associated subcontracts.

DBE Availability in Port of Portland's Market for FAA-Funded Contracts
Table 4.10 Unweighted Availability for FAA-Funded Contracts
with NAICS Code 238210

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.9%	1.8%	1.6%	1.2%	7.1%	12.5%	87.5%	100.0%
237310	0.9%	1.9%	1.7%	1.2%	8.8%	14.5%	85.5%	100.0%
238210	0.4%	0.8%	0.7%	0.5%	6.1%	8.4%	91.6%	100.0%
238220	0.2%	0.5%	0.4%	0.3%	4.2%	5.6%	94.4%	100.0%
238290	0.4%	0.9%	0.8%	0.6%	13.5%	16.2%	83.8%	100.0%
238310	0.6%	1.3%	1.1%	0.8%	2.7%	6.6%	93.4%	100.0%
238390	0.2%	0.4%	0.3%	0.2%	5.1%	6.2%	93.8%	100.0%
238910	0.6%	1.3%	1.1%	0.8%	7.6%	11.5%	88.5%	100.0%
238990	0.3%	0.7%	0.6%	0.5%	4.9%	7.0%	93.0%	100.0%
484220	0.3%	0.6%	0.5%	0.4%	10.3%	12.1%	87.9%	100.0%
488190	0.2%	0.5%	0.4%	0.3%	2.9%	4.4%	95.6%	100.0%
541370	0.6%	1.3%	1.1%	0.8%	7.6%	11.3%	88.7%	100.0%
Total	0.5%	1.0%	0.8%	0.6%	5.9%	8.8%	91.2%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

Table 4.11 Share of Port of Portland Spending on FAA-Funded Contracts
by NAICS Code
with NAICS Code 238210

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	4.5%
237310	Highway, Street, and Bridge Construction	59.2%
238210	Electrical Contractors and Other Wiring Installation Contractors	17.4%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.7%
238290	Other Building Equipment Contractors	0.7%
238310	Drywall and Insulation Contractors	1.2%
238390	Other Building Finishing Contractors	1.0%
238910	Site Preparation Contractors	3.8%
238990	All Other Specialty Trade Contractors	0.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.6%
488190	Other Support Activities for Air Transportation	4.3%
541370	Surveying and Mapping (except Geophysical) Services	1.9%
236220	Commercial and Institutional Building Construction	4.5%
237310	Highway, Street, and Bridge Construction	59.2%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
238210	Electrical Contractors and Other Wiring Installation Contractors	17.4%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.7%
238290	Other Building Equipment Contractors	0.7%
238310	Drywall and Insulation Contractors	1.2%
238390	Other Building Finishing Contractors	1.0%
238910	Site Preparation Contractors	3.8%
238990	All Other Specialty Trade Contractors	0.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	2.6%
488190	Other Support Activities for Air Transportation	4.3%
541370	Surveying and Mapping (except Geophysical) Services	1.9%
Total		100.0%

Source: CHA analysis of Port of Portland data.

Table 4.12 Aggregated Weighted Availability for FAA-Funded Contracts with NAICS Code 238210

Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
0.7%	1.5%	1.3%	1.0%	7.7%	12.2%	87.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

Table 4.13 Unweighted Availability for FAA-Funded Contracts without NAICS Code 238210

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.9%	1.8%	1.6%	1.2%	7.1%	12.5%	87.5%	100.0%
237310	0.9%	1.9%	1.7%	1.2%	8.8%	14.5%	85.5%	100.0%
238220	0.2%	0.5%	0.4%	0.3%	4.2%	5.6%	94.4%	100.0%
238290	0.4%	0.9%	0.8%	0.6%	13.5%	16.2%	83.8%	100.0%
238310	0.6%	1.3%	1.1%	0.8%	2.7%	6.6%	93.4%	100.0%
238390	0.2%	0.4%	0.3%	0.2%	5.1%	6.2%	93.8%	100.0%
238910	0.6%	1.3%	1.1%	0.8%	7.6%	11.5%	88.5%	100.0%
238990	0.3%	0.7%	0.6%	0.5%	4.9%	7.0%	93.0%	100.0%
484220	0.3%	0.6%	0.5%	0.4%	10.3%	12.1%	87.9%	100.0%
488190	0.2%	0.5%	0.4%	0.3%	2.9%	4.4%	95.6%	100.0%
541370	0.6%	1.3%	1.1%	0.8%	7.6%	11.3%	88.7%	100.0%
Total	0.5%	1.0%	0.9%	0.6%	5.8%	8.8%	91.2%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

**Table 4.14 Share of Port of Portland Spending on FAA-Funded Contracts
by NAICS Code
without NAICS Code 238210**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	5.5%
237310	Highway, Street, and Bridge Construction	71.6%
238220	Plumbing, Heating, and Air-Conditioning Contractors	3.3%
238290	Other Building Equipment Contractors	0.8%
238310	Drywall and Insulation Contractors	1.4%
238390	Other Building Finishing Contractors	1.2%
238910	Site Preparation Contractors	4.5%
238990	All Other Specialty Trade Contractors	1.0%
484220	Specialized Freight (except Used Goods) Trucking, Local	3.2%
488190	Other Support Activities for Air Transportation	5.2%
541370	Surveying and Mapping (except Geophysical) Services	2.2%
Total		100.0%

Source: CHA analysis of Port of Portland data.

**Table 4.15 Aggregated Weighted Availability for FAA-Funded Contracts
without NAICS Code 238210**

Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
0.8%	1.7%	1.5%	1.1%	8.1%	13.0%	87.0%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

5. Analysis of Race and Gender Disparities in the Port of Portland's Utilization of DBEs on FAA-Funded Contracts

To meet the Ninth Circuit's opinion in the *Western States*¹⁴⁶ case that a USDOT recipient must establish that discrimination operates in its market area, and the strict scrutiny requirement applicable to locally-funded contracts that the Port 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, on FAA- funded and non-FAA-funded contracts.

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.¹⁴⁷ 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 C. As discussed above, these tables include

¹⁴⁶ *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), i, 546 U.S. 1170 (2006).

¹⁴⁷ 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.").

results with and without NAICS code 238210 because of the distortion created by the unusually large dollars going to one Black firm in this code.

Tables 4.16 and 4.17 present the results of this disparity analysis by demographic group for FAA-Funded contracts.

**Table 4.16 Disparity Ratios by Demographic Group,
FAA-Funded Contracts**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	1566.51%‡	8.60%	0.00%	3.76%	262.01%*‡	258.45%***‡	77.84%***

Source: CHA analysis of Port of Portland data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

**Table 4.17 Disparity Ratios by Demographic Group, without NAICS Code 238210
FAA-Funded Contracts**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	10.14%	9.57%	0.00%	3.78%	217.25%‡	136.48%‡	94.54%‡

Source: CHA analysis of Port of Portland data.

‡ Indicates substantive significance

C. Port of Portland's Product and Geographic Markets for Non-FAA-Funded Contracts

The analysis of the Port's product and geographic markets for non-FAA-funded contracts followed the approach that was used for contracts funded by the FAA: we used the 1% rule to determine the unconstrained product market; identified the geographic market for the agency; and used the geographic parameters to shape the constrained product market.

1. Port of Portland's Unconstrained Product Markets for Non-FAA-Funded Contracts

Tables 4.18 through 4.20 present the NAICS codes used to define the unconstrained product market for the Port's non-FAA-funded contracts.

Table 4.18 Industry Percentage Distribution of Contracts by Dollars Paid for Non-FAA-Funded Contracts, All Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	17.7%	17.7%
541330	Engineering Services	8.4%	26.2%
541310	Architectural Services	8.4%	34.6%
485999	All Other Transit and Ground Passenger Transportation	7.6%	42.2%
236220	Commercial and Institutional Building Construction	7.2%	49.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	6.5%	56.0%
238220	Plumbing, Heating, and Air-Conditioning Contractors	4.4%	60.4%
238910	Site Preparation Contractors	3.6%	64.0%
561320	Temporary Help Services	3.0%	66.9%
423220	Home Furnishing Merchant Wholesalers	2.3%	69.2%
541512	Computer Systems Design Services	1.7%	70.9%
541611	Administrative Management and General Management Consulting Services	1.7%	72.6%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	1.5%	74.1%
238160	Roofing Contractors	1.4%	75.6%
238120	Structural Steel and Precast Concrete Contractors	1.4%	77.0%
561612	Security Guards and Patrol Services	1.4%	78.4%
562910	Remediation Services	1.3%	79.7%
541511	Custom Computer Programming Services	1.0%	80.6%
TOTAL			100.0% ¹⁴⁸

Source: CHA analysis of Port of Portland data.

¹⁴⁸ Agency spending across other NAICS codes comprised 19.4% of all spending.

**Table 4.19 Industry Percentage Distribution of Contracts by Dollars Paid for
Non-FAA-Funded Contracts,
Prime Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	14.7%	14.7%
485999	All Other Transit and Ground Passenger Transportation	13.4%	28.2%
236220	Commercial and Institutional Building Construction	12.5%	40.7%
541310	Architectural Services	10.0%	50.7%
541330	Engineering Services	7.2%	57.9%
561320	Temporary Help Services	4.6%	62.5%
541512	Computer Systems Design Services	3.0%	65.5%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	2.7%	68.2%
541611	Administrative Management and General Management Consulting Services	2.3%	70.5%
561612	Security Guards and Patrol Services	2.3%	72.7%
562910	Remediation Services	2.3%	75.0%
541511	Custom Computer Programming Services	1.7%	76.7%
541620	Environmental Consulting Services	1.6%	78.2%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.3%	79.5%
238160	Roofing Contractors	1.2%	80.8%
424690	Other Chemical and Allied Products Merchant Wholesalers	1.2%	82.0%
517911	Telecommunications Resellers	1.2%	83.1%
562112	Hazardous Waste Collection	1.2%	84.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	1.1%	85.5%
238290	Other Building Equipment Contractors	1.1%	86.6%
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.0%	87.5%
TOTAL			100.0% ¹⁴⁹

Source: CHA analysis of Port of Portland data

¹⁴⁹ Agency spending across other NAICS codes comprised 12.5% of all spending.

**Table 4.20 Industry Percentage Distribution of Contracts by Dollars Paid for
Non-FAA-Funded Contracts,
Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	21.7%	21.7%
238210	Electrical Contractors and Other Wiring Installation Contractors	13.6%	35.3%
541330	Engineering Services	10.0%	45.3%
238220	Plumbing, Heating, and Air-Conditioning Contractors	8.4%	53.8%
238910	Site Preparation Contractors	8.1%	61.8%
541310	Architectural Services	6.3%	68.1%
423220	Home Furnishing Merchant Wholesalers	5.2%	73.4%
238120	Structural Steel and Precast Concrete Contractors	3.3%	76.7%
327320	Ready-Mix Concrete Manufacturing	1.8%	78.5%
561730	Landscaping Services	1.8%	80.3%
238160	Roofing Contractors	1.8%	82.1%
922160	Fire Protection	1.7%	83.7%
238330	Flooring Contractors	1.2%	85.0%
238310	Drywall and Insulation Contractors	1.0%	86.0%
332322	Sheet Metal Work Manufacturing	1.0%	87.0%
TOTAL			100.0%¹⁵⁰

Source: CHA analysis of Port of Portland data

2. Port of Portland's Geographic Market for Non-FAA-Funded Contracts

Table 4.21 indicates that 84.5% of the unconstrained product market was contained in the state of Oregon and King and Clark counties in Washington.

**Table 4.21 Distribution of Contracts in Port of Portland's Product Market
for Non-FAA-Funded Contracts**

State/County	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
Oregon	75.8%	75.8%
King County, WA	4.4%	80.2%
Clark County, WA	4.3%	84.5%
TOTAL		100.0%¹⁵¹

Source: CHA analysis of Port of Portland data.

¹⁵⁰ Agency spending across other NAICS codes comprised 13.0% of all spending.

¹⁵¹ Agency spending across other states comprised 15.5% of all spending.

3. Port of Portland's Utilization of DBEs on Non-FAA-Funded Contracts

Tables 4.22 through 4.26 present data on the utilization of total contract dollars paid with non-FAA-funded dollars in the constrained product market. It is important to note the contract dollar shares are equivalent to the weight of each NAICS code spending. These weights were used to transform data from unweighted availability to weighted availability, discussed below. As in the section above, we present data with and without NAICS code 238210.

Table 4.22 NAICS Code Distribution of Non-FAA-Funded Contract Dollars

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$49,231,340.00	23.3%
485999	All Other Transit and Ground Passenger Transportation	\$21,377,440.00	10.1%
541330	Engineering Services	\$19,701,414.00	9.3%
236220	Commercial and Institutional Building Construction	\$19,406,070.00	9.2%
541310	Architectural Services	\$18,720,250.00	8.9%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$15,947,659.00	7.6%
238910	Site Preparation Contractors	\$10,031,544.00	4.8%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$9,263,599.00	4.4%
561320	Temporary Help Services	\$8,356,907.50	4.0%
423220	Home Furnishing Merchant Wholesalers	\$6,372,986.50	3.0%
238160	Roofing Contractors	\$4,065,017.50	1.9%
238120	Structural Steel and Precast Concrete Contractors	\$3,741,544.25	1.8%
561730	Landscaping Services	\$2,591,439.50	1.2%
541511	Custom Computer Programming Services	\$2,405,642.00	1.1%
327320	Ready-Mix Concrete Manufacturing	\$2,225,533.75	1.1%
562910	Remediation Services	\$2,171,266.50	1.0%
238290	Other Building Equipment Contractors	\$2,034,282.00	1.0%
922160	Fire Protection	\$1,971,954.88	0.9%
517911	Telecommunications Resellers	\$1,889,027.62	0.9%
562112	Hazardous Waste Collection	\$1,884,024.75	0.9%
238330	Flooring Contractors	\$1,466,203.12	0.7%
541620	Environmental Consulting Services	\$1,408,367.38	0.7%
541611	Administrative Management and General Management Consulting Services	\$1,327,254.38	0.6%
238310	Drywall and Insulation Contractors	\$1,262,070.75	0.6%
332322	Sheet Metal Work Manufacturing	\$1,006,006.00	0.5%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	\$753,663.69	0.4%
561612	Security Guards and Patrol Services	\$278,067.00	0.1%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541512	Computer Systems Design Services	\$153,492.00	0.1%
Total		\$211,044,067.07	100.0%

Source: CHA analysis of Port of Portland data.

