



INSIGHT

CENTER FOR COMMUNITY
ECONOMIC DEVELOPMENT

State Policies and Programs for Minority- and Women-Business Development

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“Best Practices, Imperfections, and Challenges in State Inclusive
Business Programs”

Part of an Inclusive Business Initiative

The Insight Center for Community Economic Development is a national research, consulting and legal organization that develops and promotes innovative solutions that help people and communities become, and remain, economically secure.

We work in collaboration with foundations, nonprofits, educational institutions and businesses to develop, strengthen and promote programs and public policy that:

- Lead to good jobs—jobs that pay enough to support a family, offer benefits and the opportunity to advance
- Strengthen early care and education systems so that children can thrive and parents can work or go to school
- Enable people and communities to build financial and educational assets

The Insight Center was formerly known as the National Economic Development and Law Center.

Inclusive Business Initiative

This research is part of an Inclusive Business Initiative of the Insight Center for Community Economic Development. This initiative seeks to promote policies and programs in the public, private, and nonprofit sectors that enhance minority and women business (MBE and WBE) development. The Insight Center has identified two specific M/WBE research and action objectives:

- Using regional industry sector analysis and policy and program design, we link M/WBE development strategies to broader, regional economic development strategies, and
- Applying our policy and program analysis skills, we look at ways that the public, nonprofit, and private sectors can increase procurement from and provide capacity building to M/WBEs, such as through affirmative procurement initiatives.

The interactive Inclusive Business Initiative website can be found at:

<http://www.insightccd.org/index.php?page=inbiz>.

This report is part of the Research Series “Best Practices, Imperfections, and Challenges in State Inclusive Business Programs.” It is the second of two research components to look at the trend and impact of affirmative procurement and targeted small business development services at the state-level. The first research component examined the impact of state affirmative procurement policies on the performance of minority- and women-owned businesses. By examining business outcomes in five states – California, Florida, Maryland, Oregon, and Washington – the study concluded that state procurement policies *do* have an impact on businesses owned by women and businesses owned by persons of color. The five-state study was released in October 2007.

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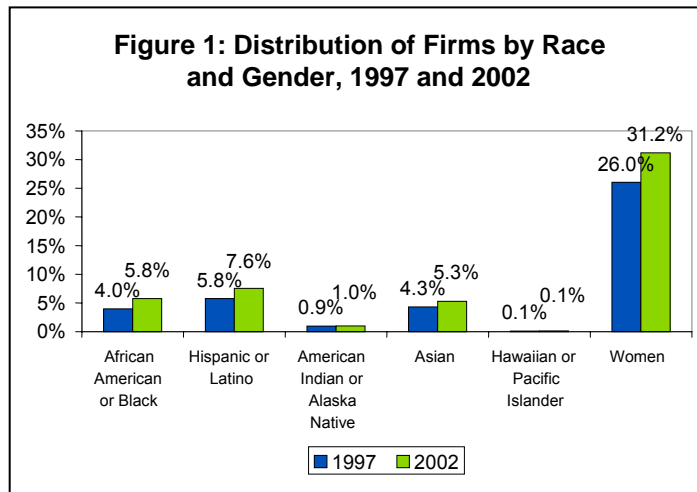
I. INTRODUCTION

Small business development is an important component of local economic development. Nationally, firms with sales under \$1 million made up 95% of all privately-held firms in 2002. There were 6.9 small businesses with sales under \$1 million for every 100 residents in the U.S. in 2000.

Small business development is a particularly important asset building strategy among women and communities of color. In 2002, nearly one-third of all businesses were owned by women, while 19 percent were owned by persons of color, according to the Economic Census Survey of Business Owners. We will use the terms 'women business enterprises' (WBEs) and 'minority business enterprises' (MBEs) to describe these firms.

W/MBEs Increasing in Number

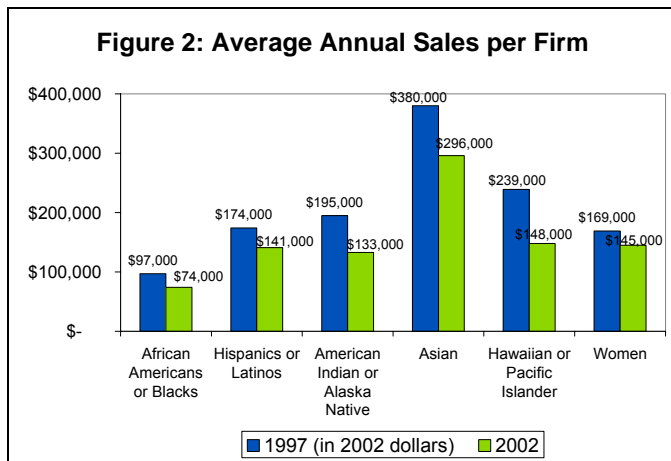
As Figure 1 shows, between 1997 and 2002, business start-ups were occurring at a faster pace among women and persons of color than among white males. For example, the proportion of firms owned by women rose from 26 percent in 1997 to 31 percent in 2002. Likewise, the proportion of firms owned by Hispanics rose from 6 percent to 8 percent during that time, and the proportion of firms owned by other minorities also rose.



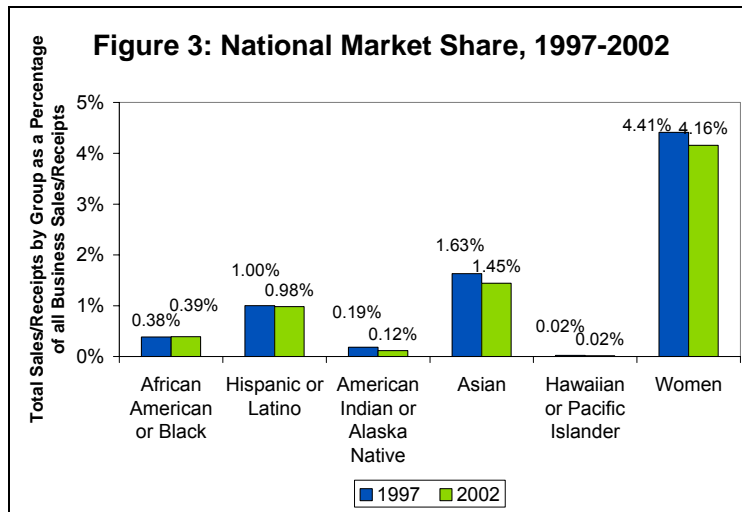
There were about 4 million MBEs in 2002, up from just over 3 million in 1997. Likewise, the number of WBEs increased from 5.4 million in 1997 to 6.5 million in 2002.

M/WBEs Decreasing Revenue/Market Share

While the number of MBEs and WBEs increased, the average sales revenue of MBEs and WBEs was lower in 2002 than in 1997, as shown in Figure 2. Average annual sales of firms owned by Hawaiian Natives, Pacific Islanders, American Indians, or Alaskan Natives all dropped by more than 30 percent from 1997 to 2002. Firms owned by other minority groups and women experienced at least a 10 percent decrease in average sales during that time.



The primary reason for the decline in average annual sales of MBEs and WBEs was their overall drop in market share. Market share is the total annual sales of a group of businesses compared to the total annual sales of all firms. The national market share of WBEs declined from 4.41% in 1997 to 4.16% in 2002, as shown in Figure 3. Likewise, the market share of MBEs dropped from 3.19% in 1997 to 2.91% in 2002. The market share of all minority groups declined, except for African American owned businesses, which increased slightly. The biggest declines in market share were experienced by Asian owned and American Indian or Alaska Native owned businesses. The declining market share, combined with the increase in new firms, about one million additional MBEs and over one million additional WBEs in 2002 compared to 1997, led to the decrease in average firm size.



Limited Access to Financing and Marketing

One possible reason for the declining market share of minority and women owned businesses is related to race- and gender- specific factors, including limited access to markets and financing. Business start-up or expansion is dependent on access to capital, debt financing, and markets. Access to markets can be more limited for minorities and women, since market access often relies on an informal network and friendship among other business owners and other potential customers. This is especially the case in the construction industry, causing an additional hurdle for women and minorities there.^{1,2} Additionally, business owners tend to use personal or family savings to start or expand a business, and minorities have lower average levels of family savings.^{3,4}

In addition to, or instead of, personal or family savings and assets, many firms need outside capital for start-up or expansion. Women and minorities have had a more difficult time accessing start-up or expansion business loans than white males.^{5,6} Using data

¹ Enchautegui, M.E., Fix, M., Loprest, P., von der Lippe, S.C., & Wissoker, D. (1997). *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* Washington, DC: The Urban Institute.

² Blanchflower, D.G. & Wainwright, J. (2005, November). *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry.* Cambridge, MA: National Bureau of Economic Research.

³ 2002 Survey of Business Owners, Economic Census, US Census Bureau.

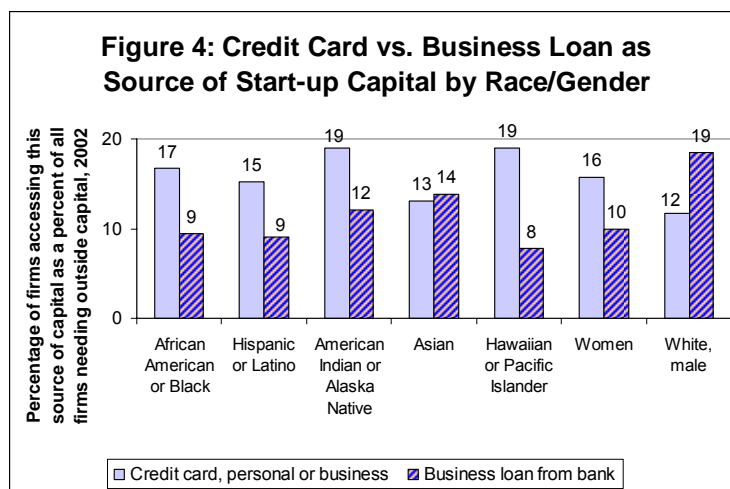
⁴ Current Population Reports (2003, May). *Net Worth and Asset Ownership of Households: 1998 and 2000.* Washington, DC: US Census Bureau.

⁵ Cavalluzzo, K. & Cavalluzzo, L. "Market Structure and Discrimination: The Case of Small Business," *Journal of Money, Credit and Banking*, 30:4, Nov. 1998, pp. 771-92.

from the 2002 Economic Census and Survey of Business Owners, we found that women and minorities were less able to access the necessary capital for business start-up from a financial institution, compared to white men. Among start-up businesses needing financing, 18.5 percent of white male-owned businesses were able to access capital from financial institutions, compared to less than 10 percent of Hispanic, African American, Native Hawaiian, Pacific Islander, or women-owned firms. Government loans for small businesses made up only a small portion of this difference, with 1.2 percent of WBEs, 1.3 percent of Latino-owned firms, and 1.8 percent of African American-owned firms receiving a government loan for business start-up, rates that were only slightly higher than for white male-owned businesses.

Greater Dependency on Consumer Credit

Women and minorities are more likely to utilize personal or business credit cards to finance their business start-up compared to white men, as shown in Figure 4. The



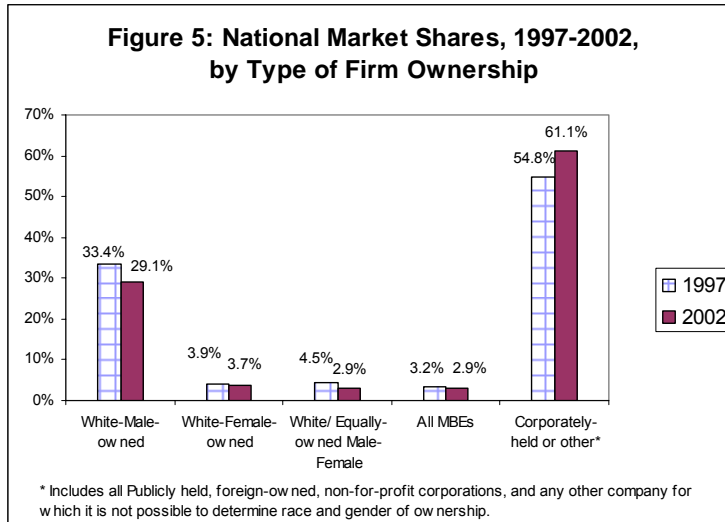
highest rates were among American Indian or Alaska Natives (19 percent), Hawaiian or Pacific Islanders (19 percent), African Americans (17 percent), and women (16 percent). Only 12 percent of white men accessed a personal or business credit card for business start up. Most credit cards have higher interest rates than commercial loans, and when used to start up a business,

cut into business profits, thus making it a less desirable form of credit for the MBEs and WBEs which were more dependent on them.

Increased Market Share of Publicly-Held Companies

A second and equally important reason for the decline in market share of MBEs and WBEs was related to a decline in market share of all privately-held companies and an increase in market share of publicly-held corporations. This is a long-term macro-economic trend in the U.S. economy, reflecting the increasing dominance of publicly-traded corporations in many U.S. economic sectors.

⁶ Bates, T. (2005). "Financing Disadvantaged Firms" in *Credit Markets for the Poor*, Bolton, P. & Rosenthal, H., ed. New York, NY: The Russell Sage Foundation.



As shown in Figure 5, in 1997, publicly-held corporations had a total 55 percent market share in the U.S. economy.⁷ This increased by over one percentile annually to 2002 when they had a 61 percent market share. Conversely, the market share of all privately-held businesses dropped, including a decline in market share from 3.2 percent in 1997 to 2.9 percent in 2002 among MBEs, a decline from 3.9 percent in 1997 to 3.7

percent in 2002 among white female-owned businesses, and a decline from 33.4 percent in 1997 to 29.1 percent in 2002 among white male-owned businesses.

All small businesses, whether they are MBEs, WBEs, or owned by white men, face the challenge of the increased market share of publicly-held corporations. Large publicly-held corporations are able to attain an economy of scale and access to global markets that provide them with profit margins rarely reached by small businesses.

Dual Track of Business Development: Inclusive Business Practices

The preceding analysis makes the case for a dual track of business development and procurement policies on the part of government bodies. On the one hand, all small businesses, regardless of race and gender, face a macro-economic barrier, which is the increasing competition from large publicly-held corporations. On the other hand, minority and women business owners face additional barriers that are specific to their status as M/WBEs. Therefore, it would follow that one set of policies could benefit all small businesses, while another complementary set of policies could specifically benefit M/WBEs, in light of their smaller average firm size and difficulty in accessing markets as well as capital from financial institutions. Policies that support the development and growth of M/WBEs, in addition to policies that support all small businesses, is an inclusive business development approach. These policies relate to public procurement and the provision of business financing and business development services.

This report will document state efforts to increase procurement from MBEs and WBEs, as well as to provide them with targeted finance and business development services. In many cases the programs consist of what has traditionally been considered affirmative action in procurement. But they also include many other types of policies and programs which eliminate the barriers that M/WBEs may face related to access to state procurement and programs. We call this entire range of policies and programs 'inclusive business practices'.

⁷ This also includes foreign-owned and nonprofit corporations, as well as any other company for which it is not possible to determine race and gender of ownership. Source: Survey of Business Owners, Economic Census, US Census Bureau, 1997 and 2002.

Because state and local inclusive business practices are largely built on federal policies and programs, as well as extensive relevant case law history, this report will begin with a history of affirmative action in procurement and a review of current federal policies and programs. This will include a description of the main federal programs, called the 8(a) and Small, Disadvantaged Business (SDB) programs.

Then we will discuss in five steps the trend in inclusive business practices at the state level since 1996, which corresponds to the date of the landmark *Adarand* case:

- A discussion of the degree to which state and local governments are a typical customer of small businesses, MBEs, and WBEs.
- An examination of the U.S. Department of Transportation Disadvantaged Business Enterprise (DBE) program in which all grantees, such as state transportation departments, are required to administer. All 50 states have a DBE program, which includes both a procurement goal on federal funds as well as targeted business development services.
- An examination of state procurement programs, including the 21 states and the District of Columbia that have M/WBE state procurement programs. Most of these are affirmative action programs, although some are 'voluntary' programs with aspirational goals and targeted vendor outreach.
- A discussion of the 14 state finance programs directed toward M/WBEs, including equity investment funds, low-interest loans, and loan guarantees. The paper will also discuss the 14 state business development service programs directed toward M/WBEs, including business networking activities, technical assistance, mentor-protégé programs, and funding nonprofit organizations, universities or others to operate minority and/or women business development centers.
- A review of the overall 1996 to 2006 state policy trend.

Finally, we will share our conclusions and make recommendations, based on those conclusions, on how states can promote inclusive business development.

II. FEDERAL INCLUSIVE BUSINESS POLICIES

A. THE LEGAL LANDSCAPE

1. The Origins of Federal Inclusive Business Policies

Affirmative action is defined as "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."⁸ In pursuit of that goal, affirmative action has two general justifications – remediation of discrimination, and promotion of inclusion – both of which are consistent with the traditional American values of opportunity, merit and fairness.

Anti-discrimination actions alone, without affirmative action, can not effectively break longstanding patterns of discrimination and institutional racism. Inclusion into America's opportunities benefits not only minorities and women who have been historically excluded but also the institutions practicing exclusion, and therefore society as a whole. For example, a police department will be more effective in protecting and servicing its community if its officers reflect the composition of that community. A secondary goal of affirmative action is economic development, which is especially applicable to affirmative action in government procurement.

Many state inclusive business programs mirror or implement federal policies and programs. In addition, since state law is generally subordinate to federal law, much of the case law relevant to state and local government inclusive business policies is based on federal case law and decisions.

Since federal law provides the framework for state and local programs, it is helpful to review the legal landscape of federal inclusive business policies, beginning with their origin in the Small Business Act. Federal policy makers have endeavored to assist minority-owned and other disadvantaged small businesses in becoming viable, competitive enterprises since at least the 1950's.

These efforts have largely focused on the federal procurement process, and have emphasized set-asides or preferences for, or mandatory participation by, minority business enterprises (MBEs) and other disadvantaged business enterprises (DBEs) in federal contract and subcontract awards. In recent years, MBE and DBE programs have been embattled, characterized by a series of court challenges and a gradual tightening of limitations on the programs' scope and flexibility.

Current federal inclusive business programs can trace their origins to §8(a) of the Small Business Act of 1958, signed by President Eisenhower, which required assistance to

⁸ U.S. Commission on Civil Rights, Statement on Affirmative Action, October 1977

“socially and economically disadvantaged” small businesses.⁹ The Small Business Administration (SBA) initially used its §8(a) authority to obtain contracts from federal agencies and subcontract them to qualifying firms that agreed to locate in or near “ghetto” areas and provide jobs to disadvantaged residents.¹⁰

While affirmative action in employment was put in place by the Kennedy and Johnson administrations, it was President Nixon who took the next step in establishing affirmative action in contracting in 1969 when he issued Executive Order 11458 (E.O. 11458), creating the Office of Minority Business Enterprise and directing federal agencies to promote and assist MBEs.¹¹ Nixon’s 1972 Executive Order 11625 required federal agencies to develop comprehensive affirmative action plans and specific program goals for contracting with MBEs.

Congress amended §8(a) in 1978 to create the Minority Small Business and Capital Ownership Development program. The amendment authorized the SBA to enter into contracts with other federal agencies and to subcontract their performance to small businesses owned by “socially and economically disadvantaged” individuals.¹² The SBA’s implementing regulations applied a presumption of social disadvantage to Blacks, Hispanics, Native Americans, and Asian Pacific Americans. This presumption was later codified in §8(d), the Minority Small Business Contracting Program.¹³ Section 8(d) required contractors on large federal contracts to negotiate subcontracting plans with the procuring agency that included percentage goals for the utilization of small socially and economically disadvantaged businesses, including MBEs.¹⁴

In 1983, President Reagan issued Executive Order 12432, which directed each federal agency with substantial procurement or grant making authority to develop a Minority Business Enterprise development plan. These plans were intended to encourage minority businesses to compete for federal contracts.

Congress expanded the small business and §8(a) program by enacting the Business Opportunity Development Reform Act of 1988. The 1988 Act directed the President to set annual, government-wide procurement goals of at least 20 percent for small business and 5 percent for small businesses owned by disadvantaged persons, as defined by the SBA.¹⁵ Federal agencies were also required to adopt their own goals. Businesses owned by non-minority women were later classified as disadvantaged (absent other factors) in the 1994 Federal Acquisition Act amendments.¹⁶ Businesses owned by white or minority women are classified as women owned business enterprises (WBEs) and are part of the federal Woman Owned Small Business (WOSB) program. The government-wide procurement goal for WOSBs is 5 percent, under Section 7106 of the 1994 Federal Acquisition Streamlining Act.

⁹ PL 85-536

¹⁰ Charles V. Dale, *Minority Contracting and Affirmative Action for Disadvantaged Small Business: Legal Issues* (Congressional Research Service, February 24, 2006).

¹¹ E.O. 11458 (March 5, 1969).

¹² 15 U.S.C. §637(a).

¹³ 15 USC §637(d).

¹⁴ The requirements applied to construction contracts in excess of \$1,000,000 and other contracts in excess of \$500,000.

¹⁵ P.L. 100-656, codified at 15 USC §644(g)(1).

¹⁶ P.L. 103-355.

Congress and federal agencies have included preferences for businesses owned by socially and economically disadvantaged persons in a variety of grant or contract authorizations, including education, defense and NASA programs. The U.S. Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) programs have been a particular focus of inclusive business development efforts, and at the center of much of the controversy that surrounds them. This is because USDOT DBE programs are administered by recipients of USDOT funds in each of the 50 states and most metropolitan regions, and because of the large dollar value of the USDOT-funded construction-related contracts. The USDOT DBE programs have been in place since 1980 and have been funded and renewed by each subsequent transportation act.

2. Judicial Responses to MBE, WBE, and DBE Programs

MBE, WBE, and DBE contracting programs have been beset by a series of legal challenges, mainly from non-M/W/DBE contractors. Such cases generally center on the plaintiff's claim that the program presents unconstitutional discrimination under the 14th Amendment.

Fourteenth amendment issues arise when a government actor draws distinctions between classes or groups of people. Courts apply different levels of scrutiny to their evaluation of 14th Amendment claims, depending on the basis for the distinction. The lowest level of scrutiny requires only that the distinction involves a legitimate exercise of governmental power and the governmental actor have a rational basis for making the distinction. The highest level of scrutiny, called strict scrutiny, is applied to distinctions based on "suspect classifications," which include race.¹⁷ To survive strict scrutiny, a classification must be:

1. A legitimate exercise of governmental power;
2. Justified by a "compelling governmental interest,"
3. "Narrowly tailored" to serve that interest; and
4. The "least restrictive means" available to achieve the compelling interest.

We will consider three principal cases to discuss the evolution of U.S. Supreme Court responses to M/W/DBE programs and the application of strict scrutiny under the 14th Amendment: *Fullilove v. Klutznick* in 1980; *City of Richmond v. J.A. Croson* in 1989; and *Adarand Constructors, Inc. v. Peña* in 1995.

a. *Fullilove v. Klutznick*

The United States Supreme Court has considered a series of challenges to minority contracting programs. In *Fullilove v. Klutznick*, a 1980 case, a construction contractor and several contractors' associations sought to enjoin the enforcement of the MBE provision of the Public Works Employment Acts (PWEA) of 1976 and 1977. These Acts required that, to the extent feasible, recipients of federal grants for local public works projects use 10 percent of the federal funds to procure services or supplies from

¹⁷ A suspect classification exists where a group 1) is based on "immutable" characteristics, that is, characteristics that the group members cannot change, 2) shares a history of discrimination, 3) is politically impotent, and 4) is a 'distinct and insular minority'

qualified, bona fide MBEs, owned and controlled by persons whose access to public contracting opportunities was impaired by the effects of past discrimination.¹⁸ The 1977 Act required recipients to engage in affirmative efforts to secure MBE participation, such as providing technical assistance and reducing bonding requirements, and provided for a waiver of the 10 percent requirement where a grantee could demonstrate that, despite affirmative efforts, it could not locate or contract with enough qualified MBEs.

The plaintiffs alleged that the MBE 10 percent mandatory goal violated the Equal Protection Clause and other anti-discrimination requirements.¹⁹ The Supreme Court, in a divided opinion, concluded that the provision was constitutional.²⁰ The principal opinion applied a two-step analysis, considering first whether the provision's objectives were within the scope of congressional power. The Justices found that the provision's purpose was to remedy the present effects of past discrimination, and that doing so by placing conditions on the use of federal funds was well established as a valid exercise of congressional spending power.²¹ The Justices next considered whether Congress used permissible means in carrying out its objectives, stating that a program which employed racial or ethnic criteria to remedy past discrimination must be narrowly tailored toward the accomplishment of that goal. Looking to the waiver provision and contractors' ability to challenge MBEs as not bona fide, the Justices concluded that the MBE provision did not mandate the allocation of federal funds according to inflexible percentages, but represented a limited use of race and ethnicity as a permissible means to counter the effects of prior discrimination, and was therefore narrowly tailored.²²

The opinion avoided stating the level of scrutiny it employed. While applying the 'narrowly tailored' prong of the strict scrutiny test, the Justices did not discuss whether the program served a compelling governmental interest, effectively adopting a presumption that its purpose of remedying past discrimination did so. Justice Powell, in a concurring opinion, reached this conclusion explicitly. Subsequent cases failed to adopt this presumption.

b. City of Richmond v. J.A. Croson

The *Fullilove* Court deferred to Congress' conclusions about the importance of reversing the effects of discrimination. The Court showed less deference to a city's MBE contracting plan in the 1989 case of *Richmond v. J.A. Croson Co.* The case involved an Equal Protection challenge to a Richmond City ordinance requiring prime contractors to subcontract at least 30 percent of the dollar amount of city contracts to MBEs.²³ Qualifying MBEs were defined as businesses in which US citizens who were "blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts" had majority ownership and control.²⁴

¹⁸ 448 U.S. 448 (1980).

¹⁹ *Id.* at 448-9.

²⁰ *Id.* at 449-50.

²¹ *Id.* at 450.

²² *Id.* at 451.

²³ 488 U.S. 469 (1989).

²⁴ *Id.*

The ordinance declared that the plan was remedial, and enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects. The ordinance was adopted after a public hearing at which witnesses had presented a study showing that the City's population was nearly 50 percent black, but MBEs had been awarded less than one percent of the City's prime construction contracts in the preceding five years.

J.A. Croson company, which submitted the only bid on a city project, was denied the contract because its bid failed to include sufficient MBE subcontracts.²⁵ Croson's general manager Eugene Bonn had attempted to engage an MBE subcontractor, but discriminatory suppliers impeded the MBE's participation. Bonn sought a waiver of the ordinance's MBE provision. Hearing of the waiver request, the MBE located a supplier who agreed to provide the required fixtures at a price in excess of market value. The MBE advised the City that it was able to work on the contract, and the City denied Croson's waiver request.

Bonn challenged the ordinance, alleging that it violated the Equal Protection Clause.²⁶ The Court concluded that the ordinance was unconstitutional.²⁷ Distinguishing *Fullilove*, the Court stated that Congress' role in enforcing the 14th Amendment empowered it to act affirmatively against discrimination. The Court explained that state and local governments did not share Congress' power to combat society-wide discrimination, and were limited to redressing discrimination within their own jurisdictional borders. Applying strict scrutiny, the Justices determined that the City Council had failed to demonstrate a compelling governmental interest for the program, because no direct evidence had been presented that the City had discriminated against MBEs. Rejecting arguments that the number of MBEs in the City was artificially depressed as a result of discrimination, the Court also concluded that the 30 percent goal was not a narrowly tailored remedy because it could not be tied to any real injury suffered by any person or business.²⁸

c. Adarand Constructors, Inc. v. Pena

The leading case on MBE preferences, *Adarand*, is actually a series of interconnected decisions. The landmark *Adarand* case, or *Adarand I*, is the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena*.²⁹ The case was brought by Adarand Constructors, Inc., a Colorado-based white-owned construction firm whose low bid on a subcontract for highway guard rails, funded in part by federal funds, was rejected in favor of a higher-bidding DBE.³⁰ Adarand challenged the constitutionality of the "race-conscious subcontracting compensation clause" (SCC) program conducted by the Federal Highway Lands Program of the Federal Highway Administration.³¹ The SCC provided for incentive payments to prime contractors whose subcontracts with qualified

²⁵ *Id.* at 482-3.

²⁶ *Id.* at 483.

²⁷ *Id.* at 510-1.

²⁸ *Id.* at 511.

²⁹ 515 U.S. 200 (1995). Some analysts refer to the initial district court case as *Adarand I* and refer to this case as *Adarand III*.

³⁰ Adarand was represented by the Pacific Legal Foundation, a conservative nonprofit legal organization.

³¹ *Id.* at 200, 205.

DBEs exceeded 10 percent of the total contract value.³² The SCC also incorporated the SBA §8(d) presumption that owners of MBEs were socially disadvantaged.³³ Rejecting *Fullilove's* deference to Congressional redress of past discrimination, the *Adarand I* Court determined that racial classifications by any level of government must serve a compelling governmental interest and be narrowly tailored to further that interest.

Despite its application of the strict scrutiny standard, the Court acknowledged Congress' role in remedying past discrimination. Writing for the majority, Justice Sandra Day O'Connor stated that the "unhappy persistence of both the practice and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it."³⁴

The Supreme Court did not reach a decision on the merits of the case, and returned or "remanded" the case to the district court for its decision. The district court concluded that federal affirmative action programs did not have to be supported by the same "particularized" showing of past discrimination as state and local programs, but Congress' chosen remedy must be "narrowly tailored so as to preclude the application of a race-conscious measure where it is not warranted."³⁵ The district court determined that Congress had a compelling governmental interest in redressing discrimination, but concluded that the USDOT incentive program was not "narrowly tailored."³⁶ The court enjoined Colorado's implementation of the USDOT DBE program and the §8(d) presumption of racial disadvantage to be both over inclusive — the benefits were available to all named minority group members, regardless of circumstances — and under inclusive because it excluded Caucasians and members of other minority groups who might have similar disadvantages.³⁷

After the district court's decision in *Adarand II*, *Adarand* sued the state of Colorado, challenging its use of DBE programs in administering federal highway programs. Colorado responded by modifying its regulations, replacing the presumption of minority disadvantage with a requirement that all DBE contractors certify disadvantage. *Adarand* became certified as a DBE under the new regulations. The Court of Appeals subsequently rejected the government's appeal of *Adarand II*, concluding that the case was moot (no longer presented an active controversy), because *Adarand* was now a DBE. The Supreme Court reversed the Court of Appeals decision on the grounds that a case was not moot when a party might have further need of the judicial protection it has sought, and that this was the case for *Adarand*, whose DBE certification was suspect. The Supreme Court remanded the case to the Tenth Circuit Court of Appeals.

In *Adarand Constructors, Inc. v. Slater (Adarand III)*,³⁸ the Tenth Circuit reversed the district court's injunction against future implementation of Colorado DOT's DBE program.³⁹ There, the appeals court considered the constitutionality of the program,

³² *Id.* at 209.

³³ *Id.*

³⁴ *Id.* at 202.

³⁵ *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997).

³⁶ *Id.* at 1580.

³⁷ *Id.*

³⁸ 228 F.3d 1147 (10th Cir. 2000).

³⁹ Charles V. Dale, at 7 (citing to *Adarand III*).

both as structured at the time of the district court decision and of later revisions to DBE regulations adopted in 1997. It agreed with the district court that the SCC system of financial incentives in *Adarand I* was not narrowly tailored, and further concluded that the new DBE program, as revised under the post-*Adarand* DOT regulations, was constitutional.⁴⁰ The Tenth Circuit found that the record showed Congress had a compelling interest in remedying the federal government’s passive complicity with private discrimination in the construction industry, which contributed to discriminatory barriers in federal contracting.⁴¹ Specifically, the record included two decades of Congressional hearings that exposed the social and economic obstacles faced by small and disadvantaged entrepreneurs, mainly minorities, in business formation and in competition for government contracts. These obstacles included “old boy networks,” racism in construction trade unions, and denial of access to bonding, credit, and capital.⁴²

3. Post *Adarand* Regulatory and Judicial Responses

a. Regulatory Changes

After *Adarand*, federal agencies sought to “narrowly tailor” their minority, women, and disadvantaged small business programs. New US Department of Transportation (USDOT) regulations overhauled the agency’s DBE goal-setting process and eligibility requirements.⁴³ The new goal-setting process shifted the program’s focus from achieving maximum DBE participation in USDOT-assisted contracting to achieving a “level playing field”—the amount of participation that DBEs would theoretically be expected to achieve in the absence of discrimination.⁴⁴ The new regulations required states and transit authorities to base their DBE participation goals on demonstrable evidence of the number of “ready, willing, and able” DBEs available in local markets, relative to the number of all businesses “ready, willing, and able” to participate in USDOT-assisted contracts in such markets.⁴⁵ This approach fails to acknowledge, and does nothing to resolve, the effects of discrimination in reducing the number and success of DBEs in the relevant market.

The new regulations also require states to meet the maximum feasible portion of their DBE goals using race-neutral measures, such as outreach and technical assistance,

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Report to Congressional Committees: Disadvantaged Business Enterprises*, at 13.

⁴⁴ *Id.* at 14.