**Table 4.23 Distribution of Non-FAA-Funded Contract Dollars
by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$79,052	\$0	\$32,992	\$0	\$3,086,517	\$3,198,561	\$16,207,510	\$19,406,070
237310	\$302,364	\$277,763	\$4,567	\$0	\$5,669,946	\$6,254,640	\$42,976,700	\$49,231,339
238120	\$0	\$0	\$0	\$0	\$580,409	\$580,409	\$3,161,135	\$3,741,544
238160	\$0	\$0	\$0	\$0	\$54,030	\$54,030	\$4,010,988	\$4,065,018
238210	\$4,873,924	\$1,332	\$0	\$40,812	\$564,227	\$5,480,295	\$10,467,363	\$15,947,659
238220	\$0	\$49,550	\$8,075	\$0	\$379,050	\$436,675	\$8,826,924	\$9,263,599
238290	\$0	\$0	\$0	\$0	\$0	\$0	\$2,034,282	\$2,034,282
238310	\$157,227	\$0	\$0	\$0	\$1,017,965	\$1,175,192	\$86,879	\$1,262,071
238330	\$0	\$0	\$0	\$0	\$0	\$0	\$1,466,203	\$1,466,203
238910	\$545,326	\$1,217,205	\$0	\$902,986	\$1,364,451	\$4,029,968	\$6,001,576	\$10,031,544
327320	\$0	\$0	\$0	\$0	\$1,580,373	\$1,580,373	\$645,161	\$2,225,534
332322	\$0	\$0	\$0	\$0	\$197,001	\$197,001	\$809,005	\$1,006,006
423220	\$0	\$0	\$0	\$0	\$1,477	\$1,477	\$6,371,510	\$6,372,987
485999	\$0	\$0	\$0	\$0	\$0	\$0	\$21,377,440	\$21,377,440
517911	\$0	\$0	\$0	\$0	\$0	\$0	\$1,889,028	\$1,889,028
541310	\$1,779,926	\$0	\$0	\$20,375	\$96,715	\$1,897,016	\$16,823,234	\$18,720,250
541330	\$126,518	\$177,398	\$0	\$13,080	\$785,445	\$1,102,441	\$18,598,972	\$19,701,414
541511	\$0	\$0	\$0	\$0	\$0	\$0	\$2,405,642	\$2,405,642
541512	\$0	\$0	\$0	\$0	\$0	\$0	\$153,492	\$153,492
541611	\$41,867	\$106,123	\$0	\$0	\$334,418	\$482,408	\$844,847	\$1,327,254
541620	\$0	\$90,792	\$0	\$0	\$5,436	\$96,228	\$1,312,140	\$1,408,367
561320	\$2,930,658	\$560,041	\$132,428	\$0	\$59,238	\$3,682,365	\$4,674,543	\$8,356,907
561612	\$0	\$0	\$0	\$0	\$0	\$0	\$278,067	\$278,067
561730	\$0	\$2,814	\$0	\$0	\$1,599,342	\$1,602,156	\$989,283	\$2,591,439
562112	\$0	\$0	\$0	\$0	\$0	\$0	\$1,884,025	\$1,884,025
562910	\$0	\$0	\$0	\$0	\$0	\$0	\$2,171,267	\$2,171,267
811310	\$0	\$0	\$0	\$0	\$0	\$0	\$753,664	\$753,664
922160	\$0	\$0	\$0	\$0	\$158,980	\$158,980	\$1,812,975	\$1,971,955
Total	\$10,836,861	\$2,483,018	\$178,062	\$977,254	\$17,535,019	\$32,010,214	\$179,033,853	\$211,044,066

Source: CHA analysis of Port of Portland data

**Table 4.24 Distribution of Non-FAA-Funded Contract Dollars
by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.4%	0.0%	0.2%	0.0%	15.9%	16.5%	83.5%	100.0%
237310	0.6%	0.6%	0.0%	0.0%	11.5%	12.7%	87.3%	100.0%
238120	0.0%	0.0%	0.0%	0.0%	15.5%	15.5%	84.5%	100.0%
238160	0.0%	0.0%	0.0%	0.0%	1.3%	1.3%	98.7%	100.0%
238210	30.6%	0.0%	0.0%	0.3%	3.5%	34.4%	65.6%	100.0%
238220	0.0%	0.5%	0.1%	0.0%	4.1%	4.7%	95.3%	100.0%
238290	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238310	12.5%	0.0%	0.0%	0.0%	80.7%	93.1%	6.9%	100.0%
238330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238910	5.4%	12.1%	0.0%	9.0%	13.6%	40.2%	59.8%	100.0%
327320	0.0%	0.0%	0.0%	0.0%	71.0%	71.0%	29.0%	100.0%
332322	0.0%	0.0%	0.0%	0.0%	19.6%	19.6%	80.4%	100.0%
423220	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
485999	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
517911	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541310	9.5%	0.0%	0.0%	0.1%	0.5%	10.1%	89.9%	100.0%
541330	0.6%	0.9%	0.0%	0.1%	4.0%	5.6%	94.4%	100.0%
541511	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541512	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541611	3.2%	8.0%	0.0%	0.0%	25.2%	36.3%	63.7%	100.0%
541620	0.0%	6.4%	0.0%	0.0%	0.4%	6.8%	93.2%	100.0%
561320	35.1%	6.7%	1.6%	0.0%	0.7%	44.1%	55.9%	100.0%
561612	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
561730	0.0%	0.1%	0.0%	0.0%	61.7%	61.8%	38.2%	100.0%
562112	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
562910	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
922160	0.0%	0.0%	0.0%	0.0%	8.1%	8.1%	91.9%	100.0%
Total	5.1%	1.2%	0.1%	0.5%	8.3%	15.2%	84.8%	100.0%

Source: CHA analysis of Port of Portland data.

**Table 4.25 Distribution of Non-FAA-Funded Contract Dollars
– without NAICS Code 238210
by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$79,052.00	\$0.00	\$32,992.00	\$0.00	\$3,086,517.00	\$3,198,561.00	\$16,207,510.00	\$19,406,070.00
237310	\$302,364.00	\$277,763.00	\$4,567.00	\$0.00	\$5,669,946.00	\$6,254,640.00	\$42,976,700.00	\$49,231,339.00
238120	\$0.00	\$0.00	\$0.00	\$0.00	\$580,409.00	\$580,409.00	\$3,161,135.00	\$3,741,544.00
238160	\$0.00	\$0.00	\$0.00	\$0.00	\$54,030.00	\$54,030.00	\$4,010,988.00	\$4,065,018.00
238220	\$0.00	\$49,550.00	\$8,075.00	\$0.00	\$379,050.00	\$436,675.00	\$8,826,924.00	\$9,263,599.00
238290	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,034,282.00	\$2,034,282.00
238310	\$157,227.00	\$0.00	\$0.00	\$0.00	\$1,017,965.00	\$1,175,192.00	\$86,879.00	\$1,262,071.00
238330	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,466,203.00	\$1,466,203.00
238910	\$545,326.00	\$1,217,205.00	\$0.00	\$902,986.00	\$1,364,451.00	\$4,029,968.00	\$6,001,576.00	\$10,031,544.00
327320	\$0.00	\$0.00	\$0.00	\$0.00	\$1,580,373.00	\$1,580,373.00	\$645,161.00	\$2,225,534.00
332322	\$0.00	\$0.00	\$0.00	\$0.00	\$197,001.00	\$197,001.00	\$809,005.00	\$1,006,006.00
423220	\$0.00	\$0.00	\$0.00	\$0.00	\$1,477.00	\$1,477.00	\$6,371,510.00	\$6,372,987.00
485999	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$21,377,440.00	\$21,377,440.00
517911	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,889,028.00	\$1,889,028.00
541310	\$1,779,926.00	\$0.00	\$0.00	\$20,375.00	\$96,715.00	\$1,897,016.00	\$16,823,234.00	\$18,720,250.00
541330	\$126,518.00	\$177,398.00	\$0.00	\$13,080.00	\$785,445.00	\$1,102,441.00	\$18,598,972.00	\$19,701,414.00
541511	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,405,642.00	\$2,405,642.00
541512	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$153,492.00	\$153,492.00
541611	\$41,867.00	\$106,123.00	\$0.00	\$0.00	\$334,418.00	\$482,408.00	\$844,847.00	\$1,327,254.00
541620	\$0.00	\$90,792.00	\$0.00	\$0.00	\$5,436.00	\$96,228.00	\$1,312,140.00	\$1,408,367.00
561320	\$2,930,658.00	\$560,041.00	\$132,428.00	\$0.00	\$59,238.00	\$3,682,365.00	\$4,674,543.00	\$8,356,907.00
561612	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$278,067.00	\$278,067.00
561730	\$0.00	\$2,814.00	\$0.00	\$0.00	\$1,599,342.00	\$1,602,156.00	\$989,283.00	\$2,591,439.00
562112	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,884,025.00	\$1,884,025.00
562910	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,171,267.00	\$2,171,267.00
811310	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$753,664.00	\$753,664.00
922160	\$0.00	\$0.00	\$0.00	\$0.00	\$158,980.00	\$158,980.00	\$1,812,975.00	\$1,971,955.00
Total	\$5,962,938.00	\$2,481,686.00	\$178,062.00	\$936,441.00	\$16,970,793.00	\$26,529,920.00	\$168,566,492.00	\$195,096,408.00

Source: CHA analysis of Port of Portland data

**Table 4.26 Distribution of Non-FAA-Funded Contract Dollars
– without NAICS Code 238210
by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.4%	0.0%	0.2%	0.0%	15.9%	16.5%	83.5%	100.0%
237310	0.6%	0.6%	0.0%	0.0%	11.5%	12.7%	87.3%	100.0%
238120	0.0%	0.0%	0.0%	0.0%	15.5%	15.5%	84.5%	100.0%
238160	0.0%	0.0%	0.0%	0.0%	1.3%	1.3%	98.7%	100.0%
238220	0.0%	0.5%	0.1%	0.0%	4.1%	4.7%	95.3%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
238290	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238310	12.5%	0.0%	0.0%	0.0%	80.7%	93.1%	6.9%	100.0%
238330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238910	5.4%	12.1%	0.0%	9.0%	13.6%	40.2%	59.8%	100.0%
327320	0.0%	0.0%	0.0%	0.0%	71.0%	71.0%	29.0%	100.0%
332322	0.0%	0.0%	0.0%	0.0%	19.6%	19.6%	80.4%	100.0%
423220	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
485999	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
517911	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541310	9.5%	0.0%	0.0%	0.1%	0.5%	10.1%	89.9%	100.0%
541330	0.6%	0.9%	0.0%	0.1%	4.0%	5.6%	94.4%	100.0%
541511	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541512	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541611	3.2%	8.0%	0.0%	0.0%	25.2%	36.3%	63.7%	100.0%
541620	0.0%	6.4%	0.0%	0.0%	0.4%	6.8%	93.2%	100.0%
561320	35.1%	6.7%	1.6%	0.0%	0.7%	44.1%	55.9%	100.0%
561612	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
561730	0.0%	0.1%	0.0%	0.0%	61.7%	61.8%	38.2%	100.0%
562112	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
562910	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
922160	0.0%	0.0%	0.0%	0.0%	8.1%	8.1%	91.9%	100.0%
Total	3.1%	1.3%	0.1%	0.5%	8.7%	13.6%	86.4%	100.0%

Source: CHA analysis of Port of Portland data.

4. Availability of DBEs in Port of Portland's Markets for Non-FAA-funded Contracts

Similar to the analysis of DBE availability, where the constrained product market was shaped by the spending of FAA-funded contracts, this section built a database of available firms for the constrained product market shaped by the spending of locally-funded dollars. Tables 4.27 through 4.32 present data on unweighted availability; the weights used to adjust the unweighted numbers; and the weighted availability. As discussed, above, the include results with and without NAICS code 238210 because of the distortion created by the unusually large dollars going to one Black firm in this code.

These weighted availability estimates can be used by Port of Portland to set its goals for non-FAA funded projects similar to the process used for FAA-funded contracts.

**Table 4.27 Unweighted Availability for Non-FAA-Funded Contracts
with NAICS Code 238210**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	1.6%	3.9%	2.4%	2.6%	9.2%	19.8%	80.2%	100.0%
237310	2.1%	4.2%	2.1%	3.0%	12.4%	23.9%	76.1%	100.0%
238120	6.7%	8.9%	3.5%	3.2%	17.0%	39.3%	60.7%	100.0%
238160	0.4%	2.4%	0.4%	0.6%	5.1%	9.0%	91.0%	100.0%
238210	1.3%	1.2%	0.8%	0.9%	7.5%	11.7%	88.3%	100.0%
238220	0.3%	0.8%	0.6%	0.6%	4.9%	7.2%	92.8%	100.0%
238290	2.9%	4.4%	3.1%	3.0%	14.7%	28.0%	72.0%	100.0%
238310	2.1%	5.8%	1.4%	1.3%	4.6%	15.3%	84.7%	100.0%
238330	1.3%	3.6%	0.5%	0.7%	6.1%	12.2%	87.8%	100.0%
238910	1.3%	3.9%	1.4%	2.8%	11.3%	20.7%	79.3%	100.0%
327320	0.4%	0.9%	0.8%	0.6%	10.5%	13.2%	86.8%	100.0%
332322	1.0%	1.3%	1.3%	1.1%	19.3%	24.0%	76.0%	100.0%
423220	0.4%	0.9%	0.8%	0.6%	10.6%	13.2%	86.8%	100.0%
485999	2.9%	1.8%	1.5%	1.1%	7.4%	14.7%	85.3%	100.0%
517911	1.4%	0.6%	0.5%	0.9%	3.3%	6.6%	93.4%	100.0%
541310	1.2%	1.5%	1.9%	1.1%	9.1%	14.8%	85.2%	100.0%
541330	1.1%	2.5%	2.2%	1.4%	6.3%	13.6%	86.4%	100.0%
541511	0.8%	1.6%	2.3%	0.8%	6.7%	12.2%	87.8%	100.0%
541512	1.1%	2.3%	2.6%	1.3%	8.3%	15.6%	84.4%	100.0%
541611	1.3%	1.6%	1.7%	1.1%	15.2%	21.0%	79.0%	100.0%
541620	1.3%	2.0%	2.7%	1.5%	28.4%	35.9%	64.1%	100.0%
561320	4.4%	2.8%	5.8%	1.7%	20.7%	35.4%	64.6%	100.0%
561612	3.9%	2.7%	2.3%	1.7%	8.8%	19.5%	80.5%	100.0%
561730	0.5%	1.6%	0.7%	0.6%	6.7%	10.2%	89.8%	100.0%
562112	6.7%	13.3%	0.0%	0.0%	13.3%	33.3%	66.7%	100.0%
562910	2.8%	6.5%	5.4%	3.2%	14.6%	32.5%	67.5%	100.0%
811310	0.3%	0.6%	0.6%	0.4%	4.9%	6.8%	93.2%	100.0%
922160	0.0%	0.1%	0.1%	0.0%	0.9%	1.1%	98.9%	100.0%
TOTAL	1.2%	2.1%	1.6%	1.2%	9.7%	15.8%	84.2%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

**Table 4.28 Share of Port of Portland Spending on Non-FAA-Funded Contracts
by NAICS Code
with NAICS Code 238210**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	9.2%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
237310	Highway, Street, and Bridge Construction	23.3%
238120	Structural Steel and Precast Concrete Contractors	1.8%
238160	Roofing Contractors	1.9%
238210	Electrical Contractors and Other Wiring Installation Contractors	7.6%
238220	Plumbing, Heating, and Air-Conditioning Contractors	4.4%
238290	Other Building Equipment Contractors	1.0%
238310	Drywall and Insulation Contractors	0.6%
238330	Flooring Contractors	0.7%
238910	Site Preparation Contractors	4.8%
327320	Ready-Mix Concrete Manufacturing	1.1%
332322	Sheet Metal Work Manufacturing	0.5%
423220	Home Furnishing Merchant Wholesalers	3.0%
485999	All Other Transit and Ground Passenger Transportation	10.1%
517911	Telecommunications Resellers	0.9%
541310	Architectural Services	8.9%
541330	Engineering Services	9.3%
541511	Custom Computer Programming Services	1.1%
541512	Computer Systems Design Services	0.1%
541611	Administrative Management and General Management Consulting Services	0.6%
541620	Environmental Consulting Services	0.7%
561320	Temporary Help Services	4.0%
561612	Security Guards and Patrol Services	0.1%
561730	Landscaping Services	1.2%
562112	Hazardous Waste Collection	0.9%
562910	Remediation Services	1.0%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.4%
922160	Fire Protection	0.9%
Total		100.0%

Source: CHA analysis of Port of Portland data.