⁴⁵ *Id.* The regulations outlined a two-step process for goal-setting. First, states and transit authorities must establish a base figure that represents the “ready, willing, and able” DBEs in the state or transit authority’s market relative to all “ready, willing, and able” firms in that market (i.e. relative availability of DBEs). To determine the relative availability of DBEs, the new regulations required that states use the best available data and suggest that states use DBE directories and Census Bureau data, bidders lists, disparity studies, or the goal of another recipient. Second, states must adjust their base figure to account for other factors affecting DBEs, such as the capacity of DBEs to perform work in USDOT-assisted contracts and findings from disparity studies.

which are designed to increase contracting opportunities for all small businesses.⁴⁶ States and transit authorities must submit their overall DBE participation goals, including the methodology used to set the goals and the projected use of race- and gender-neutral and race- and gender-conscious measures, to USDOT for approval on an annual basis.⁴⁷

Other changes to the regulations reflected the need to improve the effectiveness and efficiency of the DBE program. States and transit authorities are now required to create and maintain a bidders list, which is a record of all firms that bid on prime and subcontracts for USDOT-assisted projects, and to develop and participate in a statewide unified certification program (“UCP”). Prior to the new regulations, DBEs often had to obtain different certifications from multiple recipients within one state. Under the new regulations, DBEs only have to be certified by one agency to participate in the DBE programs administered by all recipients in the state.⁴⁸

b. Judicial Decisions

Since *Adarand*, several lower courts have addressed the issue of congressional authority to provide affirmative action remedies. These courts have looked to the record of committee hearings and other documentary evidence before Congress, and concluded that the government had a compelling interest in adopting affirmative action programs. However, in applying the “narrowly tailored” test, there is a lack of judicial consensus as to whether states or localities must independently justify the use of racial preferences to implement federal mandates within their individual jurisdictions.⁴⁹

i. Sherbrooke and Gross Seed

In 2004, the Supreme Court denied review of the Eighth Circuit Federal Court of Appeal’s consolidated ruling in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation* and *Gross Seed Company v. Nebraska Department of Roads*, effectively refusing to revisit issues left unresolved by the *Adarand* cases.⁵⁰ In *Sherbrooke* and *Gross Seed*, the Eighth Circuit upheld the DBE program, as established under then-current USDOT regulations, and approved specific state plans to implement the program. Under the revised USDOT regulations and the Transportation Efficiency Act for the 21st Century (TEA-21), the Minnesota and Nebraska state highway departments established specific goals for the award of federally-funded contracts to DBEs. In both states, white-owned businesses had submitted the low bid on USDOT funded subcontracts, but were passed over in favor of a presumptively disadvantaged minority competitor. Petitioners challenged DBE contract awards, alleging unconstitutional race discrimination and a denial of a right to compete on an equal basis for future contracts.

The Eighth Circuit found that Congress had presented satisfying evidence showing a compelling interest to remedy race discrimination in federal highway contracting,

⁴⁶ *Id.* at 15.

⁴⁷ *Id.*

⁴⁸ *Id.* at 17.

⁴⁹ *Id.* at 15.

⁵⁰ 345 F.3d 964 (8th Cir. 2003).

agreeing with the Tenth Circuit's conclusion in *Adarand III*.⁵¹ The court held that neither the Minnesota DOT nor the Nebraska road department was required to make an independent showing of a compelling interest.⁵² It also ruled that the program was narrowly tailored because the program goals could not be achieved through race-and gender-neutral means and because DBE participation goals were tied to relevant labor markets, had built-in durational limits, and were subject to good faith waivers and exemptions.⁵³ The Eighth Circuit also reviewed Minnesota's and Nebraska's implementation, including each state's reliance on findings by independent consultants in setting goals for minority-owned business participation, and concluded that the DBE program was narrowly tailored as implemented at the state level.⁵⁴

ii. *Western States Paving Company*

In *Western States Paving Co., Inc. v. Washington State Department of Transportation*,⁵⁵ the Ninth Circuit Federal Court of Appeals ruled that TEA-21's MBE and WBE preferences for highway contractors were facially valid. The Ninth Circuit found that the government had a compelling interest in ensuring that federal funding was not distributed in a way that reinforced the effects of either public or private discrimination within transportation-related construction. The court further found that TEA-21's racial preferences were narrowly tailored to further that interest because the revised USDOT regulations prohibited the use of quotas and required a state to meet its maximum feasible overall goal by using race- and gender-neutral means; had a good faith effort provision; had durational limitations; and made clear that the statute's 10 percent DBE goal was merely aspirational.⁵⁶

However, the Ninth Circuit struck down the state's implementation program as not being sufficiently narrowly tailored to further Congress' remedial objectives. Specifically, the court held a state cannot establish a narrowly tailored remedy by simply complying with the federal program's requirements. Such a remedy instead requires a showing of actual discrimination, so that each of the six principal disadvantaged groups identified in Washington's DBE program must be shown to have suffered discrimination in contract awards before the state could establish goals for its participation.⁵⁷ The Supreme Court declined to hear an appeal of the case.

In the wake of *Western States Paving*, the Washington Department of Transportation conducted a rigorous disparity study, documenting unequal utilization of firms that were ready and able from among all six disadvantaged groups compared to non-DBE firms. The state used the study as evidence that these groups had suffered discrimination in the state's contracting industry—a standard required under the Ninth Circuit's decision in *Western States Paving*. In the fall of 2006 Washington DOT re-established the race- and

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 16-7.

⁵⁴ *Id.* at 17.

⁵⁵ 407 F.3d 983 (9th Cir. 2005).

⁵⁶ Charles V. Dale, at 17 (citing to *Western States Paving Co., Inc. v. Washington State Department of Transportation*)

⁵⁷ *Id.*

gender-conscious portion of its DBE program. California followed Washington's lead one year later.

iii. Rothe Development Corporation

Another post-*Adarand* appellate court ruling appears to impose a heavier burden on the federal government to demonstrate the necessity for minority contracting preferences. In *Rothe Development Corporation v. U.S. Department of Defense*,⁵⁸ the U.S Appeals Court of the Federal Circuit declined to uphold § 1207 of the National Defense Authorization Act of 1987, as reauthorized in 1992. The provision established a 5 percent participation goal for MBEs in Department of Defense (DOD) contracts, and incorporated the §8(a) presumption of racial disadvantage. Section 1207 further authorized DOD to apply a price evaluation adjustment of 10 percent to attain the 5 percent procurement goal.⁵⁹

The Federal Circuit focused its inquiry on whether a “strong basis in evidence” supported Congress’ conclusion that discrimination existed and warranted remedial action. The court opined that a “mere listing” of the evidence before Congress when it enacted the original statute in 1987 was insufficient. Rather, detailed statistical information regarding the existence of discrimination in 1992 was necessary to find the reauthorized § 1207 constitutional. Also, the government would be required to produce evidence of discrimination prior to the 1992 enactment.⁶⁰

B. FEDERAL PROCUREMENT AND OTHER TYPES OF INCLUSIVE BUSINESS PROGRAMS

Having established the legal landscape of federal affirmative action and inclusive business policies, we move to briefly examine the implementation of those policies through inclusive business programs. In particular we will examine the small, minority, and women business designations of the Small Business Administration and the procurement to these small business designated groups. Many state governments build upon or use parts of the federal designations as they create their procurement programs. Prior to that, it is useful to place procurement within the context of the range of inclusive business programs. Procurement to small businesses, MBEs, and WBEs is part of the government’s commitment to increasing opportunity. Yet it functions best when it is part of an overall strategy that begins with leadership and top-down commitment and extends to programs that build the capacity of MBEs and WBEs through education, training, and financing programs.

⁵⁸ 262 F.3d 1306 (Fed. Cir. 2001).

⁵⁹ Charles V. Dale, at 18.

⁶⁰ *Id.*

1. Inclusive Business Program Typologies

For the purposes of this report, affirmative action on the part of public agencies refers to taking positive steps to end discrimination, to prevent its recurrence, and to create new opportunities that were previously denied minorities and women.

Inclusive business policies in government contracting and procurement can be categorized into eight types:

1. Hortatory Efforts and Vision-making
2. Goal Setting
3. Public Disclosure of Data and Information Tracking
4. Accountability and Enforcement
5. Outreach and Increasing Access
6. Mandatory Participation, Set Asides, and Incentives
7. Education and Training
8. Financial Assistance

The first four types of inclusive business practices – establishing a vision, setting goals, tracking goals, and then enforcing goals – are all related to top-down commitment or leadership. The next two types – outreach and mandatory participation – are about increasing opportunity within the governmental system for M/WBEs. Both the quality of leadership and the amount of opportunities for M/WBE participation are characteristics of the governmental system. Capacity building is a third category that subsumes the last two types of inclusive business practices, education and financial assistance, and consists of proactive programs to influence the ability of a firm to respond to the federal or other governmental system.

Figure A1 in the Appendix provides a typology of the governmental policies and programs that seek to increase M/WBE access to public procurement and contracting opportunities. Within the federal government, most of these efforts are government-wide programs overseen by the U.S. Small Business Administration (SBA) and implemented by the Office of Small and Disadvantaged Business Utilization (OSDBU), which exists within each federal agency with procurement powers. Agency-specific initiatives supplement this overall government-wide effort.

2. Federal Small Business Development Services

The SBA has a number of capacity building functions for all small businesses through the widespread small business development centers (SBDCs). There are SBDCs in every state, the District of Columbia, American Samoa, and Puerto Rico. Most are operated by universities or community colleges, with others run by nonprofit organizations or associations. In some states, the DOT DBE program or state M/WBE procurement program collaborates closely with some or all of the local SBDCs.

The SBA funds universities, nonprofit agencies, or similar organizations to operate a total of 106 women's business centers (WBCs) in 46 states, American Samoa, and

Puerto Rico, in order to provide a variety of business development services to WBEs.⁶¹ Some of the WBCs coordinate widely with state inclusive business programs. And some states, like Vermont and Nebraska, co-fund the local WBCs.

While SBA provides capacity building for MBEs through its services available to all small businesses, the US Department of Commerce provides more specialized capacity building services. The Minority Business Development Agency has minority business enterprise and opportunity centers in 29 states, the District of Columbia and Puerto Rico. Like the SBDCs, most are operated by nonprofit organizations or universities, although unlike the women business development centers, they all have common MBDA branding. These centers provide business services and help link MBEs to federal procurement opportunities. In a few cases, like North Carolina, states co-fund the MBDA centers. Indiana operates the MBDA center there in conjunction with their state-sponsored MBE services. The MBDA operates Native American business centers in Arizona, California, North Dakota, and Washington.

One of the main ways that small businesses receive assistance on how to access government contracts is through the Procurement Technical Assistance Centers (PTA Centers). The Department of Defense (DoD) Procurement Technical Assistance Program is administered by the Defense Logistics Agency, on behalf of the Secretary of Defense. The PTA Centers are a local resource available at no or nominal cost that can provide assistance to business firms in marketing products and services to the federal, state and local governments (not just DoD contracts). Similar to SBDCs, the PTA Centers are hosted by universities, nonprofit organizations, or similar entities. The level of coordination between local PTA Centers and state inclusive business programs varies greatly. There are about 93 PTA Centers located in 47 states and Puerto Rico.⁶²

3. Government-Wide Procurement Programs

The federal government has established small business development programs for all small businesses, as well as minority and women-owned businesses. These programs consist of many of the types of affirmative procurement actions as those listed previously, especially procurement goal setting, mandatory participation on contracts (with good faith effort waivers), and set-asides. In addition, these programs have components of information tracking, enforcement, outreach, training and education, and financial assistance.

a. Small Business Designations

A small business is defined as an establishment located in U.S. that is organized for profit and is independently owned and operated *and* meets Small Business Administration (SBA) size standards. Size standards vary by industry classification or the NAICS code (the North American Industrial Classification Standard) assigned to the establishment based on the product/service produced. Size standards are based on the number of employees or annual receipts of the establishment, depending on the

⁶¹ The only states without SBA-funded women's business centers are Idaho, Kentucky, Montana, and Wyoming.

⁶² There are no PTA Centers in the District of Columbia, Hawaii, New Mexico, or North Dakota.

industry. For example, in some industries, a ‘small business’ contains less than 500 employees, in other industries, a ‘small business’ has annual sales and receipts of less than \$6.5 million, while in others it is more or less than that.⁶³ Further, for the purpose of government procurement, a small business must not be dominant in the field of operation in which it is completing for government contracts.

Small businesses self-certify with the federal government by registering in the Central Contractor Registration (CCR) database and completing the Small Business Supplemental Page within CCR. Small businesses include those owned and controlled by socially and economically disadvantaged individuals – this mostly consists of economically disadvantaged MBEs, women, service disabled veterans, and HUBZone businesses. Definitions each sub-category of small business are presented in Figure 6.

Figure 6: Small Business Designations and Certification Process

Type of Small Business	Definition and Certification Process
Small Business	Small business is defined by having under a certain amount of annual sales and receipts in certain industries or under a certain number of employees in other industries. A business self-registers its small business status within the CCR database; if challenged it must present proof.
Woman-Owned Small Business (WOSB)	Small Business, at least 51% owned by ≥ 1 women, <i>and</i> management & daily business operations controlled by ≥ 1 women. A small business self-registers that it is woman-owned within the CCR database; if challenged it must present proof.
Small Disadvantaged Business (SDB)	Small Business, unconditionally owned & controlled by ≥ 1 socially & economically disadvantaged individuals who are of good character & citizens of the United States and SBA-certified. African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Native Americans are presumed to qualify. Other individuals can qualify if they show by a “preponderance of the evidence” that they are disadvantaged. Unlike other small businesses, SDB’s also have personal wealth limits for the owner(s). A small business must complete a certification process with the SBA to become SDB certified.
SDB 8(a) Certified [8(a)]	Small Business, SBA-certified as a SDB, <i>and</i> SBA-certified into the 8(a) Business Development Program for a period of 9 years. A small business must complete a detailed certification process with the SBA to become SDB 8(a) certified.
Historically Underutilized Business Zone (HUBZone)	Small Business, owned & controlled $\geq 51\%$ by U.S. citizens, SBA-certified as a HUBZone concern (principal office located in a designated HUBZone & $\geq 35\%$ of employees live in a HUBZone). A small business must complete a certification process with the SBA to become HUBZone certified.

⁶³ <http://www.sba.gov/services/contractingopportunities/sizestandardstopics/size/index.html>

Type of Small Business	Definition and Certification Process
Veteran Owned Small Business (VOSB)	Small Business, veteran-owned as defined in 38 USC 101(2), ≥ 51% owned by ≥ 1 veterans, & management/daily operations controlled by ≥ 1 veterans. A small business self-registers that it is veteran-owned within the CCR database; if challenged it must present proof.
Service-Disabled Veteran Owned Small Business (SDVOSB)	Small Business, veteran-owned, ≥ 51% owned by ≥ 1 service-disabled veterans, <i>and</i> management & daily business operations controlled by ≥ 1 service disabled veterans OR in the case of veteran with permanent & severe disability, the spouse or permanent caregiver of such veteran, <i>and</i> with 0% - 100% service-connected disability as defined in 38 USC 101(16) & documented on DD 214 or equivalent. A small business self-registers that it is service-disabled veteran-owned within the CCR database; the Veterans Administration must confirm service disability status; if challenged the firm must present proof.

b. Federal Goal Programs

Federal procurement goals for the different types of small businesses are listed in Figure 7. These are the government-wide goals for all federal agencies when added together.

Figure 7: Statutory Federal Goal Requirements for Small Business Contracting

Type of Small Business	Contracting Goal
All Small Businesses	23%
Small Disadvantaged Businesses, not 8(a)*	2.5%
8(a) certified Small Disadvantaged Businesses*	2.5%
Women-Owned Small Businesses	5%
HUBZone Businesses	3%
Service-Disabled Veteran-Owned Small Businesses	3%

*The SBA recommends that the *total* SDB goal be 5% and be split 50/50 between 8(a) SDBs and non-8(a) SDBs.

Federal law requires all federal agencies to set percentage goals for the awarding of procurement contracts to small businesses as well as subcontracting goals for prime contractors who received federal contracts above certain thresholds. The US Small Business Administration (SBA) is responsible for negotiating and establishing these goals annually with each federal agency’s Office of Small Disadvantaged Business Utilization (OSDBU). Each federal agency with procurement authority is responsible for meeting those goals by providing the “maximum practicable opportunity” to small businesses to win prime and subcontracting awards.

The federal government, as well as most states that track M/WBE procurement, only consider small businesses in their supplier diversity tracking. This means that

procurement from MBEs and WBEs that are larger than the small business limit is not tracked.

With the exception of the U.S. Department of Transportation (USDOT) and the Environmental Protection Agency (EPA), all federal agencies use the federal minority and women-owned business designations defined by the SBA, such as Small Disadvantaged Business (SDB) and Woman-owned Small Business (WSB).

4. USDOT DBE and EPA Programs

In addition to having a distinct certification process, the USDOT and the EPA are the only two federal agencies which require sub-recipients – state and local governments – to also set goals and certify MBEs and WBEs through their Disadvantaged Business Enterprise programs (DBE). In part, this is due to the large amount of USDOT and EPA funds channeled through states and local government. In addition, the funding from many federal agencies to state and local governments funds activities or services carried out by those government agencies, rather than by private businesses.

The United States Department of Transportation (USDOT) adopted regulations establishing a minority and women’s business enterprise program for its highway, airport, and transit programs in 1980.⁶⁴ Congress followed with the Surface Transportation Assistance Act of 1982 (STAA), which required that a minimum of 10 percent of the funds provided by the Act be expended with small businesses owned and controlled by “socially and economically disadvantaged individuals.”⁶⁵ Notably, STAA required recipients of Federal Highway Administration (FHWA) funds, such as states and local governments, as well as Federal Transit Authority (FTA) recipients, to also attempt to attain the 10 percent DBE procurement goal. The previous M/WBE program became a DBE program in 1983.

The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) continued the 10 percent expenditure requirement, added recipients of Federal Aviation Administration (FAA) funds to the DBE program, and added non-minority women to the statutory definition of “socially and economically disadvantaged individuals.”⁶⁶ STURAA also made the certification process of each FHWA recipient stricter and less prone to abuse, by requiring on-site visits and publishing the list of certified DBEs.

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) continued the 10 percent DBE contract goal and required specific reporting by recipients of procurement from white-women-owned firms, minority-women-owned firms, and all minority-owned firms.

The 1998 Transportation Equity Act for the 21st Century (TEA-21) continued the 10 percent DBE procurement goal, while, significantly, the USDOT allowed each state and local recipient of its funding to set its own DBE goal, rather than the previous standard

⁶⁴ United States General Accounting Office, *Report to Congressional Committees: Disadvantaged Business Enterprises*, 8 (June 2001).

⁶⁵ *Id.*

⁶⁶ *Id.*

10 percent goal. This allowed states to set goals based on the availability of DBE firms in order to narrowly tailor their programs. In addition, states were required to state how much, if any, of the goal would be met through race- and gender-conscious means. This usually refers to requiring a set percentage of DBE participation on certain contracts, with the provision of a waiver for good faith efforts to locate potential DBE subcontractors. Race- and gender-neutral means, on the other hand, refer to contracts or sub-contracts awarded to DBEs without any consideration due to race or gender.

TEA-21 also provided funds to states to plan their DBE programs, including execution of disparity and availability studies. It also required states to provide supportive business services to potential or actual DBE vendors. When possible, the supportive business services should be provided by Historically Black Colleges and Universities or other Minority Institutions of Higher Learning. It also encouraged USDOT recipients to set up financing programs for small business contractors and utilize minority-owned banks for the financing when possible.

In addition, under the 49th Chapter of the Code of Federal Regulations (49 CFR Sec. 26.81), TEA-21 required that all FHWA, FTA, and FAA grantees in a given state must participate in a Unified Certification Program (UCP). A DBE certification by one state transportation agency must be accepted by all other transportation agencies in the state. Under TEA-21 all USDOT recipients in a state must publish and use one common list of certified DBEs.

The 2005 Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) reauthorized the program, and continued the 10 percent DBE contract goal provision⁶⁷ through 2009. As with the previous two transportation acts, SAFETEA-LU raised the maximum average gross receipts for DBE eligibility. It also created a program for states to coordinate allocation of On-the-Job Training Supportive Services funds and DBE contractors.

The only other federal agency that requires grantees to attach DBE, MBE or WBE goals to its funds is the Environmental Protection Agency (EPA). The Clean Air Act (CAA) of 1990 required a fair share of 10 percent participation of M/WBEs in contracts made by sub-recipients of EPA funding, including states and counties. In 1998 the CAA was amended so that each sub-recipient could set its own fair share goal. In 2003, the EPA changed the M/WBE program to a DBE program to be consistent with the *Adarand* ruling and, for practical purposes, with the USDOT DBE program. EPA began accepting DBE certifications by USDOT grantees for its program.

C. TRACKING FEDERAL PROCUREMENT

The federal government purchases over \$300 billion of goods and services each year, from basic office supplies to advanced weapon systems. The federal government has an aggregate goal of 23 percent procurement from small businesses, some of which is procured through the small business set-aside. In 2005, 25 percent of federal procurement was from small businesses, amounting to nearly \$80 billion of the \$314

⁶⁷ *Id.*

billion in procurement. While the proportion of procurement from small businesses rose from 22 percent in 2000 to 25 percent in 2005, the average size of federal contracts nearly tripled during the same period. Most this increase occurred between 2004 and 2005. If this trend continues, it could hamper the ability of small businesses, including many MBEs and WBEs, to competitively bid on federal contracts.

Federal procurement among the various sub-groups of small businesses rose from 2000 to 2005, with a 0.4 percentile gain from MBE 8(a) certified firms, a 1.1 percentile gain from WBEs (WOSBs), a 1.6 percentile gain from HUBZone certified firms, and a 0.6 percentile gain from service-disabled veteran-owned small businesses.

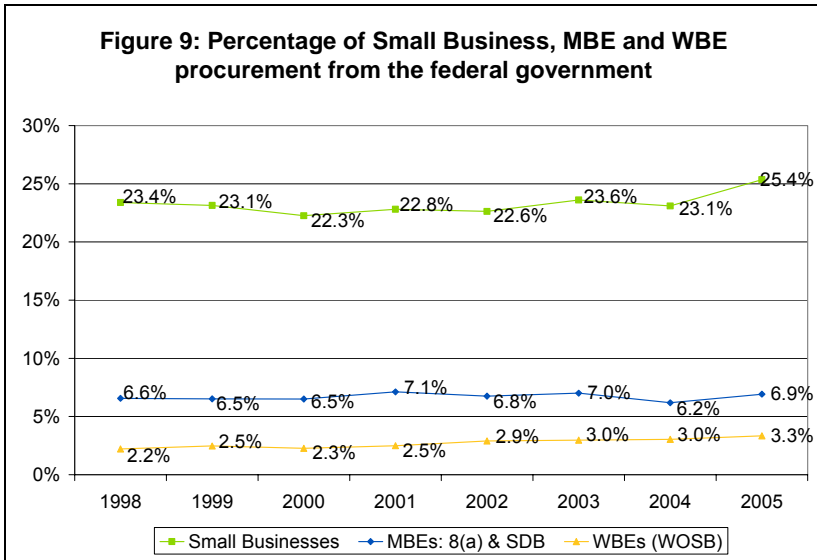
Figure 8: Federal Procurement to Small Businesses and M/WBEs, 2000 to 2005

	2000	2005	Change, 2000 to 2005
Total Federal Procurement	\$200.9 billion	\$314.0 billion	+\$113.1 billion
Number of Actions (Contracts)	9.7 million	5.6 million	-4.1 million
Average Size of Contracts	\$20,635	\$56,223	+\$35,592
Procurement to Small Businesses	\$44.7 billion	\$79.6 billion	+\$34.9 billion
Portion of Procurement to SBEs	22%	25%	+3 percentiles
Procurement to 8(a) MBEs	\$5.8 billion	\$10.5 billion	+\$4.7 billion
Portion of Procurement to 8(a)'s	2.9%	3.3%	+0.4%
Procurement to other SDB MBEs	\$7.3 billion	\$11.3 billion	+\$4.0 billion
Portion to other SDB MBEs	3.6%	3.6%	---
Procurement to Women-owned Small Businesses (WOSBs)	\$4.6 billion	\$10.5 billion	+\$5.9 billion
Portion of Procurement to WOSBs	2.3%	3.3%	+1.1 percentiles
Procurement to HUBZone Small Businesses	\$0.7 billion	\$6.1 billion	+\$5.4 billion
Portion of Procurement to HUBs	0.3%	1.9%	+1.6 percentiles
Procurement to Disabled Veteran Small Businesses (DVSBs)	\$9 million	\$1.9 billion	+\$1.9 billion
Portion of Procurement to DVSBs	0.0%	0.6%	+0.6 percentiles

Note: The 'Small Disadvantaged Business' (SDB) category is based on the SBA definition which includes any small business owned by a person from a socially or economically disadvantaged group. The SBA does not consider white women to categorically be a disadvantaged group. The SDB category does include businesses owned by women of color. Small businesses owned by women of color will also be counted in the 'Women-owned Small Business' category, along with small businesses owned by white women. For further information see definitions in the Appendix.

WBE (WOSB) procurement increased each year from 2000 to 2005. In spite of the procurement gain for WBEs, their federal procurement utilization level remained below the economy-wide market share of WBEs of 4.2 percent.

MBE procurement peaked in 2001 at 7.1%, fell to 6.2% in 2004, but rose again in 2005. This includes firms certified as Small Disadvantaged Businesses (SDBs), including 8(a)



firms. (See definitions in Figure 6.) At the same time, small business procurement was rising, resulting in a decline in MBE procurement as a percentage of all small business procurement, from 29 percent in 2000 to 27 percent in 2005. (See Figure B7 in the Appendix.)

Among the largest federal agencies, Housing and Urban

Development (HUD) has by far the largest proportion of procurement from small WBEs – 24 percent – compared to 10 percent by Commerce, the next highest agency. (See Figure B6 in the Appendix.) In addition, WBEs consist of 38 percent of all HUD procurement from small businesses, the highest of any agency, followed by the Department of Education, with 27 percent. The two agencies with the lowest procurement from WBEs as a proportion of small business procurement were Homeland Security and FEMA. The agencies that improved the most on WBE procurement from 2000 to 2005 were Education, HUD, the Department of Justice, and Interior.

HUD also had the largest proportion of procurement from small MBEs – 37 percent, compared to 22 percent by the Department of the Interior, the next highest. (See Figure B7 in the Appendix.) HUD also had the highest small MBE procurement as a percentage of all small business procurement – 59 percent – followed by NASA and FEMA. The large dollar value of MBE contracts with FEMA in 2005, averaging \$1.65 million per contract, would seem to greatly limit the range of MBEs which could successfully implement a FEMA contract. The agencies with the least MBE procurement as a percentage of all small business procurement were Agriculture, Homeland Security, and Justice. The agencies that improved the most on MBE procurement from 2000 to 2005 were HUD, Interior, the VA, FEMA, and the EPA.

III. STATE INCLUSIVE BUSINESS PROGRAMS

In order to evaluate the range and effectiveness of state inclusive business programs, we scanned the policies and programs related to minority- and women-business development and procurement among all 50 state governments and the District of Columbia. We gathered the information on programs in all 50 states by reviewing state websites and through telephone interviews with agency representatives. The policy scan includes detailed discussions of:

- State implementation of the USDOT Disadvantaged Business Enterprise (DBE) program.
- State affirmative procurement policies and programs on state discretionary spending. The procurement policies that we examined include those that might be traditionally called 'affirmative action' as well as other 'voluntary' or 'race/gender-neutral' programs.
- State programs to deliver targeted business financing and business development services to M/WBEs.

This section will begin with a brief look at the propensity of minority- and women-owned businesses to utilize state and local governments as business customers.

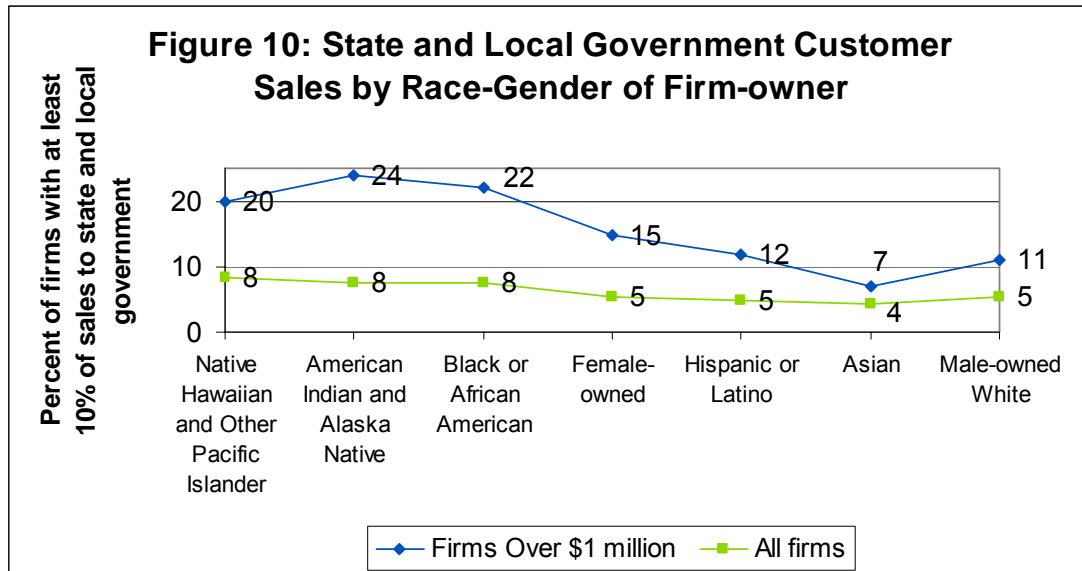
A. STATE AND LOCAL GOVERNMENTS AS BUSINESS CUSTOMERS

Businesses tend to focus their marketing plans on either direct sales with a household customer or sales to other businesses. Among businesses which primarily sell to other businesses, most businesses strive to have a wide-ranging customer base, including corporations, small businesses, nonprofit organizations, and the government.

Historically, businesses owned by people of color and women have had more limited opportunities to diversify their customer base. While this is at times due to discrimination, whether conscious or systemic, it also has to do with other factors that correlate with race and gender, including more limited social networks useful for business and geographic isolation.

Federal, state, and local governments are major purchasers of business services and products. For example, federal government purchases totaled \$314 billion in 2005, while Texas, one of the larger states both in land mass and population, made purchases totaling \$12.6 billion in fiscal year 2006. If MBEs and WBEs have a more difficult time building their customer base among state governments it can have a major impact on business outcomes.

According to the 2002 Economic Census Survey of Business Owners, about five percent of firms nationally consider state and local governments to be among their significant customers, defined as at least 10 percent of their total sales. This rate is highest among Native Hawaiian and Pacific Islander firms, Native American firms, and African American firms. Asian American owned firms are the least likely to sell to state and local governments. Larger firms are also more likely to count state and local governments among their customers. For example, among Native American owned firms with annual sales of at least \$1 million, 24 percent consider state and local governments to be among their large customers.



Privately-held firms are about equally likely as publicly-held corporations to sell to state and local governments, except for firms under \$1 million in annual sales (See Appendix C). Among these smaller businesses, privately-held firms are more likely to sell to state and local governments.

Among both MBEs and WBEs, firms in certain industries – Educational services; Health care and social assistance; Professional, scientific, and technical services; Management of enterprises; and Construction – are more likely to sell to state and local governments. (See Appendix C.) MBEs and WBEs within the Health care and social assistance and Professional, scientific, and technical services industries also have a market share higher than the median market share of MBEs and WBEs, respectively, as a whole. This may indicate a level of program success of state and local inclusive business programs in these two industries. Among MBEs, firms in Construction also have a higher market share than the median for all MBEs, also indicating possible linkages to successful state and local inclusive business programs.

One of the largest, in terms of dollars, state and local inclusive business programs is the Disadvantage Business Enterprise (DBE) program within the U.S. Department of Transportation. Much of the procurement within the DBE program is within the Professional, scientific and technical services and Construction industries. Thus, the DBE program could be one reasons that MBEs have a market share in Construction

higher than the median MBE market share and that WBEs have a market share in Construction that is at least equal to the overall median WBE market share.

B. STATE IMPLEMENTATION OF THE USDOT DBE PROGRAM

The federally mandated disadvantage-business enterprise (DBE) program, attached to U.S. Department of Transportation (USDOT) and Environmental Protection Agency (EPA) funds to states and local governments, is the only inclusive business program on the part of 24 state governments, highlighting the importance of the USDOT and EPA programs at the state level. This is especially true of smaller states and states with a smaller proportion of non-white population groups. Even if the state has an anti-affirmative action rule, such as California, Washington, and Michigan, the state must have a DBE program within its department of transportation. In addition, transportation is generally one of the largest expenditure items in state budgets. Of the Federal Highway Administration (FHWA) funds channeled through state governments in FY2006, an estimated \$2.3 billion to \$2.8 billion worth of contracts went for services and goods provided by DBEs – that is, to small businesses owned by minorities, women, or other ‘socially disadvantaged’ persons.⁶⁸

1. Legal Challenges to DBE Programs

Several states have had their DBE programs challenged in the courts, including the *Adarand* case in 1995 in Colorado and the *Sherbrooke Turf* case in 2003 in Minnesota, as have been described earlier. The results have varied but generally have led states to prepare more sophisticated disparity and availability studies to support their programs.

The biggest challenge to DBE programs was the May 2005 *Western States Paving* decision by the Ninth Circuit Court of Appeals, in which the Washington DBE program was found not to adhere to relevant case law for state and local government. In particular Washington had not tied its race- and gender-conscious program to direct evidence of discrimination against M/WBEs nor did it prescribe a narrowly tailored remedy to that discrimination.

As a result, a number of changes have taken place in the DBE and similar programs – they must be narrowly tailored; must attempt to level the playing field rather than maximizing DBE procurement; must have limited duration and scope; provide good faith efforts waiver provisions; and have race- and gender-neutral components.

⁶⁸ Dollar value of FHWA DBE contracts estimated by report authors. "Presumption of disadvantage. (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals." 49 CFR Sec 26.67.

After *Western States Paving*, the nine states in the Ninth Circuit – Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington – have had to reexamine their DBE programs. Some states suspended their programs pending updated disparity studies. A 2006 disparity study by Washington did find disparities between the utilization and availability of DBEs, compelling the state to reinstate the race- and gender-conscious portion of its DBE program in October 2006, with a 18.77% DBE goal on FHWA funds. In California, CALTRANS suspended its race-conscious goal program in 2006. It completed a disparity study in 2007 and will soon likely resume its race- and gender-conscious program. Other states expecting to complete disparity studies in 2007 or 2008 in order to renew their DBE programs include Idaho, Nevada, and Oregon.

2. Certification and Goal Setting

DBEs are certified through a Universal Certification Program (UCP) in which a state and any other certifying transit or airport authority in that state have reciprocity and share the list of certified DBEs. In addition, DBE firms that are certified in their home state have a streamlined DBE certification process in any other state.

In addition to the social disadvantage, which is primarily based on gender and race or ethnicity, firms must show economic disadvantage, which relates to the annual sales volume of the firm. The DBE certification process is among the most rigorous of any government certification, with a mandatory on-site visit to verify the active controlling management position of the disadvantaged owner. For this reason, while DBE programs accept certifications amongst each other, they generally do not accept certifications of other public or private certifiers.