Table 4.29 Aggregated Weighted Availability for Non-FAA-Funded Contracts with NAICS Code 238210¹⁵²

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
1.9%	3.0%	1.9%	1.8%	10.5%	19.1%	80.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

¹⁵² M/WBE availability consists of minority- and women-owned firms. The Port's SBE program does include small white male-owned firms; these firms are included in the non-M/WBE category.

**Table 4.30 Unweighted Availability for Non-FAA-Funded Contracts
– without NAICS Code 238210**

NAICS	Black	Latino	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	1.6%	3.9%	2.4%	2.6%	9.2%	19.8%	80.2%	100.0%
237310	2.4%	4.7%	2.2%	3.3%	13.5%	26.2%	73.8%	100.0%
238120	6.7%	8.9%	3.5%	3.2%	17.0%	39.3%	60.7%	100.0%
238160	0.4%	2.4%	0.4%	0.6%	5.1%	9.0%	91.0%	100.0%
238220	0.3%	0.8%	0.6%	0.6%	4.9%	7.2%	92.8%	100.0%
238290	2.9%	4.4%	3.1%	3.0%	14.7%	28.0%	72.0%	100.0%
238310	2.1%	5.8%	1.4%	1.3%	4.6%	15.3%	84.7%	100.0%
238330	1.3%	3.6%	0.5%	0.7%	6.1%	12.2%	87.8%	100.0%
238910	1.3%	3.9%	1.4%	2.8%	11.3%	20.7%	79.3%	100.0%
327320	0.4%	0.9%	0.8%	0.6%	10.5%	13.2%	86.8%	100.0%
332322	1.0%	1.3%	1.3%	1.1%	19.3%	24.0%	76.0%	100.0%
423220	0.4%	0.9%	0.8%	0.6%	10.6%	13.2%	86.8%	100.0%
485999	2.9%	1.8%	1.5%	1.1%	7.4%	14.7%	85.3%	100.0%
517911	1.4%	0.6%	0.5%	0.9%	3.3%	6.6%	93.4%	100.0%
541310	1.4%	0.9%	1.9%	0.8%	11.4%	16.5%	83.5%	100.0%
541330	0.9%	2.3%	2.1%	1.2%	6.4%	12.9%	87.1%	100.0%
541511	0.8%	1.6%	2.3%	0.8%	6.7%	12.2%	87.8%	100.0%
541512	1.1%	2.3%	2.6%	1.3%	8.3%	15.6%	84.4%	100.0%
541611	1.7%	1.5%	1.7%	1.0%	17.9%	23.8%	76.2%	100.0%
541620	1.3%	2.0%	2.7%	1.5%	28.4%	35.9%	64.1%	100.0%
561320	4.4%	2.8%	5.8%	1.7%	20.7%	35.4%	64.6%	100.0%
561612	3.9%	2.7%	2.3%	1.7%	8.8%	19.5%	80.5%	100.0%
561730	0.5%	1.6%	0.7%	0.6%	6.7%	10.2%	89.8%	100.0%
562112	6.7%	13.3%	0.0%	0.0%	13.3%	33.3%	66.7%	100.0%
562910	2.9%	6.9%	5.6%	3.2%	17.6%	36.3%	63.7%	100.0%
811310	0.3%	0.6%	0.6%	0.4%	4.9%	6.8%	93.2%	100.0%
922160	0.0%	0.1%	0.1%	0.0%	0.9%	1.1%	98.9%	100.0%
TOTAL	1.2%	2.1%	1.6%	1.2%	9.7%	15.8%	84.2%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

**Table 4.31 Share of Port of Portland Spending on Non-FAA-Funded Contracts
by NAICS Code
– without NAICS Code 238210**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236220	Commercial and Institutional Building Construction	10.54%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
237310	Highway, Street, and Bridge Construction	24.26%
238120	Structural Steel and Precast Concrete Contractors	2.03%
238160	Roofing Contractors	2.21%
238220	Plumbing, Heating, and Air-Conditioning Contractors	5.03%
238290	Other Building Equipment Contractors	1.10%
238310	Drywall and Insulation Contractors	0.69%
238330	Flooring Contractors	0.80%
238910	Site Preparation Contractors	5.45%
327320	Ready-Mix Concrete Manufacturing	1.21%
332322	Sheet Metal Work Manufacturing	0.55%
423220	Home Furnishing Merchant Wholesalers	3.46%
485999	All Other Transit and Ground Passenger Transportation	11.61%
517911	Telecommunications Resellers	1.03%
541310	Architectural Services	9.34%
541330	Engineering Services	8.21%
541511	Custom Computer Programming Services	1.31%
541512	Computer Systems Design Services	0.08%
541611	Administrative Management and General Management Consulting Services	0.66%
541620	Environmental Consulting Services	0.76%
561320	Temporary Help Services	4.54%
561612	Security Guards and Patrol Services	0.15%
561730	Landscaping Services	1.41%
562112	Hazardous Waste Collection	1.02%
562910	Remediation Services	1.09%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.41%
922160	Fire Protection	1.07%
Total		100.0%

Source: CHA analysis of Port of Portland data.

**Table 4.32 Aggregated Weighted Availability for Non-FAA-Funded Contracts
– without NAICS Code 238210**

Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
2.0%	3.1%	2.0%	1.9%	10.7%	19.7%	80.3%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

- Finally, we calculated and analyzed the disparity ratios for non-FAA-Funded contracts in the same manner as we did for the FAA-Funded contracts in Section B, above. Tables 4.33 and 4.34 present these results. As with the FAA-Funded contracts, we recommend that the estimates with NAICS code 238210 be used for goal setting, as that best represents the firms ready, willing and able to perform Port contracts and associated subcontracts.

**Table 4.33 Disparity Ratios by Demographic Group,
Non-FAA-Funded Contracts
with NAICS Code 238210**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	281.3%‡	40.5%	5.2%	27.6%	81.2%‡	82.8%‡	104.0%‡

Source: CHA analysis of Port of Portland data.

‡ Indicates substantive significance

**Table 4.34 Disparity Ratios by Demographic Group,
Non-FAA-Funded Contracts
– without NAICS Code 238210**

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	164.3%‡	43.2%	4.8%	26.9%	83.4%‡	71.7%	107.0%**‡

Source: CHA analysis of Port of Portland data

‡ Indicates substantive significance

**Indicates statistical significance at the 0.01 level

D. Port of Portland's Concession Contracts

49 C.F.R. Part 23 requires the Port to set triennial goals for car rental concession contracts and non-car rental concession contracts. To provide data to the agency to comply with these regulatory requirements, we analyzed these data separate. Non-car rental analyses are below.

During the study period, the Port awarded only 11 contracts for Car Rental Concessions (NAICS Code 532111 – Passenger Car Rental). All 11 contracts were included in this analysis; consequently, there was not a need to determine a product market for these contracts. All of the contracts were to firms located in Oregon; therefore, Oregon was the geographic market for this analysis. Table 4.35 presents the dollar value of these contracts.

**Table 4.35 Industry Percentage Distribution of Contracts by Dollars Paid
for Car Rental Concession Contracts**

NAICS	NAICS Code Description	Total Contract Dollars
532111	Passenger Car Rental	\$833,243,090.74
TOTAL		\$833,243,090.74

Source: CHA analysis of Port of Portland data.

1. Port of Portland's Car Rental Concession Contracts

a. Port of Portland's Utilization of ACDBEs on Car Rental Concession Contracts

Tables 4.36 and 4.37 present the agency's utilization by contract dollars for Car Rental Concessions.

**Table 4.36 Distribution of Car Rental Concessions Contract Dollars
by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
532111	\$0.00	\$0.00	\$0.00	\$0.00	\$532,245.58	\$532,245.58	\$832,710,845.16	\$833,243,090.74
Total	\$0.00	\$0.00	\$0.00	\$0.00	\$532,245.58	\$532,245.58	\$832,710,845.16	\$833,243,090.74

. Source: CHA analysis of Port of Portland data

**Table 4.37 Distribution of Car Rental Concessions Contract Dollars
by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
532111	0.0%	0.0%	0.0%	0.0%	0.1%	0.1%	99.9%	100.0%
Total	0.0%	0.0%	0.0%	0.0%	0.1%	0.1%	99.9%	100.0%

Source: CHA analysis of Port of Portland data.

b. Availability of ACDBEs in Port of Portland's Markets for Car Rental Concessions

Similar to the analysis of DBE availability in the constrained product market shaped by the spending of FAA and non-FAA-funded dollars, we built a database of available firms for in the car rental concessions market. Tables 4.38 and 4.39 present data on the unweighted availability and the weighted availability. Because there is only one NAICS code, there is not a need to weight the data.

These weighted availability estimates can be used by the Port to set its ACDBE goals for car rental concessions.

Table 4.38 Unweighted Availability for Car Rental Concession Contracts

NAICS	Black	Latino	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
532111	0.0%	0.0%	0.0%	0.0%	2.1%	2.1%	97.9%	100.0%
TOTAL	0.0%	0.0%	0.0%	0.0%	2.1%	2.1%	97.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

**Table 4.39 Aggregated ACDBE Weighted Availability for Car Rental Concession
Contracts
(total dollars)**

Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
0.0%	0.0%	0.0%	0.0%	2.1%	2.1%	97.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

2. Port of Portland's Non-Car Rental Concessions

a. Port of Portland's Unconstrained Product Markets for Non-Car Rental Concession Contracts

Because there were only 79 contracts let to non-car rental concessions, all of the associated NAICS codes were included in the unconstrained product market. Table 4.40 presents these data.

Table 4.40 Industry Percentage Distribution of Contracts by Dollars Paid for Non-Car Rental Concession Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
722511	Full-Service Restaurants	28.605%	28.605%
453220	Gift, Novelty, and Souvenir Stores	26.448%	55.053%
722513	Limited-Service Restaurants	16.754%	71.807%
722515	Snack and Nonalcoholic Beverage Bars	7.772%	79.579%
448120	Women's Clothing Stores	4.002%	83.581%
448140	Family Clothing Stores	3.821%	87.402%
523130	Commodity Contracts Dealing	3.697%	91.100%
451211	Book Stores	2.803%	93.903%
443142	Electronics Stores	2.685%	96.588%
541810	Advertising Agencies	1.091%	97.679%
488119	Other Airport Operations	0.636%	98.314%
812199	Other Personal Care Services	0.588%	98.902%
445310	Beer, Wine, and Liquor Stores	0.265%	99.167%
522110	Commercial Banking	0.224%	99.391%
611699	All Other Miscellaneous Schools and Instruction	0.130%	99.522%
448310	Jewelry Stores	0.123%	99.645%
812112	Beauty Salons	0.122%	99.767%
448130	Children's and Infants' Clothing Stores	0.119%	99.886%
561431	Private Mail Centers	0.085%	99.971%
517919	All Other Telecommunications	0.029%	99.999%
812320	Dry cleaning and Laundry Services (except Coin-Operated)	0.001%	100.000%
TOTAL			100.0%

Source: CHA analysis of Port of Portland data.

b. Port of Portland's Geographic Market for Non-Car Rental Concession Contracts

Table 4.41 presents the distribution of the contract dollars by state. All of the dollars spent in Washington were with firms located in Clark County. Consequently, this analysis used Oregon and Clark County, Washington as the geographic market for this analysis; this captured 92.5% of the non-car rental concessions dollars in the unconstrained product market.

Table 4.41 Distribution of Contracts in Port of Portland's Product Market for Non-Car Rental Concession Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
OR	87.96%	87.96%
WA	4.54%	92.50%

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
NY	2.97%	95.47%
NH	1.16%	96.63%
CA	1.10%	97.73%
NV	1.09%	98.82%
MN	0.64%	99.45%
NC	0.27%	99.72%
VA	0.13%	99.85%
MD	0.12%	99.97%
NE	0.03%	100.00%
TOTAL		100.0%

Source: CHA analysis of Port of Portland data.

c. Port of Portland's Utilization of ACDBEs – Non-Car Rental Concessions

Tables 4.42 through 4.44 present the Port's utilization by contract dollars for non-car rental concessions.

Table 4.42 NAICS Code Distribution of Non-Car Rental Concession Contract Dollars

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
722511	Full-Service Restaurants	\$135,075,248.00	30.0%
453220	Gift, Novelty, and Souvenir Stores	\$124,186,505.18	27.549%
722513	Limited-Service Restaurants	\$77,938,736.00	17.289%
722515	Snack and Nonalcoholic Beverage Bars	\$38,162,488.00	8.466%
448120	Women's Clothing Stores	\$19,653,106.00	4.360%
448140	Family Clothing Stores	\$18,764,626.00	4.163%
451211	Book Stores	\$13,764,929.00	3.054%
443142	Electronics Stores	\$13,182,467.00	2.924%
523130	Commodity Contracts Dealing	\$3,568,314.50	0.792%
812199	Other Personal Care Services	\$2,885,283.75	0.640%
445310	Beer, Wine, and Liquor Stores	\$1,303,321.12	0.289%
522110	Commercial Banking	\$1,098,997.00	0.244%
448310	Jewelry Stores	\$603,951.81	0.134%
812112	Beauty Salons	\$600,393.44	0.133%
812320	Dry cleaning and Laundry Services (except Coin-Operated)	\$3,350.61	0.001%
Total		\$450,791,717.41	100.0%

Source: CHA analysis of Port of Portland data.

**Table 4.43 Distribution of Non-Car Rental Concession Contract Dollars
by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
443142	\$0	\$0	\$0	\$0	\$8,441,317	\$8,441,317	\$4,741,150	\$13,182,467
445310	\$0	\$0	\$0	\$0	\$0	\$0	\$1,303,321	\$1,303,321
448120	\$0	\$0	\$0	\$0	\$19,653,107	\$19,653,107	\$0	\$19,653,107
448140	\$0	\$0	\$0	\$0	\$0	\$0	\$18,764,627	\$18,764,627
448310	\$0	\$0	\$0	\$0	\$0	\$0	\$603,952	\$603,952
451211	\$0	\$0	\$0	\$0	\$0	\$0	\$13,764,929	\$13,764,929
453220	\$0	\$0	\$34,683,202	\$0	\$8,863,446	\$43,546,648	\$80,639,855	\$124,186,503
522110	\$0	\$0	\$0	\$0	\$0	\$0	\$1,098,997	\$1,098,997
523130	\$0	\$3,568,314	\$0	\$0	\$0	\$3,568,314	\$0	\$3,568,314
722511	\$0	\$16,345,515	\$0	\$0	\$22,314,992	\$38,660,507	\$96,414,736	\$135,075,243
722513	\$564,501	\$2,751,188	\$2,725,790	\$0	\$47,862,883	\$53,904,362	\$24,034,376	\$77,938,738
722515	\$1,483,464	\$0	\$0	\$0	\$0	\$1,483,464	\$36,679,022	\$38,162,486
812112	\$0	\$0	\$0	\$0	\$0	\$0	\$600,393	\$600,393
812199	\$0	\$0	\$0	\$0	\$2,885,284	\$2,885,284	\$0	\$2,885,284
812320	\$0	\$0	\$0	\$0	\$0	\$0	\$3,351	\$3,351
Total	\$2,047,965	\$22,665,018	\$37,408,991	\$0	\$110,021,028	\$172,143,002	\$278,648,709	\$450,791,712

Source: CHA analysis of Port of Portland data

**Table 4.44 Distribution of Non-Car Rental Concession Contract Dollars
by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
443142	0.0%	0.0%	0.0%	0.0%	64.0%	64.0%	36.0%	100.0%
445310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
448120	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
448140	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
448310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
451211	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
453220	0.0%	0.0%	27.9%	0.0%	7.1%	35.1%	64.9%	100.0%
522110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
523130	0.0%	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
722511	0.0%	12.1%	0.0%	0.0%	16.5%	28.6%	71.4%	100.0%
722513	0.7%	3.5%	3.5%	0.0%	61.4%	69.2%	30.8%	100.0%
722515	3.9%	0.0%	0.0%	0.0%	0.0%	3.9%	96.1%	100.0%
812112	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
812199	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
812320	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.5%	5.0%	8.3%	0.0%	24.4%	38.2%	61.8%	100.0%
Total	0.5%	5.0%	8.3%	0.0%	24.4%	38.2%	61.8%	100.0%

Source: CHA analysis of Port of Portland data.

d. Availability of ACDBEs in Port of Portland's Markets – Non-Car Rental Concessions

As with the other portions of this chapter, this section uses the custom census approach to build a database of available firm for the constrained product market shaped by the spending of dollars on non-car rental concessions. Tables 4.45 through 4.47 present data on unweighted availability; the weights used to adjust the unweighted numbers; and the weighted availability.

These weighted availability estimates can be used by the Port of Portland to set its ACDBE goals for non-car rental concession contracts.

Table 4.45 Unweighted Availability for Non-Car Rental Concession Contracts

NAICS	Black	Latino	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
443142	0.10%	0.40%	1.10%	0.10%	5.10%	6.70%	93.30%	100.00%
445310	0.10%	0.50%	1.30%	0.10%	9.40%	11.30%	88.70%	100.00%
448120	0.00%	0.20%	0.60%	0.00%	17.50%	18.30%	81.70%	100.00%
448140	0.20%	1.10%	2.70%	0.20%	7.30%	11.40%	88.60%	100.00%
448310	0.10%	0.40%	1.00%	0.10%	13.00%	14.50%	85.50%	100.00%
451211	0.10%	0.40%	0.90%	0.10%	20.10%	21.40%	78.60%	100.00%
453220	0.20%	0.60%	2.30%	0.10%	19.60%	22.80%	77.20%	100.00%
522110	0.00%	0.00%	0.00%	0.00%	0.70%	0.70%	99.30%	100.00%
523130	0.20%	3.90%	2.00%	0.10%	3.10%	9.40%	90.60%	100.00%
722511	0.20%	0.90%	2.10%	0.10%	5.70%	9.00%	91.00%	100.00%
722513	0.10%	0.30%	0.80%	0.00%	7.40%	8.60%	91.40%	100.00%
722515	7.10%	3.60%	7.10%	0.00%	32.10%	50.00%	50.00%	100.00%
812112	0.10%	0.50%	1.30%	0.10%	25.00%	27.10%	72.90%	100.00%
812199	0.00%	0.20%	0.40%	0.00%	14.10%	14.80%	85.20%	100.00%
812320	0.70%	3.50%	8.90%	0.50%	9.30%	23.00%	77.00%	100.00%
TOTAL	0.10%	0.60%	1.50%	0.10%	11.70%	14.10%	85.90%	100.00%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

Table 4.46 Share of Port of Portland Spending on Non-Car Rental Concession Contracts by NAICS Code

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
443142	Electronics Stores	2.924%
445310	Beer, Wine, and Liquor Stores	0.289%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
448120	Women's Clothing Stores	4.360%
448140	Family Clothing Stores	4.163%
448310	Jewelry Stores	0.134%
451211	Book Stores	3.054%
453220	Gift, Novelty, and Souvenir Stores	27.549%
522110	Commercial Banking	0.244%
523130	Commodity Contracts Dealing	0.792%
722511	Full-Service Restaurants	29.964%
722513	Limited-Service Restaurants	17.289%
722515	Snack and Nonalcoholic Beverage Bars	8.466%
812112	Beauty Salons	0.133%
812199	Other Personal Care Services	0.640%
812320	Dry cleaning and Laundry Services (except Coin-Operated)	0.001%
Total		100.0%

Source: CHA analysis of Port of Portland data.

Table 4.47 Aggregated Weighted Availability for Non-Car Rental Concession Contracts (total dollars)

Black	Hispanic	Asian	Native American	White Women	ACDBE	Non-ACDBE	Total
0.7%	0.9%	2.2%	0.1%	13.1%	17.1%	82.9%	100.0%

Source: CHA analysis of Port of Portland data; Hoovers; CHA Master Directory.

V. ANALYSIS OF DISPARITIES IN THE PORT OF PORTLAND'S ECONOMY

A. Introduction

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

Racial discrimination pervades every aspect of a society in which it is found. It is found above all in attitudes of both races, but also in social relations, in intermarriage, in residential location, and frequently in legal barriers. It is also found in levels of economic accomplishment; this is income, wages, prices paid and credit extended.¹⁵³

This Chapter explores the data and literature relevant to how discrimination in the Port of Portland's market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in Port contract opportunities.

First, we analyze the rates at which DBEs in the Portland metropolitan area form 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 Port 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 Minority-and Women-Owned Business Enterprises ("M/WBEs")¹⁵⁴ 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.¹⁵⁵ These analyses contributed most recently to the successful defense of the Illinois Tollway's Disadvantaged Business Enterprise (DBE) Program.¹⁵⁶ As explained by the Tenth Circuit in upholding the U.S. Department of Transportation's DBE program, 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

¹⁵³Arrow, Kenneth J., "What Has Economics to say about racial discrimination?" *Journal of Economic Perspectives*, (1998), 12(2), pp. 91-100.

¹⁵⁴ We use the term "M/WBE" to include firms certified as Disadvantaged Business Enterprises ("DBEs") and Airport Concession Disadvantaged Business Enterprises ("ACDBEs").

¹⁵⁵ See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs.

¹⁵⁶ *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 840 F.3d 942 (7th Cir. 2016) (upholding the Illinois Tollway's program for state funded contracts modeled after Part 26 and based on CHA's expert testimony, including about disparities in the overall Illinois construction industry); *see also 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).

the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.¹⁵⁷

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.”¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

Likewise, in holding that the DBE program regulations meet strict scrutiny, the court in the *Western States* opinion relied on the “substantial body of statistical and anecdotal materials” considered by Congress, including studies based on Census data that provide “ample” evidence of barriers to the formation of minority-owned firms in the transportation contracting industry.¹⁶¹

This type of court-approved analysis is especially important for an agency such as the Port, which has been implementing a program in conformance with 49 C.F.R. Part 26 and 49 C.F.R. Part 23 for many years. The Port’s remedial market interventions through the use of DBE and ACDBE contract goals may ameliorate the disparate impacts of marketplace discrimination in the agency’s own contracting activities. Put another way, the program’s success in achieving parity for minority and women firms may be “masking” the effects of discrimination that otherwise would result in disparities in DBE and ACDBE utilization that mirrors that of the overall economy.

To explore the question of whether firms owned by non-Whites and White women face disparate treatment in the Port’s marketplace outside of Port contracts, we examined the U.S. Bureau of the Census’ *American Community Survey* which allows us to examine disparities using individual entrepreneurs as the basic unit of analysis.¹⁶² We used the Portland metropolitan area as the geographic unit of analysis.

¹⁵⁷ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1169 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941 (2001) (“*Adarand VII*”).

¹⁵⁸ *Id.*

¹⁵⁹ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at *64 (Sept. 8, 2005).

¹⁶⁰ *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.”).

¹⁶¹ *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

¹⁶² Data from 2012 - 2016 American Community Survey are the most recent for a five-year period.

We found disparities in wages, business earnings and business formation rates for minorities and women across the construction and construction-related services industry sectors in the Port's marketplace.

B. Disparate Treatment in the Marketplace: Evidence from the Census Bureau's 2012 - 2016 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 Port of Portland's DBE and ACDBE programs. In this section, we explore this question using the Census Bureau's *American Community Survey* data to address other aspects of this question.

One element asks if 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.

The *American Community Survey* ("ACS") *Public Use Microdata Sample* ("PUMS") is useful in addressing these issues. The ACS is an annual survey of 1 percent 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 2012 through 2016 the most recent available.¹⁶³ 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 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 A.

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.

¹⁶³ For more information about the ACS PUMS, see <http://www.census.gov/acs/>.

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 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.¹⁶⁴

Each subsection 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. All Industries Combined in the Portland Metropolitan Area

a. Business Formation Rates

One 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 using data from the U.S. Bureau of the Census' American Community Survey. Table 5.1 presents these results. The Table indicates that White men have higher business formation rates compared to non-Whites and White women. Table 5.2 utilizes probit regression analysis to examine the probability of forming a business after controlling for important factors beyond race and gender. This table indicates that non-Whites and White women are less likely to form businesses compared to similarly situated White men. For instance, Blacks are 3.6% less likely to form a business compared to White men after other key explanatory variables are controlled. These tables reinforce the conclusion that there are significant differences in the rate of non-Whites and White women to form a business compared to the rate of White men. Not only are business formation rates for non-Whites and White women lower than that of White men but also their probability of forming a business is less than White men after controlling for a variety of factors. These differences support the inference that minority- and women-owned business enterprises suffer major barriers to equal access to entrepreneurial opportunities in the overall Portland metropolitan area economy.

¹⁶⁴ Most social scientists do not endorse utilizing a confidence level of less than 95%. Appendix C explains more about statistical significance.

**Table 5.1 Business Formation Rates
All Industries
2012 - 2016**

Demographic Group	Business Formation Rates
Black	2.5%
Latino	2.6%
Native American	0.8%
Asian/Pacific Islander	4.2%
Other	2.7%
White Women	4.1%
Non-White Male	3.8%
White Male	6.3%

Source: CHA calculations from the American Community Survey

**Table 5.2 Business Formation Probabilities Relative to White Males
All Industries
2012 - 2016**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-3.6%***
Latino	-2.0%***
Native American	-6.6%**
Asian/Pacific Islander	-1.3%**
Other	-4.6%*
White Women	-1.7%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

b. Differences in Wages and Salary Incomes

Another way to measure equity is to examine how the wage and salary incomes and business earnings of particular demographic groups compares to White men. 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 also might impact outcomes.¹⁶⁵ Using these techniques and data from the Census Bureau's American Community Survey, 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. We report wages and business earnings because disparities in wages and business earnings can lead to disparities in business outcomes. The findings on wages and salary incomes are presented in Table 5.3. Parity would exist if the figures in Table 5.3 were 0.0%; in other words, non-Whites and White women would be utilized identical to White men. When the table indicates that the wage differential between Blacks and White

¹⁶⁵ See Appendix A for more information on multiple regression statistical analysis.

men is -38.9%, for example, this means that wages received by Blacks are 38.9% less than wages received by similar White men.

**Table 5.3 Wage Differentials
for Selected Groups Relative to White Men
All Industries
2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-38.9%***
Latino	-11.4%***
Native American	-25.1%***
Asian/Pacific Islander	-24.5%***
Other	-30.3%***
White Women	-26.7%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Portland metropolitan area earn less than White men in the overall economy. Estimates of the coefficients for Black, Latino, Native American, Asian/Pacific Islander, Other and White Women are statistically significant at the 0.001 level. For example, we are 99.9% confident that wages for Blacks in Portland metropolitan area (after controlling for numerous other factors) are 38.9% less than those received by White men.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by Non-Whites and White women 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 5.4 presents these findings.

**Table 5.4 Business Earnings Differentials
for Selected Groups Relative to White Men
All Industries**

Demographic Group	Earnings Relative to White Men (% Change)
Black	89.1%
Latino	-57.6%*
Native American	65.7%
Asian/Pacific Islander	10.0%
Other	-163.0%*
White Women	-10.3%

Source: CHA calculations from the American Community Survey

* Indicates statistical significance at the 0.05 level

Two of the estimates of the coefficients for these variables were found to be statistically significant at the 0.05 level.

d. Conclusion

Using descriptive analysis, Table 5.1 shows that differentials exist between the business formation rates by non-Whites and White women and White males across industry sectors. Table 5.2 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 5.3 and 5.4 present data indicating differentials in wages 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.¹⁶⁶

2. The Construction Industry in the Portland Metropolitan Area

a. Business Formation Rates

Table 5.5 presents business formation rates in the Portland metropolitan area construction industry for selected demographic groups.

**Table 5.5 Business Formation Rates,
Construction, 2012 - 2016**

Demographic Group	Business Formation Rates
Black	6.7%
Latino	3.2%
Native American	3.9%
Asian/Pacific Islander	10.8%
Other	8.3%
White Women	10.9%
Non-White Male	6.4%
White Male	13.5%

Source: CHA calculations from the American Community Survey

¹⁶⁶ Various appendices to this Report 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."

Table 5.6 presents the results of the probit analysis for the construction industry in Portland metropolitan area.

**Table 5.6 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Construction, 2012 - 2016**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	1.8%
Latino	-6.5%*
Native American	-8.1%
Asian/Pacific Islander	-5.3%
Other	-0.5%
White Women	-2.6%

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

The analysis indicates that non-Whites and White women in Portland metropolitan area form construction businesses at a lower rate compared to White men. When controlling for a variety of factors this difference is significant for Latino at the 0.05 level. The lack of statistical significance for the other groups is most likely due to the very small sample size.

b. Differences in Wage and Salary Incomes

Table 5.7 presents the findings from the wage and salary income regression analysis examining the construction industry in Portland metropolitan area. This indicates the wage differential for selected demographic groups in Portland metropolitan area relative to White men.

**Table 5.7 Wage Differentials
for Selected Groups Relative to White Men
Construction, 2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-70.9%***
Latino	-31.9%***
Native American	-71.1%*
Asian/Pacific Islander	-43.5%**
Other	-63.6%*
White Women	-36.1%***

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 the Portland metropolitan area earn less than White men in the construction industry. The differential ranges between 31.9% less and 70.9% less. Estimates of the coefficients for Black, Latino, and White Women are statistically significant at the 0.001 level. The coefficient

for Asian/Pacific Islander is statistically significant at the 0.01 level and the 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 5.8 presents these findings.