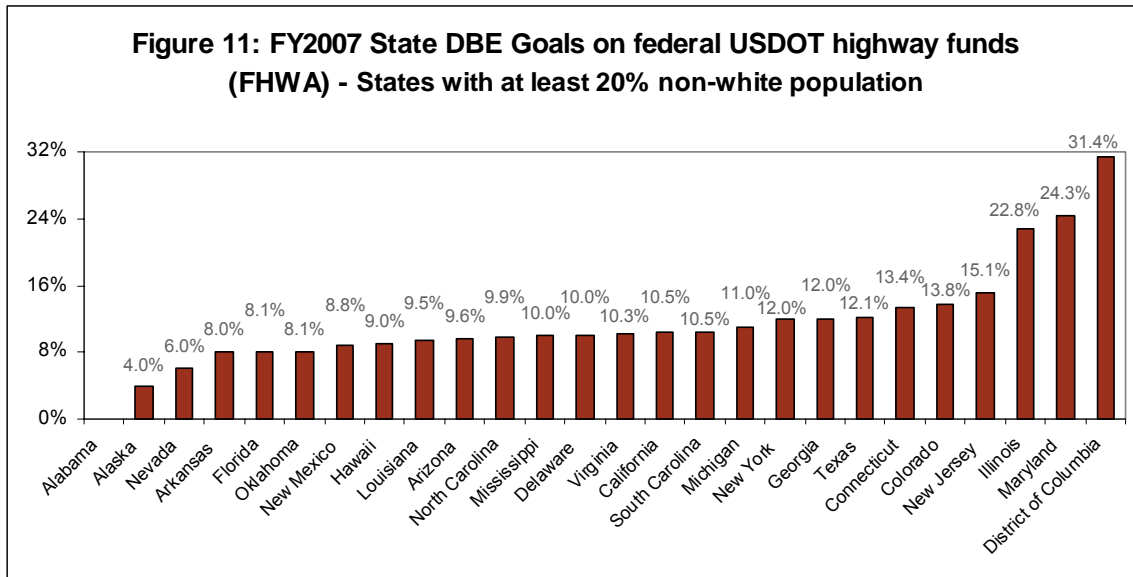
The aggregate USDOT goal is 10% procurement from DBEs, while state and local recipients of USDOT funds are required to set their own DBE procurement goal, based on the availability of firms in their region. The USDOT provides the funding to states and local governments to conduct the necessary disparity studies in order to determine the availability of DBE firms.

Three branches within USDOT have DBE programs: the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA). The FAA also has a specific DBE program for airport vendors. All grantees of the FHWA, FTA, and the FAA must set annual DBE contracting goals, a portion of which is usually race- and gender-conscious and a portion is race- and gender-neutral. In the USDOT DBE context, race- and gender-conscious generally refers to contracts where the prime contractor is required to have a percentage of DBE firm participation as sub-contractors, or must provide a waiver demonstrating its "good faith effort" to locate and sub-contract with a DBE firm.

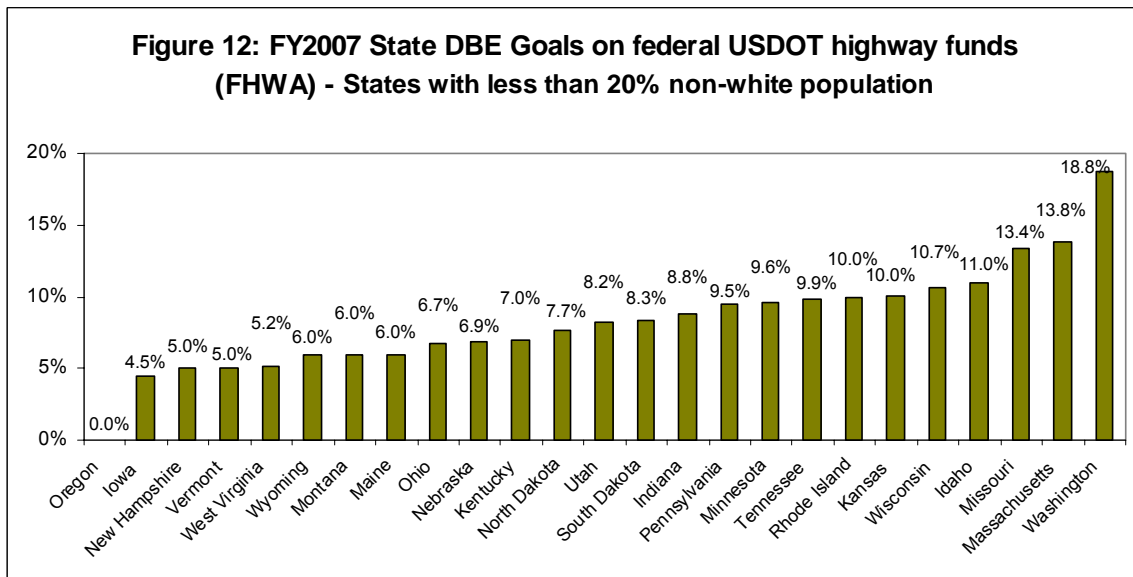
The largest share of USDOT funds going to states is through the FHWA. States vary greatly in their FHWA DBE spending goals from 4% at the low extreme (Alaska) to 24% at the high end (Maryland). A recent disparity study in Maryland showed that DBE firms were under-represented in the previous 16% goal on FHWA funds and that 24.34% would be a goal more representative of the availability of DBE firms. Likewise, in Illinois, a disparity study demonstrated continued need for a race- and gender-conscious DBE

program and established a 22.77% DBE goal for FY2007 on FHWA funds, the second highest in the country.

Other states with a significant non-white population (at least 20 percent) and with a high DBE goal included New Jersey, with a 15.1% goal, and Colorado, 13.8%. Neither of these states have a particularly strong inclusive business program, making their high DBE goal even more notable. At the other end of the spectrum, two states with strong inclusive business programs, but with rather low DBE goals were Florida (8.1%) and North Carolina (9.9%). Florida uses only a race- and gender-neutral approach, but the 8.1% goal is much lower than the 25% M/WBE procurement that the state attains on overall procurement when using a more focused supplier diversity effort.



Note: Alabama failed to provide its FHWA DBE goal to researchers.



Note: Oregon suspended all goals based on the *Western States Paving* decision.

Among states with a lower proportion of non-white population, Washington, with a 18.8% DBE goal, Massachusetts, with a 13.8% DBE goal, and Missouri, with a 13.4% goal stand out. Iowa is at the other end of the spectrum, with a 4.5% DBE goal, in spite of the fact that it has an established inclusive business program on the state-portion of its spending through its Targeted Small Business program.

The actual DBE achievement (procurement) tends to track closely to the DBE goal for most states. However, some states' DBE achievement was at least two percentiles higher than their goal for FY 2006, including Alaska, Georgia, Indiana, Maryland, New Hampshire, Rhode Island, and West Virginia. On the other hand, Arizona, Idaho and New Jersey underperformed and had actual DBE achievement that was at least two percentiles below their FY2006 goal.

While states must submit their plans, methodology, goals, and achievement to USDOT for approval, monitoring of state DBE goals and spending has been lax. For example, between 2003 and 2006, and perhaps beyond, the FHWA did not compile a list of the goals and actual amount and percentage of DBE procurement for each state.

3. DBE Finance and Small Business Development Services

In addition to setting procurement goals, which sometimes are challenged in court, USDOT's DBE program also funds states and other grantees to provide financial assistance and business development services to DBEs, through the Office of Small Disadvantaged Business Utilization (OSDBU). The OSDBU suggests that state DOTs provide a basic set of services to DBEs:

- Linking DBEs to OSDBU DBE loan programs, mentioned in the previous section.
- Technical assistance related to construction projects, such as blueprint and specification reading and bid estimation.
- Vendor outreach and networking events.
- Reimbursement to DBEs for training opportunities, small business development services, or for membership in professional organizations.
- Small business development, including business planning, accounting, marketing plan, certification assistance, and website development.

A few states provide only the bare-bones set of DBE services, including Alaska, Nebraska, and New York, which is currently revamping its program. Some states provide the services with their own staff, such as Michigan, while other states rely on private-sector consultants, such as Illinois. Alabama utilizes four of the historical black colleges in the state to provide services, something encouraged by OSDBU.

Most states provide services in a group setting, such as workshops and trainings. For example, Indiana, South Carolina, and West Virginia have an entrepreneurial development institute for DBEs during the slower winter months, with intensive training modules involving a distinct set of 20 to 30 firms each year. Some states primarily provide services in an individualized setting, such as South Dakota and Kansas. The Kansas DOT, for example, conducts a thorough needs assessment with each DBE wanting to participate, evaluating business plans, financial statements, billing, payroll,

estimating capabilities, and bonding needs. A comprehensive action plan geared toward business development is developed and presented to the DBE owner for approval. Mississippi also develops its services based on the needs of DBEs by surveying them on an ongoing fashion.

The remainder of this section describes some of the innovative service models provided by states in the areas of technical assistance; vendor outreach, communications, and partnerships; small business development services; and legal and workforce development services.

a) Financial Assistance to DBEs

The U.S. Department of Transportation's Office of Small Disadvantaged Business Utilization (OSDBU) offers financial assistance to small disadvantaged businesses (DBEs) by providing guaranteed loans through its Short Term Lending Program (STLP) for transportation related contracts only. By providing loan guarantees small disadvantaged businesses can receive financial assistance for financing accounts receivable and other short term cost of performing transportation related contracts. Unlike most of the rest of the DBE program, this component is administered by USDOT itself. The OSDBU also encourages state DOTs to utilize minority-owned banks as they create low-interest loan, loan guarantee, or loan brokering programs.

Some states have added financial-related assistance to their DBE programs, including low-interest loans, bonding assistance, or bond guarantees. While a number of states have M/WBE loan programs run by other agencies, only a few have a DBE loan program operated by the department of transportation, including Georgia, Hawaii, and Wisconsin. Georgia DOT funds Citizens Trust Bank, a minority-owned bank, to make loans to DBE sub-contractors below market rate. The GDOT subcontract is used as collateral. Hawaii DOT also has a loan program for DBEs. Montana DOT is hoping to set up a similar program as Georgia, primarily using Native-American-owned banks, but it has not yet been implemented. Like Georgia, the Wisconsin DBE loan mobilization program partners with minority-owned banks.

State DOTs with a bond guarantee component to their DBE program include: Florida, Maryland, and Tennessee. The DOTs of Rhode Island, South Dakota, Washington, and Wisconsin play a brokering role between DBEs and financial institutions and bonding companies or provide other assistance to DBEs to obtain a loan or bond. For example, Rhode Island DOT funds a nonprofit to prepare DBEs to apply for loans. Wisconsin DOT is noteworthy, as it helps DBEs to access financing and bonding specifically for the purpose of helping them move from being sub-contractors to prime contractors. At the same time it provides the same DBEs with long-term financial counseling.

b) Technical Assistance to DBEs

Technical assistance refers to construction-related project assistance, such as blueprint and specification reading and bid estimation. Illinois DOT, Kansas DOT, and Texas DOT provide exemplary technical assistance to DBEs:

- **Illinois** DOT consultants provide interested DBEs with training and assistance in estimating, bidding, negotiations, technical tasks, reading specifications and plans, unit (metric) conversions, production scheduling, procuring materials and

supplies, preparing required reporting forms and documentation, developing and managing subcontractor relationships, project staff development, and project management.

- **Kansas** DOT provides project plans by mail to any interested DBEs. KDOT field staff provide on-site assistance to DBEs in bid preparation, plan reading, special provisions, etc.
- **Texas** DOT has specialized workshops and a detailed technical assistance program. It also has a specific training program for DBEs in the building maintenance industry.

c) Vendor Outreach, Communications, and Partnering

The idea of vendor outreach is to provide more links, information, and communication to DBE firms who may not be privy to the informal communication links that can be typical in the construction and professional services industries. Many states have excelled at their vendor outreach programs, including notifying DBEs of contracting or subcontracting opportunities, as well as partnering with nonprofits, universities, and private supplier diversity councils.

With changes in technology, vendor outreach strategies are quickly adapting, including electronic vendor registration, electronic notices and bidding, and bid notices sent by email to a list targeted by industry code, geography, and/or potential sub-contractor lists. Yet some DBE firms are not ready to take advantage of the available technology. In addition, the networking that occurs electronically does not always remove the pattern of communication that can leave MBEs and WBEs out of the loop. Therefore, many states combine the “e-outreach” with more traditional in-person networking, informational meetings, mail, and telephone calls.

Some examples of innovative vendor outreach by state Departments of Transportation (DOTs) are:

- **Delaware.** One state that combines the approaches of vendor outreach, electronic communications, and partnership building is the Delaware DOT. Like other state agencies in Delaware, the DOT is a leader among various states in electronic procurement, including vendor registration, notices, and bidding. In addition, the DOT sponsors many networking mixers, inviting DBEs with prime contractors, and provides “match-making services,” trying to link prime- and sub-contractors.
- **South Dakota** provides a virtual sign-in for DBEs and contractors to meet electronically prior to each bid letting, as part of their electronic bidding. To help DBEs gain name recognition, a DBE directory with the owners’ photographs and business profiles is sent by mail to prime contractors and placed on the internet. The SDDOT also sends a monthly DBE newsletter to all DBEs by email and/or regular mail with business articles, events, and bid opportunities.
- **Vermont** stands out for its partnering in its vendor outreach activities. It co-hosts many networking events with the Small Business Development Centers and the Women’s Business Centers.

d) Small Business Development Services

Business development services include training and assistance related to business formation, development of business plans and marketing plans, management training, and finance and accounting assistance. As mentioned in the introduction to this section, most state DBE programs provide business development services to DBEs, either by their own staff, staff of another state agency, or through consultants. The efforts of four states are highlighted because they include innovations or best practices: Illinois, Minnesota, New Hampshire, and Pennsylvania.

- The main innovation of the **Illinois** Department of Transportation (IDOT) has been to open targeted assistance centers in two regions with historic underutilization of DBEs – in order to provide more localized and intensive business development and technical assistance to DBE firms, and to monitor the progress of the local DBE firms. IDOT also provides state-wide business development services to DBEs, including DBE firm recruitment, certification application assistance, business plan orientation workshops, business plan reviews and updates, finance, technology, marketing strategy, networking with prime contractors, and expanding business opportunities.
- The **Minnesota** Department of Transportation Business Jumpstart Program offers DBEs the flexibility to select from a menu of workshops and seminars on topics such as financial planning, Quickbooks, taxes, electronic bidding, bonding, and website creation, while working with business instructors to assess business practices, approaches and planning free of charge. Participants of the program may receive incentives such as computer equipment, Internet service and reimbursement for business software.
- **New Hampshire** is one of the few states to refer DBEs to trade associations where they can access cheaper supplies and services, such as insurance, due to the purchasing power of the associations. The NH Department of Transportation also concentrates some of its business development services, through contracted consultants, on financial analysis of the DBEs and addressing cash flow issues.
- The **Pennsylvania** DBE Program is a good example of comprehensive services being provided through a contracted university or college, in its case, Cheyney University of Pennsylvania, through the DBE Supportive Services Center. Cheyney is a historically black higher institution of learning located near Philadelphia. The Center has a dedicated, accessible website, with one of the most wide-ranging and useful arrays of information and service referrals of any state DBE program. Most of the trainings offered by the Center are located in either of the two major urban centers of the state, Philadelphia or Pittsburgh.

One of the ways that some states provide small business development services to DBEs is through a peer mentoring process, called mentor-protégé programs. Specifically, a more established firm plays a mentoring role to a DBE through regular meetings with the DBE's management team or by observing the DBE management meetings or operations.

DBE programs in at least six states have implemented mentor-protégé programs, including: California, Delaware, Illinois, Minnesota, North Carolina, and Texas. CALTRANS, the California Department of Transportation, has one of the largest

programs, with 32 mentor firms and 30 protégé firms that were participating in its DBE Mentor-Protégé program in November 2006.

The Illinois Department of Transportation unveiled a new Mentor-Protégé program in January 2007. Under the new program, once a mentor firm and a protégé are teamed up, they jointly establish a Development Plan that outlines their goals and expectations, sets benchmarks and creates a monitoring and reporting mechanism to judge the effectiveness of the effort. The mentor and protégé work together toward the goal of winning contracts for the protégé and the two contractors have the option of forming joint ventures to bid on projects.

Like its technical assistance services, the Texas Department of Transportation (TxDOT) offers exemplary business development services to DBEs including specialized workshops and the LINC (Learning, Information, Networking, Collaboration) mentor-protégé program. LINC is different from most other mentor-protégé programs in that the mentors are staff of the TxDOT Business Opportunities Programs section and that the LINC is primarily focused on introducing DBEs to key TxDOT staff and prime contractors and on navigating their way through the TxDOT procurement process.

e) Legal Services and Workforce Development

Two unusual components of DBE support service programs are legal services and workforce development. The Wisconsin DOT is one of the few state DOTs to offer legal services to DBEs, including incorporation and licensing assistance, reviewing subcontract documents for DBEs and other transactional matters.

The FHWA Headquarters Office of Civil Rights has new program funding for states to assist DBEs with their workforce development needs, the Business Opportunity and Workforce Development (BOWD) Center. The BOWD Centers provide targeted assistance, including in workforce development, to help develop underutilized DBEs. The BOWD Center delivers both the FHWA On-the-Job-Training (OJT) program and the Disadvantaged Business Enterprise (DBE) program together. The BOWD Centers also serve as a resource to recruit, hire and assist highway contractors (including DBEs) with meeting OJT requirements and developing their workforce.

Two of the first states to implement the BOWD program are Colorado and North Carolina. Colorado has selected 20 DBEs to participate in the first phase of their BOWD program. The DBEs are provided with workforce development resources, including on-the-job-training resources and wrap-around services.

North Carolina opened three BOWD centers by early 2007 and planned to open one more. North Carolina's BOWD centers provide management services, operations assistance, finance and accounting assistance, marketing plan assistance, human resources assistance, and a workforce development program related to training, recruitment, monitoring, and evaluation.

C. STATE AFFIRMATIVE PROCUREMENT PROGRAMS

State governments create affirmative procurement programs in order to remove barriers to state contracts faced by minority- or women-owned businesses, barriers that white male-owned businesses usually do not face and large corporations almost never face.

Contrary to the popular perception, affirmative procurement programs almost never involve set-asides – where only M/WBEs are allowed to bid on certain contracts that are set aside from the regular contracting process – nor does it usually involve preferences – where M/WBEs are given a percentage bid discount, for example a 5 percent preference would mean that a M/WBE bid of \$100 would be judged equivalent to a non-M/WBE bid of \$95. Instead, affirmative procurement more typically involves:

- Requirements on certain projects that prime contractors use a certain percentage of M/WBE sub-contractors, or demonstrate good faith efforts to attempt to utilize M/WBEs.
- Targeted outreach by governmental procurement agents to M/WBE vendors to bid on contracts for goods or services. In some cases purchases of a certain size are required to have at least one M/WBE bidder. While M/WBEs compete on equal terms with other companies, by ensuring or increasing their participation in the bidding process, their overall utilization rate by the governmental agency usually increases.

Two of the first states to begin affirmative procurement programs were Mississippi in 1972 and Connecticut in 1973. An additional 18 states and the District of Columbia initiated programs by 1990, as well as many local governments. The states include California, Florida, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee. Texas began its program in 1995. At least six other states began partial or undefined programs during the same period – Arkansas, Indiana, New York, South Carolina, Virginia, and Washington.

Affirmative procurement programs increased the public procurement from minority- and women-owned businesses, at the federal and state levels, although still below the level of availability in most cases. However, state programs began facing increased legal and political challenges in the late 1980s and throughout the 1990s.

The next section will look at state government responses to legal and political challenges, at three types of state affirmative procurement programs, and at the need to coordinate procurement programs with external partners and internally with other agencies. The external coordination refers to coordination between public agencies related to procurement, finance and business development with business associations, nonprofit business development organizations, and private supplier diversity councils. Internal coordination of governmental agencies refers to the need for governmental affirmative procurement agencies to coordinate with other governmental agencies related to finance, business development, and administrative functions.

1. State and Local Government Responses to Legal and Political Challenges

The heightened standards of proof articulated in *Croson*, and further developed by *Adarand*, led many states, counties, and municipalities to reevaluate their M/WBE programs.⁶⁹ For example, soon after *Croson*, Michigan and Oregon ended their affirmative procurement programs, and just after *Adarand*, Louisiana ended its affirmative procurement program.

Local jurisdictions sought to use statistical disparity studies, coupled with available “anecdotal” evidence, to establish specific evidence of minority exclusion from public contracting activity within the jurisdiction.⁷⁰ After *Adarand*, these studies were often poorly received by the courts, which rejected them because of their failure to adequately reflect minority contractor qualifications. Courts overturned many state and local M/WBE programs because of the municipalities’ failure to show that remedies were narrowly tailored;⁷¹ the failure to properly limit the program in scope and limitation;⁷² the absence of a “waiver” provision;⁷³ or their failure to first apply race- and gender-neutral alternatives.⁷⁴

⁶⁹ *Id.* at 20.

⁷⁰ *Id.* at 21.

⁷¹ *Id.* at 22. See e.g. *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997) (minority set-aside of 15% was arbitrary and not narrowly tailored were evidence of record as to percentage of black subcontractors in market indicated percentage of 0.7%, and city made no effort to identify barriers to entry to market by black contractors); *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 2000 WL 201606 (D.Md. 2-16-2000) (rejecting city’s reliance on disparity study then in progress for annual minority and female set-asides where there was no record of “what evidence the City considered prior to promulgating the set-aside goals for 1999”); *Main Line Paving Co. v. Board of Education*, 725 F. Supp. 1349 (E.D. Pa. 1989) (evidentiary basis for the program was too general, since it related to race-neutral practices, and the remedy overbroad in that it did not provide for an individualized determination that those benefiting from the plan were victims of past discrimination).

⁷² Charles V. Dale, *supra* n. 1, at 22. See e.g. *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (state minority preference plan not narrowly tailored where it had been in effect for 20 years with no set expiration); *Kornhass Construction, Inc. v. State of Oklahoma*, 140 F. Supp. 2d 1232 (W.D.Okla, 2001) (duration of state 10% minority contracting goal “not tied in any way to the eradication of past or present racial discrimination” and “legal authority to bypass a certified minority bidder” has never been exercised); *Webster v. Fulton County, Ga.* *supra* n. 64 (“random inclusion” of racial or ethnic groups who may never have suffered from discrimination undermined narrowly tailored remedy); *Associated General Contractors v. New Haven*, 791 F. Supp. 941, 948 (D. Conn. 1992)(failure to document discrimination against any “disadvantaged” business other than disadvantage based on race made program overinclusive as to other groups and thus not appropriately tailored to its asserted remedial purpose).

⁷³ Charles V. Dale, *supra* n. 1, at 23. See e.g. *Associated General Contractors of Ohio, supra* n. 66 (rejecting waiver provision which focused solely on MBE availability without regard to “whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors”). Compare *Builders Ass’n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d, 725, 740 (finding DBE plan not to be narrowly tailored where waivers were “rarely or never granted”) with *Northern Contracting, Inc. v. State of Illinois*, 2005 WL 2230195 (N.D. Ill) (slip op. 9-08-2005) (state transportation funding plan approved where flexibility

Builders Association of Greater Chicago v. County of Cook provides an example.⁷⁵ In that case, the Seventh Circuit Federal Court of Appeals ruled that Cook County, Illinois had failed to establish a compelling interest supporting its contract mandatory goal program. The County had presented anecdotal evidence that prime contractors failed to solicit minority- and women-owned subcontractors at the same rate as similarly-situated firms owned by white males.⁷⁶ The County also produced data showing that a number of firms rarely or never solicited minority- or women-owned firms for subcontract work. However, this evidence did not persuade the court of majority contractors' systematic refusal to solicit such firms for subcontract work, because it was based on the practice of only thirteen general contractors.⁷⁷ The appeals court further noted that the program's goal levels (30% minorities, 10% women) were not linked to evidence of their availability on the relevant market.⁷⁸

These cases suggest that, to survive legal challenges, state and local M/WBE programs must be justified by studies that are based on statistically valid samples and include an assessment of the qualifications and availability of M/WBEs in the specific jurisdiction. Such programs must also incorporate race- and gender-neutral alternatives, and avoid being overly burdensome by incorporating waivers and good faith provisions.

In the case of state plans adopted to enforce federal requirements, the courts have yet to resolve whether different fact-finding standards apply.⁷⁹ Several post-*Croson* decisions suggest that independent findings may not be required to establish a compelling governmental interest where a state agency is implementing a federal requirement to counteract the effects of past or present discrimination on a federally funded project.⁸⁰ These cases seem to indicate that the evidentiary record compiled by Congress to find a compelling interest for the federal program provides the factual leverage necessary to sustain supporting action at the state and local level.⁸¹ The lower courts' lack of consensus on this issue presents a likelihood of Supreme Court review, and a possible further narrowing of the programs' permissible scope.

In addition to legal challenges to state-administered USDOT DBE programs, such as those already discussed, like *Adarand* in Colorado, there have been legal challenges to

assured by "the employment of individualized DBE goals on a contract-by-contract basis, and through the maintenance of a waiver provision to account for those situations in which achievement of the set DBE goals is not reasonably possible.").

⁷⁴ Charles V. Dale, *supra* n.1, at 23. See e.g. *Contractors Association of Eastern Pennsylvania*, *supra* n. 65 (minority subcontracting program not narrowly tailored where city failed to consider race-neutral alternatives designed to encourage investment and/or credit extension to small contractors); *Associated General Contractors of Ohio*, *supra* n. 66 (Ohio's MBE Act "doom[ed]" by state's failure to consider race-neutral alternatives recommended by the Attorney General before adopting 15% minority set-aside for purchase of nonconstruction-related goods and services.); *Concrete Works of Colorado v. City and County of Denver*, 86 F. Supp. 2d 1042 (D.Colo. 2000) ("The City pursued a mandatory goals program as a first, rather than as a last resort.").

⁷⁵ 256 F.3d 642 (7th Cir. 2001).

⁷⁶ Charles V. Dale, at 24.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Charles V. Dale, at 23.

⁸⁰ *Id.*

⁸¹ *Id.*

broader state programs in Ohio, Minnesota, Oklahoma, Nebraska, New Jersey, and Missouri. There have also been political challenges, such as the ballot initiatives that partially ended both state and local affirmative procurement in California (1996), Washington (1998), and Michigan (2006). There have been four main responses to the legal challenges and ballot initiatives:

1. As a direct result of many court decisions, many states have undertaken disparity studies. Rigorous disparity studies document differences in the utilization of MBEs and WBEs when states use only voluntary measures and can lead to race- and gender-conscious procurement goals and programs. These programs use race and gender as one of the determinants in the selection of contractors or suppliers in the provision of services. Examples of this approach include Illinois' IDOT DBE program, the state-wide program in Maryland, and the county-wide program in Denver.
2. At the other extreme, a few states have done little to respond to the legal challenges or ballot initiatives, including Louisiana, Oklahoma, and California. In fact, California dismantled much more than it was required to do under Proposition 209, which voters passed in 1996. Proposition 209 required that California remove its provision for mandatory participation of MBEs (15%) and WBEs (5%) in public contracts. However, the state voluntarily removed many other aspects of its program that it was not required to, including certification of M/WBEs, tracking the procurement dollars to M/WBEs, and some of its targeted outreach to M/WBEs.
3. A third approach is a program based on proactive vendor outreach and voluntary procurement goals to M/WBEs. Many states are following the lead of the private sector to create 'supplier diversity' programs. Supplier diversity refers to efforts to diversify the pool of suppliers and contractors to the state as well as to ensure them equal procurement opportunity. Florida began the first state supplier diversity effort with a proactive vendor outreach and networking initiative called 'One Florida' in 2000. A vulnerability of race- and gender-neutral supplier diversity programs is that they are especially dependent on the political will of the Governor and executive leadership in each agency.
4. Finally, a few states have combined a race/gender-neutral approach with a race/gender-conscious approach, including Ohio's EDGE program and Minnesota's Targeted Group and Economically Disadvantaged small business program. These states combined a mandatory procurement goal program for all small businesses (including those owned by white males) in economically depressed areas of the state with a procurement goal program for all M/WBEs throughout the state. The procurement program is combined with widespread and intensive small business development services and vendor outreach.

2. Types of State Affirmative Procurement Programs

Twenty two states have some type of affirmative procurement program, where the state attempts to increase its purchasing of goods and services from minority- and/or women-owned businesses (M/WBEs). This is most common in contracting for construction-

related services, including professional engineering and architectural services, but also often includes all types of goods, supplies, and services purchased by the state.

There are three main types of affirmative procurement programs by state governments. The first is a goals-based program, what has traditionally been called affirmative action. Fourteen states and the District of Columbia maintain goals-based procurement programs. The second type of program is a hybrid program, found in two states. Finally, the third type of program is a voluntary, targeted outreach program, modeled to a certain extent, on corporate supplier diversity programs. Seven states have voluntary, targeted outreach programs, while many of the states that have goals-based programs also incorporate aspects of the supplier diversity model. Six additional states have partially defined programs which are not well articulated and do not fit any of the above typologies.⁸²

Many states, whether they have goals-based affirmative procurement programs or voluntary targeted outreach programs are following the lead of the private sector to create 'supplier diversity' programs. State supplier diversity efforts are greatly aided by rapid advances in technology and communications, such as electronic bidding and notification, electronic procurement tracking, and integrated, open-network databases.

Key activities in the effort to set up supplier diversity programs by government bodies include:

- Designating a supplier diversity coordinator in each government agency and university
- Creation of an affirmative procurement or supplier diversity plan in each agency and university
- Inclusion of supplier diversity efforts in performance reviews of agency heads
- Aspirational or laudatory goals of M/WBE procurement achievement on agency discretionary funds
- Workshops and one-on-one assistance with agency procurement officers
- Publicity events, such as awards or report cards, which shower either praise or shame on prime contractors/suppliers, depending on whether they *do* or *do not* practice supplier diversity in their contracts with the agency.
- Targeted vendor outreach events, including vendor fairs or matchmaking events with public agency procurement officers.
- E-bid-notification to certified or registered M/WBEs on all public lettings.

⁸² Alabama, Arkansas, Mississippi, New Jersey, New York, and Oklahoma have written inclusive business policies but do not have well-articulated mechanisms to implement the policies. For example, there may be a state office charged with eliminating barriers to or increasing MBE and/or WBE procurement to the state, but little in the way of specific mechanisms to increase M/WBE procurement.

- Funding or forming partnerships with nonprofit organizations, university centers, small business development centers, or private supplier diversity councils in order to provide business services or business research and information to M/WBEs.

a. Goal-Based Programs

Goal-based programs consist of a contracting goal that is achieved through some combination of the requirement of a good faith effort on the part of prime contractors or suppliers to subcontract a given portion of the contract to M/WBEs. They also often include targeted outreach to M/WBEs by state purchasing agents, a requirement to have M/WBEs bidders on certain types of contracts, and point or price discounts on M/WBE bid proposals.

Goal-based programs that use race or gender as one of the determining criteria in the awarding of contracts or sub-contracts are accompanied by a disparity or similar study to demonstrate the underutilization of minority- and women-owned businesses. They also nearly always include a waiver for good faith effort on the part of a prime contractor/supplier to locate a M/WBE sub-contractor.

Here is a brief look at the 15 states or districts with goal-based programs:

- **Colorado** has initiated an M/WBE goal program for state spending in the city/county of Denver. The program began in 2007 for construction projects and will be expanded to other goods and services. The actual goal amount will vary from contract to contract.
- **Connecticut** has one of the longest-standing programs, begun in 1973, and has a statutory set aside of 25 percent of contract dollars for all in-state small businesses and a goal-based program of 6.25 percent for M/WBE procurement.
- **District of Columbia** has a local, small business (LSBE) purchasing goal of 50 percent, including a LSBE set-aside on contracts under \$100,000. As part of this program, MBEs receive a 2% cost reduction on bids. Many other types of LSBEs also receive bid cost reductions.
- **Illinois** has a Business Enterprise Program (BEP), begun in 1984, to increase procurement from MBEs, WBEs, and businesses owned by persons with disabilities. The BEP goal was increased to 19 percent in 1998. The Central Management Services (CMS) administers the BEP and implements it on larger contracts, while each of 49 other agencies and universities implement the program on non-CMS contracts.
- **Indiana's** goal-based program, begun in 1983, was overhauled in 2003 with the creation of the M-WBE Division to coordinate the program, overseen by the M-WBE Commission. There are separate goals for MBEs, ranging from 5 to 8 percent, and WBEs, ranging from 3 to 11 percent, depending on the good or service. M/WBE participation (or a good faith effort waiver) is required on all construction projects over \$150,000.

- **Iowa** established the Targeted Small Business (TSB) program in 1986, which includes MBEs, WBEs, and businesses owned by persons with disabilities. The state has a goal of 10 percent procurement from TSB firms. For very small contracts – under \$5,000 – there is sole source purchasing from TSBs.
- **Maryland** has a goal of 25 percent of state procurement going to M/WBEs. The state program was begun in 1978 and the goal was increased from 14 percent in 2001, based on a disparity study. A second disparity study, completed in 2006, provides evidence of the continuing need for the 25 percent goal. It is one of the few states to have sub-goals of 7 percent for African-American-owned firms and 10 percent for WBEs.
- **Massachusetts** started its program in 1996 and has a 10 percent M/WBE procurement goal. It is coordinated by the Affirmative Marketing Program. The Construction Reform Act of 2004 added further program details for construction and design procurement, including the requirement that local governments that receive state funding should include M/WBE participation in contracts or sub-contracts.
- **North Carolina's** M/WBE program began in 1977, with the current Historically Underutilized Business (HUB) program initiated in 1999. In 2006, the state goals were updated to 10 percent of state procurement to MBEs and 5 percent to WBEs and businesses owned by persons with disabilities. Starting in 2001, the state has required local governments that receive state funding for construction projects to include HUB participation in contracts or sub-contracts.
- **Ohio** has a 15 percent goal program on state purchases other than construction. The program was suspended for one year after a legal challenge in 1998. Based on disparity studies, the state has an MBE set-aside bidding program for sheltered markets with shown disparities where there are at least three qualified, responsible MBE certified bidders capable of providing the identified goods or services. Ohio has a 'hybrid' program on construction procurement called EDGE, described in the next section.
- **Pennsylvania** uses a minimum participation level (MPL) of M/WBEs on construction projects over \$50,000 and on contracts for goods and non-construction services over \$250,000. The MPL on construction projects is 20 percent, divided evenly between MBEs and WBEs and sub-contractors and suppliers. The MPL on non-construction projects is 10 percent, also divided evenly in the same manner. The MPL may be waived in special cases.
- **Rhode Island** has a goal of 10 percent procurement by M/WBEs on state procurement by all agencies.
- **South Carolina** set a goal of 10 percent procurement by M/WBEs on state procurement in 2006. Previously, there was a certification program but no particular goal or mechanism to increase M/WBE procurement. Each state agency must have an M/WBE utilization plan.
- **Texas** has a Historically Underutilized Business (HUB) program initiated in 1995 that includes all M/WBEs, not just those certified as small businesses. The HUB

goals vary by type of contract, ranging from 11.9 percent for heavy construction on the low end, 12.6 percent on commodities, 20 percent on professional services, to 57.2 percent on specialty trade contracts.