**Table 5.8 Business Earnings Differentials
for Selected Groups Relative to White Men
Construction, 2012 - 2016**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-252.0%
Latino	-83.9%
Native American	(omitted)
Asian/Pacific Islander	(omitted)
Other	-95.9%
White Women	115.0%

Source: CHA calculations from the American Community Survey

The sample for non-whites made it impossible to draw statistically significant conclusions.

d. Conclusion

Using descriptive analysis, Table 5.5 shows that differentials exist between the business formation rates by non-White males and White males. Non-whites and White women working in construction made statistically significant lower wages compared to White men. The small number of non-white firms in construction made it impossible to make statistically significant inferences about business earnings differentials.

3. The Construction-Related Services Industry in the Portland Metropolitan Area

a. Business Formation Rates

Table 5.9 presents business formation rates in the construction-related services industry in Portland metropolitan area for selected demographic groups.

**Table 5.9 Business Formation Rates,
Construction-Related Services
2012 - 2016**

Demographic Group	Business Formation Rates
Black	5.6%
Latino	0.0%
Native American	0.0%
Asian/Pacific Islander	6.3%
Other	0.0%
White Women	2.8%
Non-White Male	3.3%
White Male	11.0%

Source: CHA calculations from the American Community Survey
* Indicates statistical significance at the 0.05 level

White males have a higher rate of business formation than Non-whites and White women. (There were no Latino, Native American or Other firms in the sample and only 1 Black firm.) 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 5.10 presents the results of the probit analysis for the construction-related services industry in Portland metropolitan area.

**Table 5.10 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Construction-related Services, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	7.6%
Latino	--- ¹⁶⁷
Native American	---
Asian/Pacific Islander	-3.6%
Other	---
White Women	-7.2%*

Source: CHA calculations from the American Community Survey
* Indicates statistical significance at the 0.05 level

Here, White women were 7.2% less likely to form a business relative to White Men. This estimate was statistically significant at the 0.05 level.

¹⁶⁷ Many times, there were not sufficient observations in the data to conduct a reliable statistical analysis. In these instances, the tables will contain the symbol "---".

b. Differences in Wage and Salary Incomes

Table 5.11 presents the findings from the wage and salary income regression analysis examining the construction-related services industry in Portland metropolitan area. This indicates the wage differential for selected demographic groups in Portland metropolitan area relative to White men.

**Table 5.11 Wage Differentials
for Selected Groups Relative to White Men
Construction-Related Services, 2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-9.5%
Latino	2.2%
Native American	3.1%
Asian/Pacific Islander	-10.2%
Other	-192.0%***
White Women	-42.1%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

* Indicates statistical significance at the 0.05 level

The coefficients for Other and White Women was statistically significant at the 0.001 level respectively and both groups earned less than White Men.

c. Differences in Business Earnings

The same approach was used to investigate 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 5.12 presents these findings.

**Table 5.12 Business Earnings Differentials
for Selected Groups Relative to White Men
Construction-related Services, 2012 - 2016**

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-205.0%

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Because of sample size concerns, the analysis could only be conducted for White women.

d. Conclusion

Because of the limited number of observations in this sector and subsequent sample size concerns, statistically significant conclusions could not be drawn

4. Goods Industries in the Portland Metropolitan Area

a. Business Formation Rates

Table 5.13 presents business formation rates in the goods industry in Portland metropolitan area for selected demographic groups.

Table 5.13 Business Formation Rates
Goods
2012 - 2016

Demographic Group	Business Formation Rates
Black	0.0%
Latino	2.5%
Native American	0.0%
Asian/Pacific Islander	4.9%
Other	0.0%
White Women	3.2%
Non-White Male	3.0%
White Male	4.7%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than Non-whites and White women except of Asian/Pacific Islanders. (There were no Black, Native American or Other firms in the sample.)

Table 5.14 Business Formation Probabilities Relative to White Males
Goods
2012 - 2016

Demographic Group	Probability of Forming a Business Relative to White Men
Black	---
Latino	-1.2%
Native American	---
Asian/Pacific Islander	1.5%
Other	---
White Women	-1.8%*

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

b. Differences in Wages and Salary Incomes

**Table 5.15 Wage Differentials
for Selected Groups Relative to White Men
Goods
2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-22.2%
Latino	-20.8%**
Native American	1.8%
Asian/Pacific Islander	-34.0%***
Other	-6.3%
White Women	-41.2%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Portland metropolitan area earn less than White men in the overall economy. Estimates of the coefficients for Latino, Asian/Pacific Islander and White Women are statistically significant at the 0.01, 0.001, 0.001 levels, respectively.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by Non-Whites and White women entrepreneurs and White male entrepreneurs in the goods industry. 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 5.16 presents these findings.

**Table 5.16 Business Earnings Differentials
for Selected Groups Relative to White Men
Goods
2012 - 2016**

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	-0.9%
Native American	---
Asian/Pacific Islander	80.2%
Other	---
White Women	-194.0%

Source: CHA calculations from the American Community Survey

* Indicates statistical significance at the 0.05 level

Where the sample contained non-zero numbers of firms, the estimates were not statistically significant.

d. Conclusion

Using descriptive analysis, Table 5.13 shows that differentials exist between the business formation rates by non-Whites and White women and White males (with the exception of Asian/Pacific Islanders). The paucity of

firms makes it difficult to draw statistical inferences about business differentials across demographic groups. Table 5.15 does present evidence of statistically significant wage differentials. Table 15.16 presents the results of a further statistical analysis, which indicated that even after considering potential mitigating factors, the differential still exists for selected groups.

5. The Services Industry in the Portland Metropolitan Area

a. Business Formation Rates

Table 5.17 presents business formation rates in the Portland metropolitan area service industry for selected demographic groups.

**Table 5.17 Business Formation Rates,
Services
2012 - 2016**

Demographic Group	Business Formation Rates
Black	3.6%
Latino	3.2%
Native American	0.0%
Asian/Pacific Islander	5.8%
Other	1.6%
White Women	4.8%
Non-White Male	4.5%
White Male	8.1%

Source: CHA calculations from the American Community Survey

Table 5.18 presents the results of the probit analysis for the service industry in Portland metropolitan area.

**Table 5.18 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Services
2012 - 2016**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-3.2%**
Latino	-1.3%*
Native American	---
Asian/Pacific Islander	-1.3%*
Other	-7.8%*
White Women	-2.2%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

* Indicates statistical significance at the 0.05 level

The analysis indicates that non-Whites and White women in Portland metropolitan area are less likely to form service businesses compared to White men after controlling for key factors. The reduction in probability ranges from 1.3% to 7.8%.

b. Differences in Wage and Salary Incomes

Table 5.19 presents the findings from the wage and salary income regression analysis examining the service industry in Portland metropolitan area. This indicates the wage differential for selected demographic groups in Portland metropolitan area relative to White men.

**Table 5.19 Wage Differentials
for Selected Groups Relative to White Men
Services
2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-40.4%***
Latino	-4.4%
Native American	-7.3%
Asian/Pacific Islander	-27.8%***
Other	-16.6%
White Women	-24.9%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Portland metropolitan area earn less than White men in the service industry. The statistically significance differentials range between 24.9% less and 40.4% less.

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 relative to White Men. Table 5.20 presents these findings.

**Table 5.20 Business Earnings Differentials
for Selected Groups Relative to White Men
Services
2012 - 2016**

Demographic Group	Earnings Relative to White Men (% Change)
Black	219.0%*
Latino	-4.6%
Native American	---
Asian/Pacific Islander	-24.2%
Other	-371.0%**
White Women	13.2%

Source: CHA calculations from the American Community Survey

Statistically significant business earning differentials were only found for Blacks and Others.

d. Conclusion

Using descriptive analysis, Table 5.17 shows that differentials exist between the business formation rates by non-White males and White males. Table 5.18 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Table 5.19 presents data indicating wage differentials and Table 5.20 indicates no statistically significant differences in business earnings.

6. Information Technology Industry in the Portland Metropolitan Area

a. Business Formation Rates

Table 5.21 presents business formation rates in the information technology industry in Portland metropolitan area for selected demographic groups.

**Table 5.21 Business Formation Rates,
Information Technology
2012 - 2016**

Demographic Group	Business Formation Rates
Black	2.1%
Latino	6.1%
Native American	0.0%
Asian/Pacific Islander	3.2%
Other	0.0%
White Women	3.9%
Non-White Male	3.8%
White Male	6.8%

Source: CHA calculations from the American Community Survey
* Indicates statistical significance at the 0.05 level

White males have a higher rate of business formation than other groups.

Table 5.22 presents the results of the probit analysis for the information technology industry in Portland metropolitan area.

**Table 5.22 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Information Technology
2012 - 2016**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-1.0%
Latino	0.6%
Native American	0.0%
Asian/Pacific Islander	-5.2%*
Other	0.0%
White Women	-2.1%

Source: CHA calculations from the American Community Survey
* Indicates statistical significance at the 0.05 level

Here, Asian/Pacific Islanders were 5.2% less likely to form a business relative to White Men. This estimate was statistically significant at the 0.05 level.

b. Differences in Wage and Salary Incomes

Table 5.23 presents the findings from the wage and salary income regression analysis examining the information technology industry in Portland metropolitan area. This indicates the wage differential for selected demographic groups in Portland's metropolitan area relative to White men.

**Table 5.23 Wage Differentials
for Selected Groups Relative to White Men
Information Technology
2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-24.4%
Latino	-2.6%
Native American	2.6%
Asian/Pacific Islander	-12.2%
Other	-44.5%
White Women	-14.8%

Source: CHA calculations from the American Community Survey

None of the wage coefficients were statistically significant.

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 5.24 presents these findings.

**Table 5.24 Business Earnings Differentials
for Selected Groups Relative to White Men
Information Technology
2012 - 2016**

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	-694.0%
Native American	---
Asian/Pacific Islander	-168.0%
Other	---
White Women	70.5%

Source: CHA calculations from the American Community Survey

Because of sample size concerns, the analysis could not be conducted for Black, Native American, and Other. For the other groups, the results were not statistically significant.

d. Conclusion

Because of the limited number of observations in this sector and subsequent sample size concerns, the estimates are not as robust as for the other sectors analyzed in this chapter.

C. Disparate Treatment in the Marketplace: Evidence from the Census Bureau's 2012 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.¹⁶⁸ The 2012 SBO was released on December 15, 2015, so our analysis reflects the most current data available. The SBO collects demographic data on business owners disaggregated into the following groups:^{169, 170}

- 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

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

To examine those sectors in which the Port purchases, we analyzed economy-wide SBO data on the following sectors:

- Construction
- Professional, Scientific and Technical Services
- Goods
- Other services

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 Port'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

¹⁶⁸ See <http://www.census.gov/econ/sbo/about.html> for more information on the Survey.

¹⁶⁹ Race and gender labels reflect the categories used by the Census Bureau.

¹⁷⁰ 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.

to avoid disclosing data on businesses that can be identified or because the small sample size generates unreliable estimates of the universe.¹⁷¹ We therefore report 2-digit data.

Table 5.25 presents information on which NAICS codes were used to define each sector.

Table 5.25 2-Digit NAICS Code Definition of Sector

SBO Sector Label	2-Digit NAICS Codes
Construction	23
Professional, Scientific, and Technical Services ¹⁷²	54
Goods	31,42, 44
Other Services	48, 52, 53, 56, 61, 62, 71, 72, 81

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. All Industries

For a baseline analysis, we examined all industries in the state of Oregon. Table 5.26 presents data on the percentage share that each group has of the total of each of the following six business measures:

- 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 employer firms

Panel A of Table 5.26 presents data for the four basic non-White racial groups:

- Black
- Latino
- Native American
- Asian
- Panel B of Table 5.26 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

¹⁷¹ Even with these broad sector definitions, there were many cases when the Census Bureau did not report information. In these cases, the value will be entered into the table as “---”

¹⁷² 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.

Categories in the second panel are mutually exclusive. Hence, firms that are non-White and equally owned by men and women are classified as non-White and firms that are equally owned by non-Whites and Whites and equally owned by men and women are classified as equally owned by non-Whites and Whites.¹⁷³

**Table 5.26 Percentage Demographic Distribution of Sales and Payroll Data
All Industries, 2012**

	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	1.42%	0.16%	0.48%	0.14%	0.24%	0.16%
Latino	4.55%	0.66%	2.97%	0.55%	1.26%	0.78%
Native American	1.24%	0.15%	0.74%	0.12%	0.25%	0.17%
Asian	4.67%	1.83%	5.75%	1.74%	2.97%	1.59%
Panel B: Distribution of All Firms						
Non-White	12.22%	2.85%	10.11%	2.58%	4.83%	2.76%
White Women	30.59%	4.47%	17.01%	3.83%	7.34%	5.15%
White Men	42.83%	29.89%	47.90%	29.12%	33.85%	32.01%
Equally Non-White & White	1.40%	0.41%	1.63%	0.36%	0.81%	0.49%
Equally Women & Men	10.59%	4.94%	15.64%	4.59%	7.15%	5.20%
Firms Not Classifiable	2.38%	57.44%	7.71%	59.51%	46.01%	54.38%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

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 5.27, Panel B, re-aggregates the last four groups— White men; equally non-White and White; equally women and men; and firms not classifiable— into one group: Not Non-White/Not White Women.¹⁷⁴ 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 5.28:

- 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 firms is 11.37% (as shown in Table 5.28). This is derived by taking the Black share of sales and receipts for all firms (0.2%) and dividing it by the Black share of total number of all firms (1.4%) that are

¹⁷³ 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

¹⁷⁴ Again, while a cumbersome nomenclature, it is important to remain clear that this category includes firms other than those identified as owned by White men.

presented in Table 5.27.¹⁷⁵ 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.¹⁷⁶ All disparity ratios for non-White firms and White women firms are below this threshold.¹⁷⁷

**Table 5.27 Demographic Distribution of Sales and Payroll Data – Aggregated Groups
All Industries, 2012**

	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	1.4%	0.2%	0.5%	0.1%	0.2%	0.2%
Latino	4.5%	0.7%	3.0%	0.6%	1.3%	0.8%
Native American	1.2%	0.2%	0.7%	0.1%	0.2%	0.2%
Asian	4.7%	1.8%	5.8%	1.7%	3.0%	1.6%
Panel B: Distribution of All Firms						
Non-White	12.2%	2.8%	10.1%	2.6%	4.8%	2.8%
White Women	30.6%	4.5%	17.0%	3.8%	7.3%	5.2%
Not Non-White/Not White Women	57.2%	92.7%	72.9%	93.6%	87.8%	92.1%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

¹⁷⁵ Please note: the numbers presented in the tables are rounded off to the nearest tenth or nearest one hundredth. Consequently, while the ratios presented in Table 5.28 are calculated from the precise numbers, the underlying numbers in Table 5.27 are presented in their rounded form. For instance, the precise number for the Black share of total firms is 1.41642057611713% and the precise number for the Black share of sales is 0.161061224533912%. When the Black share of sales is divided into the Black share of firms the result is 11.37100288% or rounded to 11.4%. However, when the presented rounded numbers are utilized (0.2/1.4) the result is 14.3% (which is not reported in any table).

¹⁷⁶ 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.").

¹⁷⁷ Because the data in the subsequent tables are presented for descriptive purposes, significance tests on these results were not conducted.

**Table 5.28 Disparity Ratios of Firm Utilization Measures
All Industries, 2012**

	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	11.37%	28.50%	65.47%
Latino	14.48%	18.67%	61.75%
Native American	12.15%	16.30%	69.42%
Asian	39.17%	30.21%	53.77%
Panel B: Disparity Ratios for All Firms			
Non-Whites	23.30%	25.56%	57.16%
White Women	14.61%	22.53%	70.14%
Not Non-White/Not White Women	162.05%	128.41%	104.85%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

This same approach was used to examine the construction, professional, scientific and technical services, goods, and other services sectors. The following are summaries of the results of the disparity analyses.

2. Construction

Of the 8 disparity ratios for non-White firms and White women firms presented in Table 5.29, all fall under the 80% threshold.

**Table 5.29 Disparity Ratios – Aggregated Groups
Construction, 2012**

	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	---	---	---
Latino	40.95%	39.83%	---
Native American	---	---	---
Asian	33.94%	42.98%	---
Panel B: Disparity Ratios for All Firms			
Non-White	43.47%	49.97%	---
White Women	55.35%	60.70%	---
Not Non-White/Not White Women	109.62%	106.94%	---
All Firms	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

3. Construction-Related Services

Of the 18 disparity ratios for non-White firms and White women firms presented in Table 5.30, all fall under the 80% threshold.

**Table 5.30 Disparity Ratios – Aggregated Groups
Professional, Scientific, and Technical Services, 2012**

	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	22.79%	49.85%	54.07%
Latino	28.24%	42.10%	56.57%
Native American	26.04%	45.52%	77.70%
Asian	51.29%	75.01%	79.57%
Panel B: Disparity Ratios for All Firms			
Non-White	37.92%	57.67%	69.44%
White Women	23.31%	26.58%	57.22%
Not Non-White/Not White Women	153.40%	125.61%	106.29%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

4. Goods

Data disclosure issues precluded any analysis of firms in the Goods industry

**Table 5.31 Disparity Ratios – Aggregated Groups
Goods, 2012**

	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	---	---	---
Latino	---	---	---
Native American	---	---	---
Asian	---	---	---
Panel B: Disparity Ratios for All Firms			
Non-White	---	---	---
White Women	---	---	---
Not Non-White/Not White Women	---	---	---
All Firms	---	---	---

Source: CHA calculations from Survey of Business Owners

5. Services

Of the 11 disparity ratios for non-White firms and White women firms presented in Table 5.32, all fall under the 80% threshold.

**Table 5.32 Disparity Ratios – Aggregated Groups
Services, 2012**

	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	6.5%	---	---
Latino	9.0%	---	---
Native American	---	---	---
Asian	16.9%	10.4%	42.1%
Panel B: Disparity Ratios for All Firms			
Non-White	11.5%	9.9%	43.8%
White Women	10.2%	12.2%	52.9%
Not Non-White/Not White Women	182.6%	140.8%	107.2%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

VI. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN THE PORT OF PORTLAND'S MARKET

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities and the Port's program. This evidence is relevant to the question of whether observed statistical disparities are due to discrimination and not to some other non-discriminatory cause or causes, as well as the likely efficacy of any race- and gender-neutral remedies employed by the Port. As discussed in Chapter II, this type of anecdotal data has been held by the courts to be relevant and probative of whether the Department continues to have a need to use narrowly tailored DBE and M/W/ESB contract goals to remedy the effects of past and current discrimination, and create a level playing field for contract opportunities for all firms.

The Supreme Court has held that anecdotal evidence can be persuasive because it "brought the cold [statistics] convincingly to life."¹⁷⁸ Evidence about discriminatory practices engaged in by prime contractors, agency personnel, and other actors relevant to business opportunities has been found relevant regarding barriers both to minority firms' business formation and to their success on governmental projects.¹⁷⁹ 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."¹⁸⁰ "[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."¹⁸¹

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."¹⁸² 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."¹⁸³

To explore this type of anecdotal evidence of possible discrimination against minorities and women in the Port's geographic and industry markets and the effectiveness of its current race-conscious and race-neutral measures, we conducted public business owner and stakeholder interviews, totaling 228 participants. We met with a broad cross section of business owners from the Port's geographic and industry markets. Firms ranged in size from large national businesses to established family-owned firms to new start-ups. We sought to explore their experiences in seeking and performing public and private sector prime contracts and subcontracts and concession contracts with the Port, other government agencies, and in the private sector. We also elicited recommendations for improvements to the Port's Disadvantaged Enterprise Program ("DBE"), the Airport Concessions Disadvantaged Business Enterprise ("ACDBE") Program and the Minority Women Service Disabled Veteran Emerging Small Business ("SBE") program, as discussed in Chapter III.

Many minority and women owners reported that while some progress has been made in integrating their firms into public and private sector transportation contracting activities through race- and gender-conscious

¹⁷⁸ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

¹⁷⁹ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1172 (10th Cir. 2000), cert. granted, 532 U.S. 941, then dismissed as improvidently granted, 534 U.S. 103 (2001).

¹⁸⁰ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1120, 1530 (10th Cir. 1994).

¹⁸¹ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 926 (11th Cir. 1997).

¹⁸² *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233, 249 (4th Cir. 2010).

¹⁸³ *Concrete Works*, 321 F.3d at 989.

contracting programs, significant barriers remain. Race- and gender-neutral approaches alone were described as unlikely to ensure a level playing field for Port contract and concession opportunities.

We also conducted an electronic survey of firms in the Port's market area about their experiences in obtaining work, marketplace conditions and the agency's contracting equity programs. The results were similar to those of the interviews. Almost a quarter of D/M/WBEs reported they still experience barriers to equal contracting opportunities; questioning of their competency because of their race or gender; less access to business networks and information. Ten percent reported job-related sexual or racial harassment or stereotyping.

A. Business Owner Interviews

The following are summaries of the issues discussed. Quotations are indented and may have been shorted for readability. The statements are representative of the views expressed over the many sessions by many participants.

Many minority and female owners reported that they still suffer from biased perceptions and stereotypes about their competency and professionalism.

I hear all the time in our office from businesses talking about the comments that are made to them about their perceived [lack of] capacity just because they are a minority.

When they hear M/WBE, they look at us as a charity. Now we gotta do this charity case for these people, or we gotta sponsor them, because they're a woman minority, so I don't normally display that I'm a woman minority ... because I want the credentials and the experience to be primary and not the M/WBE.

One of the reasons that I started a business was because I felt like I was hitting a ceiling.

What I hear most of the time is white people complaining, not all but some, complaining, "I wish I could voice how I really feel. I don't feel like I should get lower on the list because I'm a guy and I'm straight".

As a woman minority, the perception that I can't be an architect. I'm either a carpet sales rep, or IT support. There is a perception thing, and in order to move on, I try not to think about that. There are gender and race biases, but I try and move on.

I never felt like I had a glass ceiling in my career. I did work for quite a large firm before coming to [name]. I had my son when I was there and that's the one time in my career where I did face a situation where I was passed over for a promotion because I was pregnant at the time, and so I made the decision to leave and just advocated for myself and found a firm that was better for me.

I was at a meeting and I was standing right next to a man who was a representative of a male minority owned [services firm], and nobody came to talk to me about [the service]. They all went to him, person after person, and I think it's because I was a woman. I felt like they went to him because a woman they don't trust for their [services] project.

If you try to get paid the right amount, [as a woman] you're interpreted as challenging instead of a businessperson.

Several interviewees reported that sexism and unconscious bias limit their opportunities and adversely affect their businesses.

I could think of a few inspectors here in the Port that if we get a project, we intentionally put a white male as the lead for that project. We thought this problem had gone away, and then we put

a young male in charge of a project, and to the point where he wouldn't accept the testing. Everything tested out fine.

I know my company will not send me to walk a job even though I train the person who's going to go walk the job. It's just, there's certain job sites where it's like, "Oh don't let her walk that one," or, "Don't let her walk by that person." It's unfortunate and there's definitely I think steps and opportunities like this where we can take those steps to break down those barriers, but I definitely know I do not have the same privileges and respect that my male counterparts do when I walk a job. So, I don't get to go to jobs anymore. I'm in the office.

It's almost like [the Port inspector] can forget that we're a minority contractor- as long as we don't show a minority presence.... But the minute we start bringing women and minorities onto the site, everything is a problem.

Being a female in [trade], especially, I know no matter what job I'm on, no matter what I'm doing I always have to prove myself. So, I just took it as an opportunity to make myself that much better than my male counterparts, which is why I'm now a business owner and my male counterparts are still working for somebody else.

When I talk to someone on the phone, when I try to put in a bid, there's a lot of good old guys that known each other. And I've been in the business forever, so it's more of a good old guys buddy buddy type.... And it's hard to break that chain, because this guy knows this guy, and they're pals. And they've been friends. And they've been in the business forever, so it's like a chain that can't be broken. And so, I have to reach beyond that chain to other clientele.

Sexual harassment remains a problem for women, regardless of their industry.

I had a lot of "little ladies, little girls", all of that and now I wouldn't even notice.

All the comments are still there ... It just happens behind closed doors. I've been in rooms interviewing, where not everybody knew each other, and the conversation as soon as there's five people in the room, as soon as the one woman leaves, the conversation is about her. I've been in a room and as soon as the one Hispanic guy leaves, the conversation is about him.

Once I get in the room, I don't experience much direct bias, but you'll still hear that implicit bias ... people are always commenting to me, "I can't believe you do all that, and you're a mom, too." You wouldn't comment on that to a man.

You hit a job site, right in the first day you're the poster girl, and then all the commentary in the field.

I'll just say the architectural community, and the contracting community in general, harassment, "Hello, of course there was harassment." All the time.

I've been in the industry for 7 years, and I think it still surprises me how much focus is on what we look like. I've been told in the past that the way that I look is potentially distracting, or something I'm wearing is potentially distracting, where I think that conversation would never come up with a man. It becomes an issue that's brought to me as if it's something that I need to remedy, where in fact I'm a professional. I don't see anyone else approaching men about the way that they're ... looking, and how that's affecting their performance.... Why is the focus on that as opposed to the quality of work and the contributions and the things that I'm saying?

My ex-boss, who I will not name, was a huge [executive at a concessions firm], he did a lot of work for [name]. I was harassed by him sexually, and guess what? When you talk to people

about how I get in as a minority business I'm supposed to go have relationships with these people, so that then they call me. He's the last person on the planet I'm going to call.

Younger women reported that blatant sexism has subsided.

I think the younger you are, the less people care [about gender].... If you're over 35 there's still a lot of it going on, under 35 there's a lot less.

I don't think I've personally experienced anything horrible. I've certainly heard stories. Some have quietly left the field. Some have tried to file claims. I'm kind of backing up 20, 25 years.... I'm definitely a source in the office where people can go to me.... It's changed a lot for the better.

Our [older] generation has learned to really deal with it differently by ignoring it... I just think it's a matter of the age and experience on when you're going to go through that.

I find working with younger men and most people in this audience has been a lot easier. There's still the people who are making the powerful decisions here in Portland, and I think this notion that I somehow have to go through them to get into their team is really a complicated one, so I've only done it a couple of times.

Most participants reported that becoming certified as a DBE or M/WBE helped to reduce these barriers.

Having the certification actually does help, because we are usually a sub to a large architectural firm, going in as a team, during the design process on the project. And so, having the certification helps them meet the quota, but I think, again, our work also speaks for itself. So, it helps us maybe get the job, but then we are qualified. We're not getting the job just because we're a minority or a woman owned business, because of that and the qualification. But I find, for us, it does help, especially being a smaller company.

We've certainly gotten opportunities for getting subcontracts due to DBE, WBE, DBE status.... And then, we'll do business with them on everything after that.

There's even times where I've clearly been told, the only reason why you got this job is because you're a woman owned business.

There's preferential treatment in purchasing departments with purchasing managers ... for people who are already in the system, as opposed to the people who are trying to get into the system.... A lot of the people who are on the outside of the system are people of color and women owned firms.... The goals are necessary. They need to be adhered to.

I have a really mixed experience with the designation of small woman owned business, emerging small business. And I've had a lot of people tell me, it's really gonna help me. It has once, so far, in the first two and half years. But that one time was crucial for the growth of my business. So, I just want to support the Port and all the other agencies that are doing this.... The actual number of the percentage that you're trying to achieve makes a huge difference for a field like mine. And it's made a huge difference for me. I would say that there's lots of jurisdictions, or clients, that I've tried to work with so far, in the first two and a half years, where there's a lot of words about certification, but in the end, it doesn't really matter, because the way that the point structures are negotiated process. I can't undercut my bigger competition. So, I have all the experience that a larger firm has, but I can't go to the client and say, give me a chance.

Now I can agree, that with an MWBE, it opens doors for the general contractors to come to us to bid, but we have a fair chance, just like everybody else, because the lowest bidder wins the bids.

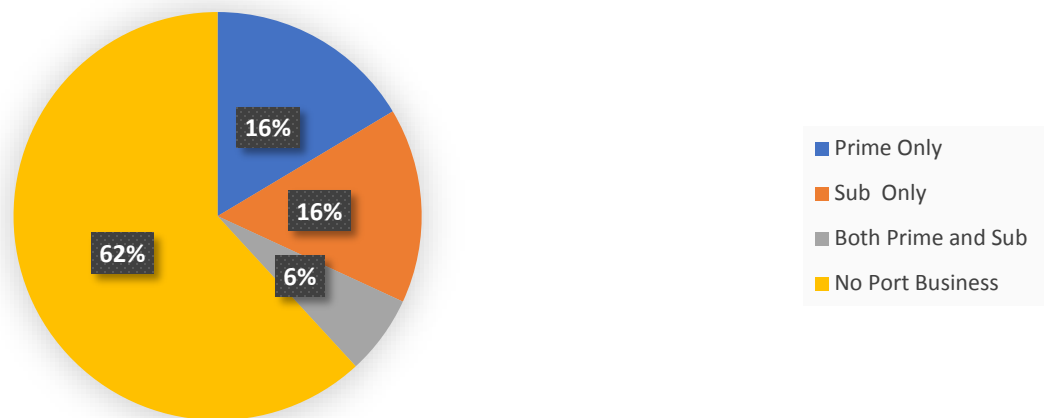
Some firms, especially consultants, felt that larger prime vendors do not use them to their full capabilities.

When I'm working for large contractors, they will recruit you, if they know you can do the work, so that they can get points, because most of the public sector agencies now require you to diversify your teams. So, they'll recruit you, but they really sort of sequester the work that you're doing. It's a little chunk of work, to give them points, and you're sort of buried in the team.