- **Wisconsin** has a goal of increasing minority purchasing, with a program begun in 1983 (Act 390). The program includes a 5 percent MBE procurement goal and 5 percent price preference for MBE firms, except in printing.

b. Hybrid Programs

All of the above states combine approaches to affirmative procurement, using both race- and gender-neutral strategies and race- and gender-conscious strategies. In a few cases, though, the approaches are combined in one program, allowing states to keep at least a portion of a race- and gender-conscious strategy in the aftermath of legal challenges to a broader strategy.

- **Minnesota** has a targeted group and economically disadvantaged (TG/ED) goals-based program, begun in 1990 after a legal challenge to its existing MBE goal program. The TG/ED program includes, as ‘targeted groups’, small businesses that are MBEs, WBEs, or owned by persons with disabilities, and, as ‘economically disadvantaged’, any small business located in a county designated as economically disadvantaged. The TG firms receive a 6 percent price preference on construction bids. The ED firms receive a 4 percent price preference on construction and 6 percent preference on other goods and service bids. Certain contracts also may have specific TG/ED participation goals.
- **Ohio** has a ‘hybrid’ program, mainly for construction procurement, called Encouraging Diversity, Growth, and Equity (EDGE), with a 5 percent goal for procurement from MBEs statewide or any other small businesses located in areas with high unemployment rate or a low median income (federal HUB zones). The EDGE program began in 2003 and was a response to the suspension of Ohio’s goals-based procurement program in construction after a 1998 legal challenge.

c. Voluntary, Targeted Outreach

A third group of states base their affirmative procurement programs on voluntary participation and targeted outreach. Voluntary participation differs from goals-based procurement in that the participation of M/WBEs is not required on certain types of contracts or sub-contracts. Instead, procurement agents and prime contractors are often encouraged by various means to utilize M/WBEs. The second major component of this type of program is targeted outreach on the part of state procurement agents or business development specialists.

i. Florida

The best example of a state voluntary, targeted outreach program is Florida, which largely modeled its program on corporate supplier diversity programs. Florida began its program with the lead of former Governor Jeb Bush, who established a proactive vendor outreach and networking initiative called the One Florida program in 2000. Bush was

responding to the possibility of a ballot measure in Florida similar to Proposition 209 in California and Initiative 200 in Washington. Early in 2000, Bush dismantled Florida's affirmative action in education, employment, and contracting and replaced it with the One Florida program. Unlike California and Washington, local governments in Florida are still allowed to have affirmative action in contracting.

The One Florida incorporates all of the components mentioned earlier related to state supplier diversity and is coordinated by the Office of Supplier Diversity (OSD). Procurement agents and prime contractors are encouraged to utilize M/WBE firms through awards events and other positive public relations. On other hand, the performance reviews of procurement agents and agency heads incorporate their supplier diversity outcomes. Prime contractors are given an 'A' to 'F' grade for their inclusion of M/WBE firms in their sub-contracting and these grades are published online. A grade of 'F' for two years can lead to an investigation of the prime contractor under Title VI of the Civil Rights Act.

The targeted outreach activities of the OSD include sponsorship of workshops, trade shows, conferences, and special match-maker events. The annual Matchmaker and Trade Fair has over 1000 participants. The OSD also creates strategic alliances with the MBE and WBE supplier diversity development councils and member corporations to spotlight certified firms and create new contract opportunities. The OSD also brings together the purchasing agents of each state department and each month will spotlight one or more vendors in a targeted forum. The OSD also has a vendor spotlight program it conducts at cross-agency content meetings. For example, it will bring M/WBE IT firms to the IT state officer meeting.

Judged by the level of reported state procurement to M/WBEs, the One Florida program has been successful. The state procurement report demonstrates that by fiscal year 2005, over \$1.6 billion of state procurement was to certified or non-certified M/WBEs. This amounted to 25% of state procurement, one of the highest proportions in the U.S. (See Appendix D.)

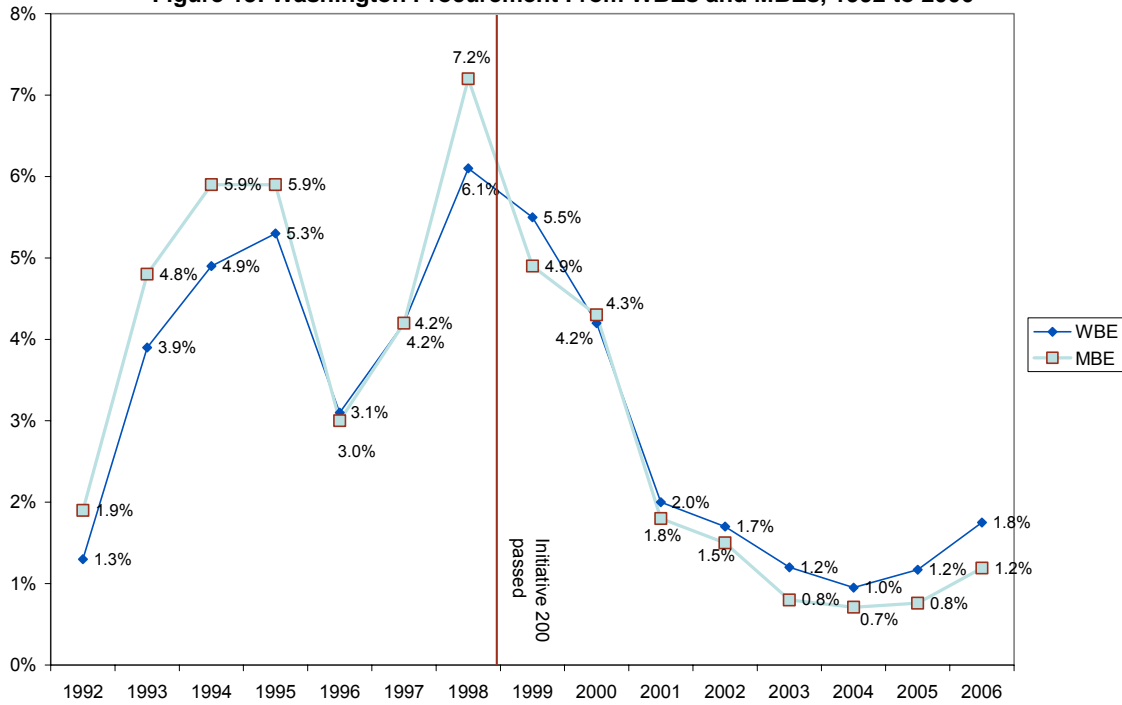
ii. Washington

Washington voters passed Initiative 200 in November 1998 ending programs providing preferences based on race or gender. Related to contracting, the main state agencies affected were the few which had a mandatory goal for M/WBE participation in state contracts prior to Initiative 200.

Washington continued to certify and track the amount of procurement from M/WBEs. In 1997 and 1998, state procurement to MBEs had been 5.7% and WBE procurement had been 5.2% of state discretionary spending. These rates fell for six consecutive years, until by 2004 they reached 0.7% for MBEs and 1.0% for WBEs.

The state began to study measures it could take within the Initiative 200 framework to reverse the situation of disparity in state procurement. Similar to the One Florida program, Washington established voluntary M/WBE spend goals for each agency and appointed supplier diversity coordinators in each agency. It continues to certify M/WBEs and monitor their utilization and engages in outreach and recruitment activities to M/WBE firms, including vendor fairs. By 2006, procurement had slowly risen to 1.2% for MBEs and 1.8% for WBEs.

Figure 13: Washington Procurement From WBEs and MBEs, 1992 to 2006



iii. Other States with Voluntary Programs

- **Arizona** has a voluntary supplier diversity program – the Governor’s Equity in State Contracting Initiative – that consists of four main components:
 - A requirement that state contracts which require at least three bidders and are under \$50,000 must have at least one M/WBE bidder. This was originally set in Executive Order 2000-4, for contracts under \$25,000, and was increased to \$50,000 in 2004.
 - An implementation, tracking, and compliance system to ensure that each state agency is enforcing EO 2000-4, established by EO 2003-9.
 - In 2004, Arizona implemented an online business directory or vendor list, called ‘Arizona Steps Up’, which includes self-reported M/WBE status.
 - To guide the whole process the Governor appointed an Executive Oversight Committee to examine state purchasing from M/WBEs and to create a plan to enhance such procurement (EO 2004-6).

- In lieu of a goals-based program that was instituted in early 2000 and briefly implemented, **Delaware** instead opted for a supplier diversity program with Executive Order 23 of 2001, which established the Public Works and Procurement Opportunity Council and mandated increasing participation of M/WBEs in state public works contracts. EO 23 required each state agency to affirmatively procure, track M/WBE purchasing, and present annual report to the Council. In 2003, EO 52 mandated the state to send formal notice of state lettings over \$10,000 to electronic lists maintained by DeIEXCHANGE, the Women’s Business Enterprise National Council, and the National Minority

Supplier Development Council of PA-NJ-DE. DeIEXCHANGE is a nonprofit networking and small business development service.

- **Missouri's** goals-based program was rescinded in 2004 after a legal challenge. It then followed the approach of Florida and Washington in 2005 to set up a voluntary, proactive vendor outreach program, with supplier diversity coordinators in each government agency and university, under the newly created Office of Supplier and Workforce Diversity (OSWD). The new Missouri program, however, had few results the first two years.
- **Tennessee** started its voluntary program in 2003 with the creation of the Governor's Office of Diversity Business Enterprise (GO-DBE), with the charge of increasing procurement opportunities for small, minority, and women-owned businesses. Tennessee Code 12-3-8 was amended in 2004 requiring all state agencies to actively solicit bids and proposals for goods and services from MBEs, WBEs, and small businesses generally (SBEs) in order to strive to obtain a fair proportion of procurements from each. The GO-DBE works with each state agency to recommend an aspirational goal for M/W/SBE procurement, based on past achievement and the potential vendor pool. The objective is to increase the diversity of both the vendor/supplier pool and the actual spend from diverse suppliers. The current program replaced a rarely implemented MBE procurement program first introduced in 1980.
- **Virginia** had an M/WBE procurement policy since 1982 that was shown in a 2004 disparity study to have generated little actual M/WBE procurement. Therefore, state legislation was amended in 2006 to change the state procurement manual and require each state agency to have an annual plan describing how it would increase procurement from MBEs, WBEs, and small businesses generally (SBEs). The Commonwealth also set an overall 40 percent procurement goal from small, women, and minority businesses (the SWaM program). The SWaM program includes provisions for SBE set-aside contracts and established an online small business directory. The new program is coordinated by the Department of Minority Business Enterprise, which, like many other states, builds partnerships with many other state agencies and outside private and nonprofit organizations.

3. Partnerships, Coordination, and Reciprocity

a. *Partnerships and External Coordination*

The coordination of services and activities between a state inclusive business program and external partners is not a service in itself, to small businesses, but it can enhance the services received by M/WBEs. There are four types of partners that are especially important for state inclusive business programs to coordinate with: local governments; federally-funded small business centers; chambers of commerce, corporations, and others in the private sector; and nonprofit organizations or associations that represent or provide services to M/WBEs:

- State inclusive business programs that have taken a lead in coordinating with local government bodies include Kansas, Massachusetts and North Carolina.

- Alabama, Arizona, and Connecticut are among the many states that coordinate with Small Business Development Centers, Procurement Technical Assistance Centers, Women’s Business Centers, and the Minority Business Development Agency centers. Washington co-locates its M/WBE supportive services staff at two branch sites with the local SBDCs.
- Many states coordinate with chambers of commerce, including ethnic chambers, including Alabama, Arkansas, Kansas, and Maryland. Iowa and Indiana partner a lot with individual corporations, especially in vendor outreach activities.
- Finally, some states, notably Arkansas, Indiana, Maryland, Missouri, New Jersey DOT, North Carolina, and Utah DOT, partner with nonprofit economic development organizations that provide services to M/WBEs; associations that represent M/WBEs; or M/WBE supplier development councils. For example, many public, private, and nonprofit partners come together to participate in the Arkansas Minority Business Development Roundtable. The Roundtable sponsors trade fairs, expositions, and events to highlight M/WBEs, such as the Minority Enterprise Development Week.

b. Inter-Governmental Coordination

Perhaps even more important than external coordination is the degree to which various state agencies coordinate with each other in the provision of supportive services to M/WBEs. In many cases the supportive services are provided by a department of economic development, or similar agency, while there may be a centralized procurement agency within a department of administration, or similar agency. Some states have an independent finance authority that may have specific M/WBE finance programs. Certification is another function that could be done by a distinct government agency. Finally, some states have a minority affairs office or minority and/or women’s business development office, often directly under the purview of the Governor’s Office. To have a comprehensive M/WBE development strategy, the state needs to ensure that these various agencies and personnel are coordinating.

Surprisingly, in many states, the websites of the above agencies often did not link the websites of other agencies also involved in M/WBE development. In some states with inclusive business programs, there seems to be a disconnect between their DOT DBE supportive services program and their overall M/WBE development program.

There are two main ways that states have tended to address internal coordination: a lead agency that acts as a hub and coordinates with all other agencies, in some cases with memorandums of understanding (MOUs) or contracts with other agencies to provide specific services for its ‘clients’ (M/WBEs); or a program run jointly by three or four agencies, in some cases with staff of one agency based in a joint agency’s office.

States that have taken the approach of having one lead agency include Maryland, Ohio, Texas, Virginia, and Washington. One of the better examples of a lead M/WBE agency is the Historically Underutilized Business (HUB) Program within the Texas Building and Procurement Commission. The Texas HUB Program coordinates certifications and state procurement from M/WBEs. But it also coordinates with other state agencies. For example, it has an MOU with the Texas Department of Economic Development (DED) in

order to ensure that the HUB contracting program aligns with the overall state economic development strategy.

At least four states have innovated by connecting their Department of Transportation DBE programs with the small business development services provided to M/WBEs by the state: Massachusetts, Maryland, Virginia, and Washington. Maryland and Washington are the two best examples of business development services being integrated between their DOT DBE programs and their overall M/WBE business services. In Maryland the lead agency is the Governor's Office of Minority Affairs, while in Washington it is the Office of Minority and Women Business Enterprise.

The Massachusetts State Office of Minority and Women Business Assistance (SOMWBA) is another example of an agency that provides business development services to DBEs certified through the Executive Office of Transportation. It is not clear, however, if the SOMWBA shares the same level of coordination with the state affirmative procurement office, the Affirmative Marketing Program (AMP).

A second approach is to have multiple agencies working together. The Iowa Targeted Small Business (TSB) program is an example. Four agencies work together on the TSB program: the Department of Administrative Services General Services Enterprise coordinates goal setting and administers the overall program, the Department of Inspections and Appeals certifies firms for the TSB program, the Department of Management tracks procurement dollars on TSB contracts, and the Department of Economic Development has a finance scheme aimed at certified TSBs.

Tennessee ensures that the state's economic development resources are, in part, aimed at M/WBEs by having the lead M/WBE agency, in Tennessee called the Business Enterprise Resource Office (BERO), have a staff liaison based within the Department of Economic and Community Development. The role of the BERO liaison is to provide a link between the two offices and to help coordinate business services provided to certified M/WBE firms.

c. Certification Reciprocity and Streamlined Process

Many states are attempting to further ease the burden on MBEs and WBEs to participate in the public procurement process by streamlining the certification process for firms already certified by a different entity, whether they are the SBA, the DOT, or a private supplier development council. Usually this means that the firm will need to fill out a one page form along with a copy of the first certification. In some cases it is reciprocal certification, with no additional necessary paperwork. It is much less likely for DOT's to streamline the DBE due to specific requirements for an onsite visit prior to certification and size restrictions.

States that streamline their certification process for M/WBE firms already certified by either federal or private certifiers, include: Illinois, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Tennessee, and Virginia. States with a reciprocal certification process include Indiana, with the Indiana Business Diversity Council; and Texas, which has reciprocity with two DOT UCP partners, two cities, and five private supplier development councils. Colorado's DOT also has a dual certification process with the Rocky Mountain Minority Supplier Development Council.