B. Anecdotal Survey

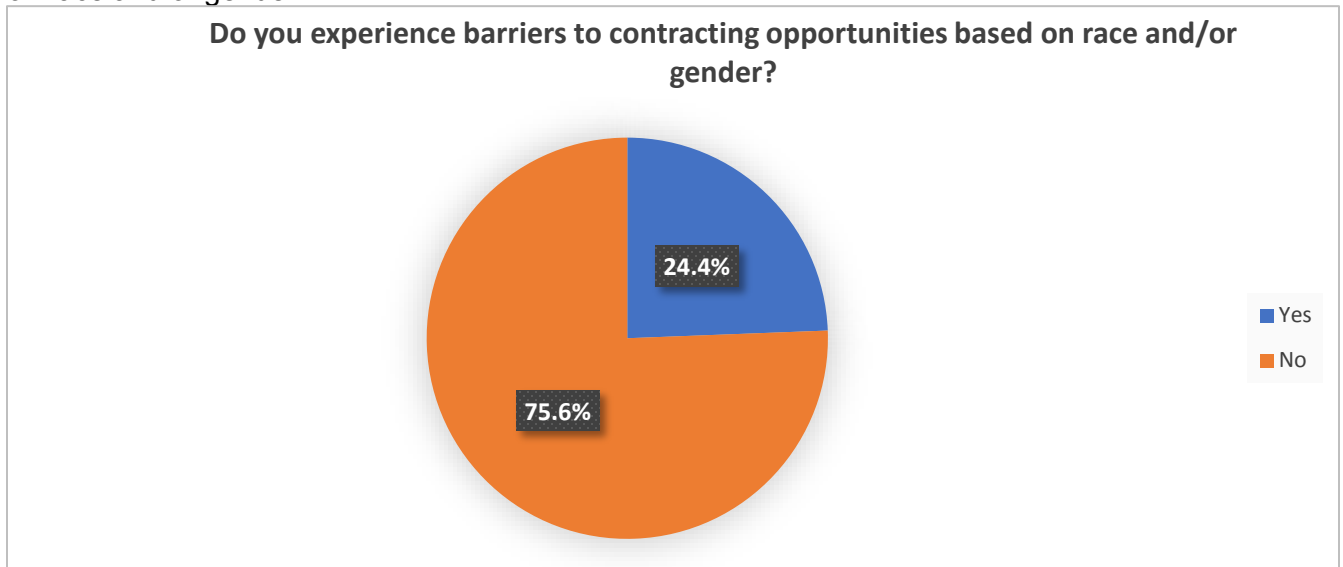
To supplement the in-person interviews, we also conducted an electronic survey of firms on our availability list. Two hundred and five (205) minority- and women-owned firms participated. Sixteen percent (16%) of DBEs had worked on Port projects only as a prime contractor/consultant or concessionaire; 16% had worked only as a subcontractor; 6.0% had worked as both a prime contractor, consultant or concessionaire, and as a subcontractor, subconsultant or supplier; and 62% had not done business on any Port contracts.

Have you done business with Port as either a prime contractor/consultant/concessionaire, subcontractor/supplier/concessionaire, or both?

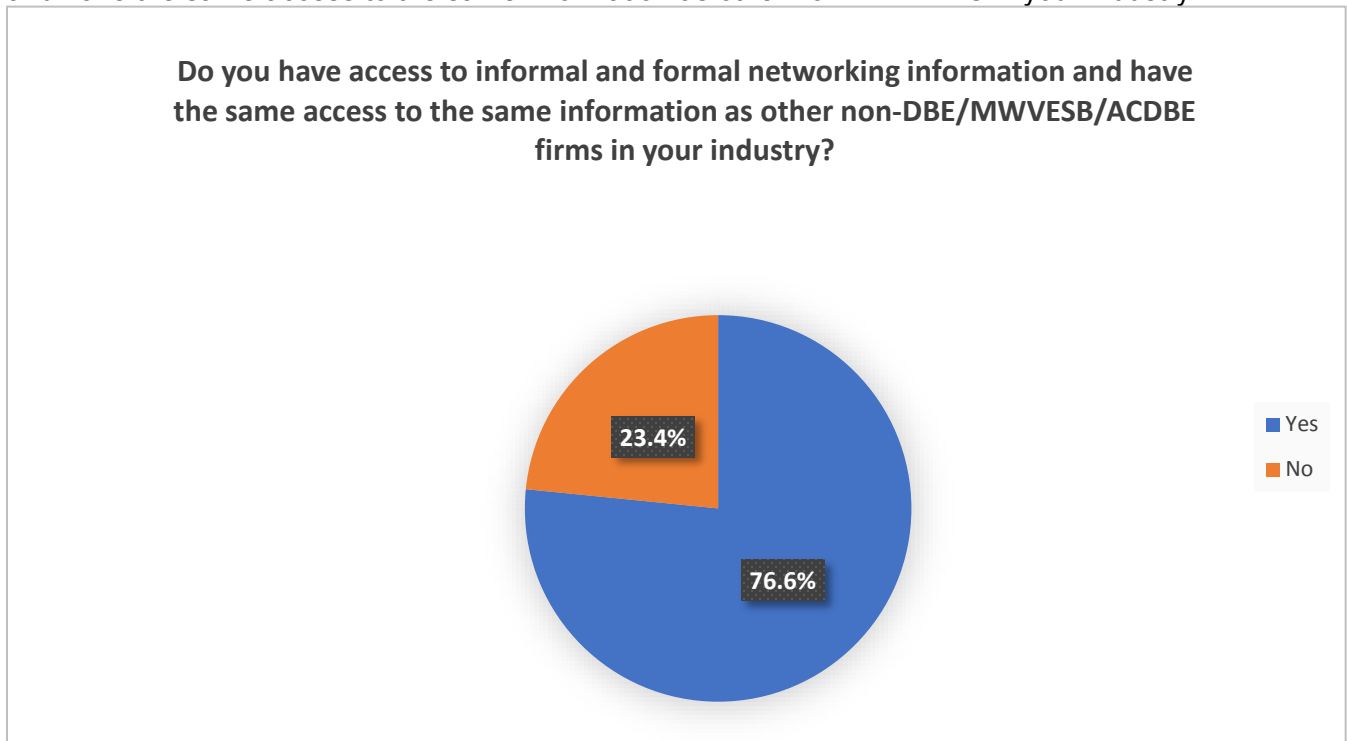


These respondents reported the following experiences.

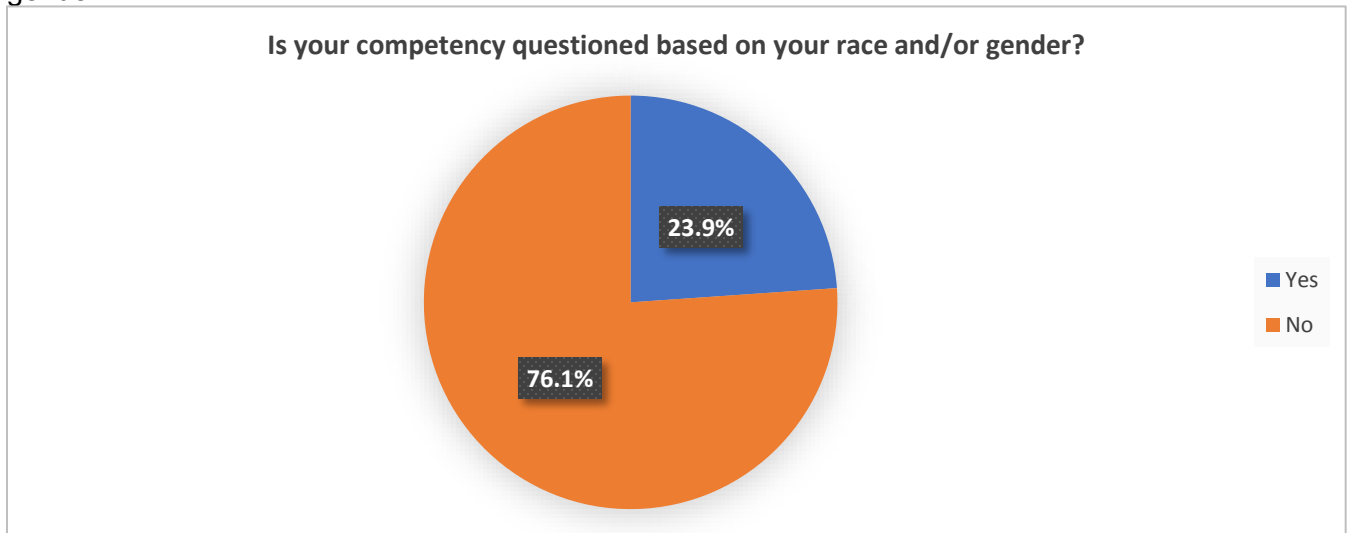
- 24.40% answered yes to the question “Do you experience barriers to contracting opportunities based on race and/or gender?”



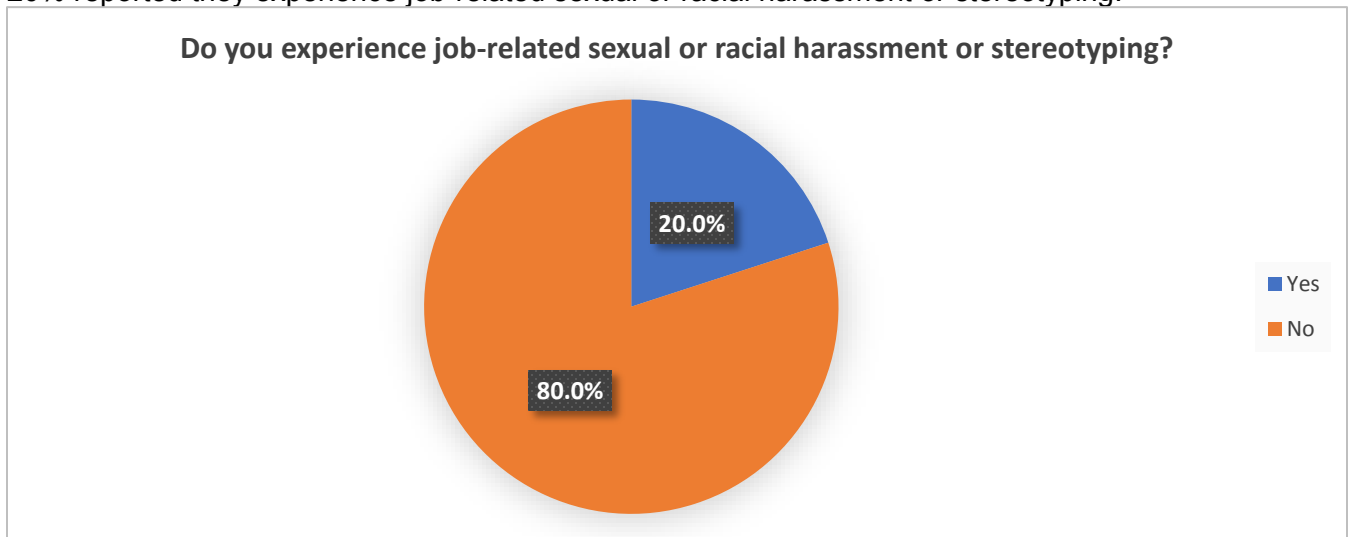
- 23.4% answered no to the question “Do you have access to informal and formal networking information and have the same access to the same information as other non-DBE firms in your industry?”



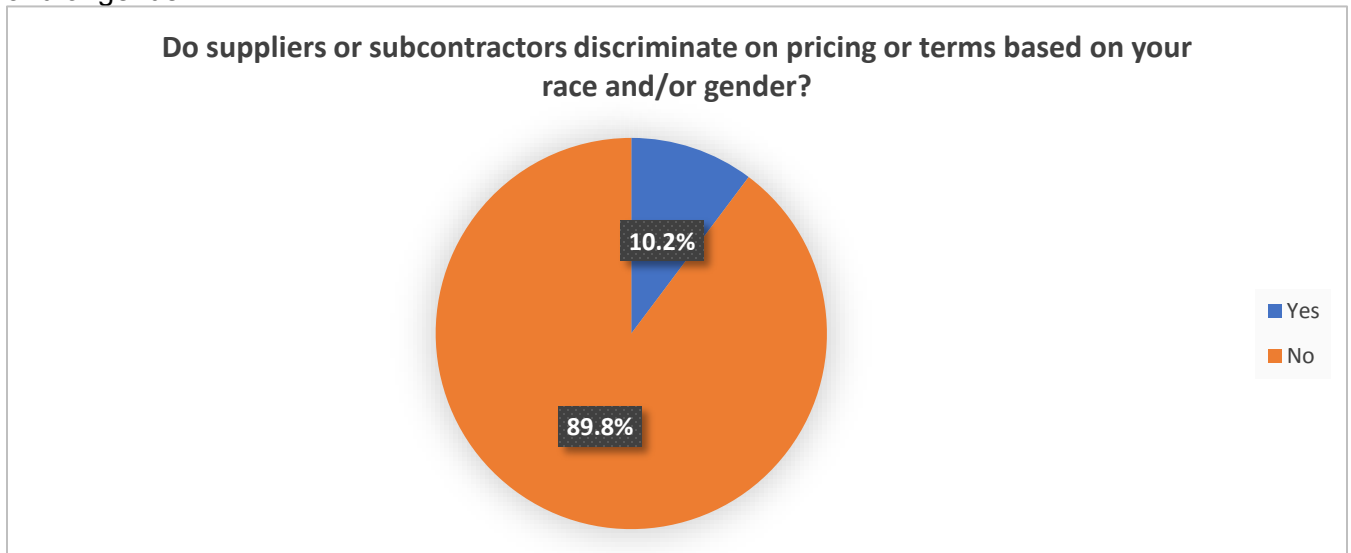
- 23.9% answered yes to the question “Is your competency questioned based on your race and/or gender?”



- 20% reported they experience job-related sexual or racial harassment or stereotyping.



- 10.2% stated they experience discrimination from suppliers or subcontractors because of their race and/or gender.



1. Other Survey Results:

- 8.8% reported they have unequal access to insurance; 5.4 % reported they have unequal access to surety bonding services; and 15.1% reported they have unequal access to financing and business capital.
- 38% reported they are solicited for Port or government projects with DBE goals.
- 49.34% reported they are solicited for private projects and projects without DBE goals.
- 92.6% of those with Port work stated that the Port and/or prime contracts pay them promptly.
- 45.4% had accessed some type of supportive services or other program to assist DBEs and small firms (percentage based on program usage and is not mutually exclusive per respondent):
 1. 4.4% had participated in financing or loan programs;
 2. 1.5% had accessed bonding support programs;
 3. 14.69% had participated in a mentor-protégé program or relationship; 10.7% had received support services such as assistance with marketing, estimating, information technology, etc.; and
 4. 14.1% had joint ventured with another firm.

C. Conclusion

Consistent with other evidence reported in this Study, the anecdotal interviews and the survey results strongly suggest that minorities and women continue to suffer discriminatory barriers to full and fair access to contracts and associated subcontracts in the Port's market area. While not definitive proof that the Port needs to continue to implement race- and gender-conscious remedies for these impediments, the results of the qualitative data are the types of evidence that, especially when considered in conjunction with the numerous pieces of statistical evidence assembled, the courts have found to be highly probative of whether the Port 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 PORT OF PORTLAND'S SMALL BUSINESS DEVELOPMENT PROGRAMS

The quantitative and qualitative data in this study provide a thorough examination of the evidence of the experiences of minority- and women-owned firms in the Port of Portland's geographic and industry markets. As required by strict constitutional scrutiny, the Disadvantaged Business Enterprise ("DBE") program for Federal Aviation Administration ("FAA") contracts¹⁸⁴ and the Ninth Circuit Court of Appeals' jurisprudence for the DBE program, the Airport Concessions Disadvantaged Business Enterprise ("ACDBE") program,¹⁸⁵ and the Port's Minority/Women/Service-Disabled Veteran/Emerging Small Business ("SBE") program, we analyzed evidence of DBEs'¹⁸⁶ and ACDBEs' utilization by the Port as measured by dollars spent. We next estimated the availability of DBEs and ACDBEs in Port's markets in the aggregate and by funding source and detailed industry code. We then compared the Port's utilization of DBEs to the availability of all ready, willing and able firms in its markets to calculate whether there are disparities between utilization and availability for FAA-funded and non-FAA-funded contracts. We also solicited anecdotal or qualitative evidence of DBEs' and ACDBEs' experiences in obtaining contracts and concession opportunities in the public and private sectors. These results provide the agency with the evidence necessary to narrowly tailor its DBE program for FAA-funded contracts, as required by the Ninth Circuit, and for non-FAA-funded contracts as required by strict constitutional scrutiny. Based upon these findings, we make the following recommendations.

A. Augment Race- and Gender-Neutral Measures

The courts and the DBE and ACDBE program regulations require that recipients use race-neutral¹⁸⁷ approaches to the maximum feasible extent to meet the annual DBE and ACDBEs goals. This is a critical element of narrowly tailoring the programs, so that the burden on non-DBEs is no more than necessary to achieve the Port's remedial purposes. Increased participation by DBEs on all contracts regardless of funding source and ACDBEs on concession opportunities through race-neutral measures will also reduce the need to set DBE and ACDBE contract goals. We, therefore, suggest the following enhancements of the Airport's current efforts, based on the business owner and stakeholder interviews, the input of agency staff, and national best practices for DBE and ACDBE programs. We note that the provision of more staff for the Small Business Development Program office is critical to implementing many of the following recommendations and continuing to administer outstanding programs.

1. Increase Targeted Outreach

Participants in the business owner and stakeholder groups interviews generally lauded the Small Business Development Program office. Although significantly short staffed, DBEs felt that they were able to access information through this department. However, several professional services firm owners wanted direct access to the decision makers in user departments. We suggest outreach sessions with Port staff from user departments for firms certified in the specific areas in which those departments purchase to ensure that DBEs can determine to whom to market and learn more about what the Port requires of professional services firms. Likewise, outreach meetings to discuss specific upcoming projects by industry would help to broaden the pool of certified firms available to the Port as prime vendors and to non-certified firms to meet contract goals.

2. Ensure Prompt Payment of Prime Vendors and Subcontractors

Complaints about slow payments came from all types of firms. This seemed to be a universal concern, mostly unrelated to race or gender status. Prime contractors reported that slow payment by the agency means they sometimes have to finance their subcontractors to ensure the prime meets its D/M/WBE goals. A solution that was enthusiastically embraced was increasing the payment schedule to perhaps twice monthly or a frontloaded payment schedule, and we second this idea. Another recommendation is that the Port should pay the prime contractor for the work the subcontractor has satisfactorily performed, even if all the other subs

¹⁸⁴ 49 C.F.R. Part 26.

¹⁸⁵ 49 C.F.R. Part 23.

¹⁸⁶ We use the term "DBEs" to refer collectively to DBEs and SBEs for simplicity and ease of usage.

¹⁸⁷ The term race-neutral as used here includes gender-neutrality.

and/or the prime contractor cannot yet invoice for their work or the Port has not yet approved payment for those line items. This removes the risk from the subcontractors of issues unrelated to their performance and eliminates delays that could result in extreme financial distress for small firms.

3. Increase Contract “Unbundling”

Airport projects are often very large and complex. Not surprisingly, this was reported to be a disincentive to small firms to seek Port contracts. Unbundling projects, providing longer lead times and simplifying requirements would assist these businesses to take on some Port work. In conjunction with reduced insurance and bonding requirements where possible, unbundled contracts should permit smaller firms to move from quoting solely as subcontractors to bidding as prime contractors, as well as enhance their subcontracting opportunities. Unbundling must be conducted, however, within the constraints of the need to ensure efficiency and limit costs to taxpayers.

Further, some DBEs reported that although they were listed on on-call contracts, they received little or no work. This is to some extent the nature of on-call contracts, where the actual scopes of work are not yet specified, so a listed firm might not receive work because the Port did not in fact require those services. However, being listed caused some certified firms to set aside staff and other resources in case they were called. One approach to lessen this outcome would be for the on-call contracts to be unbundled more, so that perhaps DBEs might receive them as prime vendors.

4. Review Contract Specifications

A major issue for small construction contractors was the inability to obtain materials specified in the Port’s solicitation. One answer would be to review proprietary requirements to make sure that in fact no other possible materials would be suitable. The Port could also work with its material suppliers to ensure they have a robust supplier diversity program. As with insurance and bonding specifications, the Port should always review its standards through the lens of their effect on small firms.

5. Review and Revise Program Policies and Documents

As part of our review of the Port’s programs, we examined documents relevant to program administration. While relatively minor, there are some areas that need to be revised to ensure compliance with the DBE program regulations. These include:

- Tailoring Port forms to DBE and ACDBE requirements, such as ensuring the nondiscrimination provisions track the language in Part 26 and ensuring the good faith efforts language conform to the regulations;
- Ensuring the ACDBE joint venture provisions meet FAA guidance;
- Conducting spot reviews concerning who orders and pays for supplies used by DBE subcontractor; and
- Developing more checklists to assist contractors to comply with program requirements.

6. Adopt an SBE Target Market Program

There was significant support for a race- and gender-neutral small business setaside to assist SBEs to work as prime contractors and consultants. If permitted under state law, this program would set aside some smaller or less complex contracts for bidding only by SBEs as prime contractors. The Port would have to determine the size limits for contracts and the types of contracts to be included. For example, maintenance contracts and small consulting contracts might be successfully procured using this method. This measure would be especially useful for those industries that do not operate on a prime vendor-subcontractor model, such as consulting services, or contracts with few opportunities for subcontracting. On call contracts were pointed to as an excellent vehicle for this target market approach. If implemented on a fully race- and gender-neutral basis, this is a constitutionally acceptable method to increase opportunities for all small firms.

7. Develop a Bonding and Financing Program for DBEs

Access to bonding and working capital are the two of largest barriers to the development and success of DBEs and small firms because traditional underwriting standards have often excluded them. One approach that has proven to be effective for some agencies is to develop a Port-sponsored bonding and financing assistance program for DBEs. This goes beyond the provision of information about outside bonding resources to providing actual assistance to firms through a program consultant; it is not, however, a bonding guarantee program that places the Airport's credit at risk or provides direct subsidies to participants. Rather, this concept brings the commitment of a surety company to provide a bond for firms that have successfully completed the program. Other agencies have reported significant increases in DBEs' bonding capacities and ability to take on larger projects using this type of program. Such a program could be implemented in conjunction with other local agencies to reduce costs and increase participation.

8. Enhance the Mentor-Protégé Program

The Port administers an award-winning Mentor-Protégé program. Most participants praised this initiative as very helpful to the development of their firms. Mentors also lauded the program and benefited from it. Two possible enhancements should be considered. First, the program could include benefits for using the protégé on specific Port projects. The current approach is not tied to any Port opportunities, and some protégés thought that ensuring that they were at least considered for contract goals would increase their utilization. Second, some incentives beyond the current benefit of trying to increase the pool of qualified firms, such as awarding of extra evaluation points for use of the protégé, could add to the utility of the mentor-protégé relationship.

9. Support Interaction Between ACDBEs and Between ACDBES and Prime Concessionaires

Overall, both ACDBES and prime concessionaires praised the Port's program. ACDBEs believed that the program was necessary to open up opportunities at PDX. There have been challenges in meeting ACDBE contract goals. One suggestion for program enhancement was to have regular meetings of ACDBEs to discuss issues and work towards common solutions; non-ACDBEs agreed. We concur.

B. Continue to Implement a Narrowly Tailored DBE Program

The Study's results support the determination that the Port has a strong basis in evidence to continue to implement a fully race-conscious DBE program that includes all groups for race-conscious relief for its FAA-funded contracts. The record—both quantitative and anecdotal—establishes that minorities and White women in the Port's market area continue to experience significant disparities in and barriers to their fair and equal access to the agency's FAA-funded contracts, non-FAA-funded contracts, concession opportunities, and the aviation and construction industry in the Portland area. While DBEs did not experience large disparities in their utilization on FAA-funded contracts, the underutilization of minority- and women-owned businesses on non-FAA-funded contracts, coupled with the anecdotal and economy-wide results, support the inference that utilization is the result of the Port's strong administration of the DBE program, not the absence of discrimination on the basis of race and gender in the Port's market area. We are, therefore, confident that the Port can support the use of race-conscious contract goals on its FAA-funded contracts.

1. Use the Study to Set the Triennial DBE Goal and Contract Goals

49 C.F.R. Part 26 requires that the Port engage in a two-step process to set a triennial goal for DBE participation in its federally-funded projects. To determine the Step 1 base figure for the relative availability of DBEs required by § 26.45(c), we suggest the Port use the DBE weighted availability findings for FAA-funded contracts. Our custom census is an alternative method permitted under §26.45(c)(5), and is the only approach that has received repeated judicial approval.

To perform the Step 2 analysis required by § 26.45(d) to adjust the step 1 figure to reflect the level of DBE availability that would be expected in the absence of discrimination, the Port can use the statistical disparities

in Chapter V in the rates at which DBEs form businesses. This is the type of “demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.”¹⁸⁸

As discussed in Chapter II, the Port’s constitutional responsibility is to ensure that its implementation of 49 C.F.R. Part 26 is narrowly tailored to its geographic and procurement marketplace. In the Ninth Circuit, this means examining whether each racial and ethnic group and white women have suffered discrimination in the Port’s market.¹⁸⁹

The study found that spending on FAA-funded jobs for all groups, other than White women, did not reach parity with non-DBEs, even with the application of DBE contract goals. On non-FAA-funded contracts, DBEs as a group suffered large disparities. Blacks and White women did not experience large disparities for contracts; however, as discussed at length in Chapter IV, the results for Blacks were anomalous given that one firm received a large share of the dollars for highly specialized work.

In our judgment, these results fit squarely within the framework of the *Western States* opinion by providing the type of quantitative and qualitative data that were totally lacking in that case.¹⁹⁰ This report presents statistical evidence of the Port’s utilization of available DBEs in its market, as well as the economy-wide and unremediated markets data approved by the Ninth Circuit.¹⁹¹ Business owners provided strong anecdotal evidence of the continuing existence of race- and gender-based barriers, including bias, stereotyping, harassment, exclusion from networks and unfair performance standards. The picture drawn by these results is of a playing field for Port work that is still not level, absent the agency’s remedial efforts through the application of the DBE program. These findings suggest that the Airport may infer that the cause is the continued effects of discrimination on the basis of race and gender. Therefore, to ensure it is not a passive participant in this discriminatory market, we recommend that the Port continue to utilize race-conscious contract goals and include all groups for credit towards meeting contract goals.

The highly detailed unweighted availability estimates in Chapter IV can serve as the starting point for narrowly tailored contract goal setting that reflects the percentage of available DBEs as a percentage of the total pool of available firms. The Port should weigh the estimated scopes of the contract by the availability of DBEs in those scopes, and then adjust the result based on geography and current market conditions (for example, the volume of work currently underway in the market, the entrance of newly certified firms, specialized nature of the project, etc.).

The recently purchased B2GNow electronic data collection and monitoring system contains a contract goal setting module developed to utilize the study’s unweighted availability data as the starting point. Written procedures detailing the implementation of contract goal setting should be developed and disseminated so that all contracting actors understand the methodology. This will help to address the perceived lack of transparency reported by some interviewees.

2. Use the Study to Set the ACDBE Triennial and Contract Goals

Likewise, the study’s weighted availability estimates should serve as the step 1 basis for the car rental ACDBE goal and the non-car rental ACDBE goal. The detailed unweighted availability data should be used as the starting point for contract goal setting. As discussed in Chapter II, a disparity analysis was not performed on concession contracts.

¹⁸⁸ 49 CFR § 26.45(d)(3); *see also* §23.51.

¹⁸⁹ 407 F.3d at 997-998 (“Whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry. ... Moreover, even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”).

¹⁹⁰ 407 F.3d at 991-992.

¹⁹¹ *See* Chapter II.

3. Use the Study to Set the SBE Annual and Contract Goals

Strict constitutional scrutiny requires the Port to examine whether it has a strong basis in evidence of discrimination in its market for non-federally assisted contracts to determine if race-conscious relief is supportable. Minorities and women as a whole suffered large disparities, and in our judgment, that is sufficient to establish the need for affirmative intervention to prevent the Port from functioning as a passive participant in a discriminatory marketplace. We, therefore, recommend the continuation of the program for non-FAA-funded contracts. We note that White males may participate in the SBE program through certification as an Emerging Small Business, and so this program has inherently race-neutral features.

As with the DBE and ACDBE programs, we urge the Port to use the study's weighted availability estimate to set its overall annual, aspirational goal for its non-FAA-funded contracts. The unweighted estimates can serve as the basis for goal setting using the B2GNow system, as with the DBE goals.

C. Develop Performance Measures for Program Success

The Port should develop quantitative performance measures for certified firms and the overall success of the program to evaluate its effectiveness in reducing the systemic barriers identified by the study. In addition to meeting the triennial goal, possible benchmarks might be:

- The number of bids or proposals and the dollar amount of the awards, and the goal shortfall where the bidder submitted good faith efforts to meet the contract goal;
- 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; and

Increased "capacity" of certified firms as measured by bonding limits, size of jobs, profitability, etc.

APPENDIX A: 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, age and education were used.

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. Since this Report examined the Port of Portland, the analysis was limited to data from the Portland metropolitan area. The coefficient for the new variable showed the impact of being a member of that race or gender in Portland metropolitan area.

APPENDIX B: 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 layperson's point of view lie in the nature of the 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.¹⁹² However, in the probit model, the initial coefficients cannot be interpreted this way. One additional step - which can be computed 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.

¹⁹² The exact interpretation depends upon the functional form of the model.

APPENDIX C: 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 Port of Portland as it explores whether each racial and ethnic group and White women continues to experience discrimination in its markets is do non-Whites and White women receive lower wages than White men? As discussed in Appendix A, one way to uncover the relationship between the dependent variable (e.g., wages) and the independent variable (e.g. non-Whites) is through multiple regression analysis. An example helps to explain this concept.

Let us say 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 sometimes called the null hypothesis. We then calculate a confidence interval to find explore the probability that the observed relationship (e.g., - 35%) is between 0 and minus that confidence interval.¹⁹³ The confidence interval will vary depending upon the level 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.

¹⁹³ 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 above or below the hypothesized value, then we would say “plus or minus the confidence level” and this would be a two-tailed test.