D. TARGETED FINANCE AND BUSINESS DEVELOPMENT SERVICES

Most studies of affirmative action or inclusive business policies have looked only at contracting and procurement, leaving out financing and business development assistance. Yet, these are two key aspects of public policy that help to increase both the number and the capacity of MBEs and WBEs to be able to compete with other firms for both public and private contracts. This section will examine six components of finance and business development assistance:

- M/WBE Financing Programs, including loan guarantees, low-interest loan programs, and links between generic small business finance programs and M/WBEs
- Vendor Outreach Programs, including trade fairs and matchmaking events
- M/WBE Awards Events, which highlight exemplary firms, agencies, and intermediaries
- M/WBE Business Development Services, including technical assistance, business planning assistance, and mentor-protégé programs

1. M/WBE Financing Programs

Every state has various mechanisms to help finance business development in their state, especially for small businesses, but only a few states have financing mechanisms directly targeted to assist MBEs and/or WBEs. In addition, a few states have special outreach to M/WBEs to access their generic small business finance programs. Nearly every state attempts to create links between M/WBEs and federal SBA loans for M/WBEs, so this section will not highlight those efforts. This section presents information about three types of business financing, as well as about coordination:

- Programs that assist with equity investment in M/WBEs
- Programs that assist M/WBEs with debt financing – loans or loan guarantees
- Programs that assist with bonding requirements

Maryland and Ohio stand out as states that do each of these three activities well and with innovation. The Maryland Small Business Development Financing Authority (MSBDFA), within the state's Department of Economic Development, has a joint venture equity investment program, a MWBE loan fund, a loan guarantee program, and bonding assistance, as well as coordinating with the Governor's Office of Minority Affairs, which coordinates the state's M/WBE program. The Office of Minority Business Financial Incentives plays a similar role in Ohio.

As already mentioned, there is some linkage between M/WBE financing programs to M/WBE procurement programs in Maryland. Other states that do a fairly good job at linking their procurement programs with their M/WBE financing programs are

Mississippi, Ohio, and Washington, through its Office of Minority and Women Business Enterprise. Most states, such as North Carolina and Illinois, fall into the 'need improvement' category on coordination. For example, the North Carolina Historically Under-utilized Business (HUB) procurement program does not link on its website to the state's Minority Business Enterprise Center, which facilitates the financing programs.

a. M/WBE Equity Investment Programs

Equity investment programs are ones which help provide equity investment in businesses, such as through joint ventures. For M/WBEs it is important that they retain controlling interest of any joint venture. At least three states have M/WBE equity investment programs: Florida, Maryland, and Ohio.

- Florida helped finance the Black Business Investment Board in 1985, matched by local financial institutions, to create eight regional investment corporations. These regional corporations provide equity investment in African-American-owned businesses through joint ventures and limited partnerships. They also provide loans and loan guarantees.
- Maryland provides equity investment in M/WBEs through the MSBDFA.
- Ohio is the only state with a venture capital tax credit program specifically directed toward investments in M/WBEs. The state provides a tax credit of 30 percent for investments of up to \$150,000 in MBEs located in economically distressed counties.

b. Debt Financing for M/WBEs

At least 14 states provide M/WBEs with debt financing assistance by operating M/WBE loan funds, in some cases through community development financial institutions (CDFIs); by lowering interest rates for M/WBEs on commercial loans; by helping to broker loans with financial institutions; or by providing a loan guarantee to M/WBEs.

i. M/WBE Loan Programs

At least ten states have M/WBE loan programs, making it the most common debt financing program. Some operate the program themselves: Illinois, Iowa, Maryland, Ohio, Pennsylvania, and Wisconsin. Others fund financial institutions, CDFIs, or other nonprofits to manage the loan funds – Arkansas, Mississippi, New York, and Rhode Island.

Illinois provides loans of up to \$50,000 or 50 percent of a state project, through its Department of Commerce and Economic Opportunity. Iowa's Department of Economic Development has run a M/WBE loan program since 1988, loaning out about \$500,000 per year, with a maximum loan amount of \$50,000. In fiscal year 2006, it made 16 loans, averaging just over \$19,000 each. Pennsylvania has one of the higher maximum loan values - \$500,000, managed by the PA Minority Business Development Authority. The interest rate is half the prime interest rate. Wisconsin's Commerce Department runs the Minority Business Development loan program, with rates at or below prime, and terms ranging from five years, for equipment or working capital, to 15 years, for real estate.

Arkansas has reinitiated its loan program after being suspended. It provides 50 percent of the necessary capital to commercial banks who agree to be ‘community lenders’ and provide low-interest loans to M/WBEs. Mississippi has one of the larger MBE loan pools, with a total capitalization of over \$26 million. There are two loan programs – one for loans of up to \$250,000 and a micro-loan program for up to \$35,000. They are managed by the Mississippi Planning and Development Districts.

New York and Rhode Island fund CDFIs to operate M/WBE loan funds. New York’s Empire State Development administers the Minority and Women Revolving Loan Trust Fund Program through 18 community-based economic development organizations located throughout the state. Rhode Island funds the Coalition for Minority Investments and the Minority Investment Development Corporation to provide low-interest loans to M/WBEs.

Massachusetts, Tennessee and the District of Columbia are separately in the discussion or planning stage of developing M/WBE loan programs. Tennessee plans to have an initial loan pool of \$10 million and provide loans of up to \$125,000, available to any certified small business.

ii. M/WBE Commercial Loan Enhancements

Four states have programs to provide collateral or to lower interest rates for M/WBE loans with commercial banks: Florida, Georgia, New York, and Washington. Another state, Montana, is in the planning stage to develop this kind of program.

The Florida Office of Supplier Diversity will provide 5% to 10% of a state project cost upfront to an M/WBE to be used as collateral with a financial institution in order to secure financing necessary to carry out the state contract. Georgia has a partnership with Citizens Trust Bank, a minority-owned bank, where state sub-contracts are used as collateral for M/WBE sub-contractors on state projects. Interest rates are generally a little below market rate. The New York Department of Transportation has set up a program with the Albany Chamber of Commerce and local banks to provide loans to local M/WBEs. The state contract or sub-contract is used as collateral.

One of the more unique debt financing programs is operated by Washington, called the Linked Deposit Program. The State Treasurer invests up to \$100 million of the state’s short-term surplus funds to purchase certificates of deposit (CDs). The CDs are linked to commercial loans made to M/WBEs, where two percent of the interest earned by the state on the CDs goes to financial institutions in order to lower the interest charged on commercial loans to M/WBE by two percent or the CD interest rate (whichever is lower).

iii. Brokering Commercial Loans to M/WBEs

At least six states help to broker loans to M/WBEs by working with financial institutions – Florida, North Carolina, Ohio, Virginia, Washington, and Wisconsin. For example, the North Carolina Minority Business Enterprise Center, funded, in part, by the state, prequalifies MBEs for loans and helps to package loans by building relationships with banks to get MBE loans underwritten.

iv. Loan Guarantees for M/WBEs

Florida, Maryland, Ohio, Virginia, and Wisconsin are among the states that have a loan guarantee program for loans to M/WBEs. Loan guarantees are provided to MBEs in Florida through the Black Business Investment Board and in Maryland through the MSBDFA.

The Ohio Minority Business Financial Incentives (OMFI) program administers both the Minority Direct Loan Program as well as the Mini-Loan Guarantee Program, which will guarantee up to 45 percent of the value of loans under \$100,000. Virginia's PACE program guarantees up to 90 percent of the value of the loan. Like the Ohio program, all small businesses are eligible for PACE loan guarantees with a special emphasis on M/WBEs. Wisconsin also guarantees up to 90 percent of the value of the loan.

c. Bonding and Bond Guarantee Programs

Maryland and Ohio are two of the only states that have a bonding program for M/WBEs. Maryland's MSBDFA will bond M/WBEs for projects up to \$1.5 million. And Ohio's OMFI operates the Minority Business Bond Program.

At least four states have bond guarantee programs, including Maryland, Mississippi, Ohio, and Tennessee. Maryland has two bond guarantee programs: in addition to its MSBDFA bond guarantee program, prime contractors in its transportation DBE program are required to guarantee the bonds of M/WBE sub-contractors as part of their good faith effort to subcontract with M/WBEs. Mississippi's Minority Surety Bond Guarantee Program guarantees the bond for any certified MBE in the construction or building trades, with a maximum guarantee of 90 percent of the loan. Ohio's OMFI also administers a 90 percent bond guarantee program for M/WBEs. Tennessee's Department of Transportation has a bond guarantee program for certified DBEs.

2. Vendor Outreach Programs and M/WBE Awards

One of the barriers to business success commonly identified by MBEs and WBEs is the lack of business networks that foster joint ventures, partnerships, and business-to-business transactions. Participants in these networks include both public procurement agents as well as private sector supply chain managers.

a. Vendor Outreach

Many states attempt to help M/WBEs to overcome this barrier by sponsoring vendor outreach activities. This can include business fairs, social events, and match-maker activities.

One of the more common vendor outreach activities is a business fair, where M/WBE firms are invited along with state agency purchasing agents. Some states sponsor one per year, while others sponsor multiple fairs in various parts of the state. Most states also invite corporate purchasing agents. Among the states who conduct business fairs or 'power networking' events of this type are Florida, Illinois, Indiana, Tennessee, and Wisconsin. Kansas, Massachusetts and North Carolina make a point of inviting local

government purchasing agents to their M/WBE business fairs. North Carolina also hosts a special M/WBE networking reception at the annual state construction conference, with attendance usually at over 1,000 persons.

States that hold M/WBE outreach events, on a regular basis throughout the state, such as local “meet-and-greets” and business fairs, include Florida, Illinois, North Carolina, and Wisconsin. In Vermont this happens for WBEs through the Women’s Business Center.

Another vendor outreach activity is a ‘match-making’ event where contractors and potential sub-contractors or suppliers are brought together, often in relation to specific upcoming state projects. States which sponsor match-making events include Indiana, Massachusetts (“meet the vendor” series), Pennsylvania, Tennessee, and Wyoming (DOT).

Some states concentrate on electronic means to conduct vendor outreach, in part to be budget conscious. This includes email listserves, telephone call conferences, video conferences, and webinars. States that frequently use electronic means to conduct vendor outreach include Michigan, South Dakota, and Washington.

Another approach used by some states includes participation by M/WBE program coordinators and public agency purchasing agents in the events held by minority or women business associations. Some of the states that frequently use this approach are Michigan and Washington.

In many cases, the vendor outreach activities also include state procurement workshops that train M/WBEs how to access state contracts or RFPs. States that frequently carry out procurement workshops include Illinois, Indiana, and Massachusetts.

As of mid-2007, Georgia was planning to unveil a new M/WBE vendor outreach program through the new Governor’s Entrepreneur & Small Business Office. It plans to create a Minority Partners Outreach program for the purpose of resource awareness and networking.

b. M/WBE Awards Events

Related to vendor outreach, a few states have annual awards events in order to highlight the importance of M/WBEs to the state economy as well as honoring specific M/WBEs, corporations, and state agencies. At least three states hold annual M/WBE awards events: Florida, Illinois (IDOT), and Massachusetts.

The annual Florida Minority Business Awards event gives out five awards:

- M/WBE of the year
- State agency of the year (for the most M/WBE spend)
- State advocate of the year
- Director’s award for majority companies that help mentor or form strategic alliances with M/WBEs

- Corporation of the year, for strategic partnerships with M/WBEs on state contracts.

3. M/WBE Business Development Services

While about half of the states have an M/WBE procurement program of some type, a smaller portion has targeted business development services. Business development services refers to assistance to businesses in developing business plans, marketing plans, management systems, use of technology, etc., in addition to the financing and vendor outreach assistance already mentioned. Several states offer a particular business development service, such as legal assistance, assistance with certification, or training in how to access public contracts. Still others sponsor mentor- protégé programs.

At least 14 states offer general business development services targeted to M/WBEs: Alabama, Arkansas, Georgia, Massachusetts, Mississippi, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin. This section will highlight the efforts of Mississippi, North Carolina, and Ohio.

Mississippi has one of the more extensive M/WBE business development programs, through its Minority and Small Business Development Division. It provides individual counseling, information and referral services, various training workshops, and business expansion assistance. Additional technical assistance is provided to M/WBEs through the Planning & Development Districts, which, as mentioned earlier, also manage two MBE loan programs.

North Carolina is one of the rare states to combine state dollars with funding from the federal Department of Commerce Minority Business Development Agency to create the Minority Business Enterprise Center (MBEC). The MBEC provides technical and financial assistance to MBEs and works closely with community college and university small business development centers, as well as the state HUB (affirmative procurement) program.

Ohio has perhaps the most extensive targeted business development services to M/WBEs through the Division of Minority Business Affairs (DMBA) within the Department of Development. The DMBA has set up the Minority Contractors and Business Assistance Program (MCBAP). There are 8 MCBAP offices throughout the state operated by universities or nonprofit organizations. The MCBAP offices assist M/WBEs with management, technical and business development services, as well financial and contract procurement assistance. They also help broker loans and bonds.

Some states provide business development services to a subgroup of M/WBEs. For example, Vermont provides targeted business development services to women-owned businesses, while Nebraska provides services to both WBEs and Hispanic-owned businesses. Both Montana and North Dakota provide business development services to Native-American-owned businesses. On the other hand, Tennessee provides business development services to all small businesses but does specific outreach to MBEs.

At least nine states have a mentor-protégé program, where an established business provides ongoing, intensive business counseling to a 'protégé' M/WBE. This has proven

to be one of the more effective business development approaches. This includes: Florida, Georgia, Maryland, Massachusetts, New York, North Carolina, Ohio, Texas, and Virginia, in addition to other states which may have a mentor-protégé program as part of their federally-funded DOT DBE program. Massachusetts' Affirmative Marketing Program has one of the larger programs with 29 participating pairs. Texas requires all state agencies with at least \$5 million in procurement to have a mentor-protégé program.

At least two states provide legal services, such as business incorporation assistance, to M/WBEs – Rhode Island and Tennessee. Arkansas sponsors a youth entrepreneurial program to expose youth of color to business development.

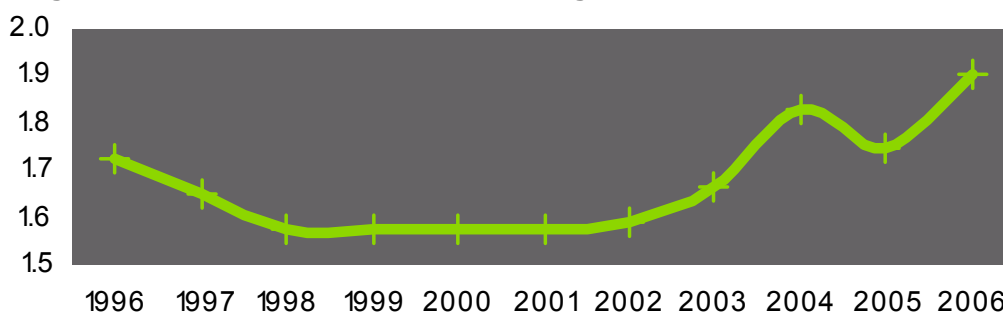
E. A STEP BACK: THE 1996-2006 POLICY TREND

The state policy trend from 1996 to 2001 demonstrates a noticeable curtailment in affirmative action and inclusive business policies. The most dramatic challenges to affirmative procurement programs were the end of Louisiana's and California's programs in 1996, Washington's and Ohio's programs in 1998, Florida's program in 2000, and Oklahoma's bid preference program in 2001. More minor curtailments were experienced in Colorado in 1996, with restrictions to its DBE program as a result of the *Adarand* decision, the end to a portion of Minnesota's goal-based program in 1998, and the end of race- and gender-conscious goals in New Hampshire's DOT DBE program in 1999.

Washington, Ohio, Florida, Colorado, and Minnesota all responded with new initiatives in response to these challenges. In Ohio, the first response was quick, with the restoration of its MBE goal program on state spending on goods and non-construction services in 1999. Florida rather quickly began implementing the One Florida supplier diversity program late in 2000.

The inclusive business program trend line began an upward swing in 2003. Four states started new major initiatives to increase procurement from minority- and women-business enterprises between 2003 and 2006, including Arizona, Colorado, Tennessee, and Virginia. Ten other states enhanced their policies during the same period. While the *Western States Paving* decision caused a blip in the trend line in 2005, the trend in inclusive business programs continued to rise in 2006.

Figure 14: State Inclusive Business Program Trend Line



Note: This chart is based on the average inclusive business policy index of the 39 states with the largest non-white population. The inclusive business policy ranking is a composite score of 0 to 4, based on state policies and programs. An index of 0 = no inclusive business programs; an index of 4 = extensive and effective inclusive business programs within the state government.

Both Republican and Democratic governors have led efforts to enhance supplier diversity in their state, including Republican governors Jeb Bush (former, FL) and Mitch Daniels (IN) and Democratic governors Bill Ritter (CO) and Tim Kaine (VA).

Below is the list of new or enhanced state inclusive business programs between 2003 and early 2007. A complete list of state policy changes is available as Appendix E.

2003

- | | |
|----------|--|
| Indiana | Created an M/WBE advisory Commission and administrative Division to lead its supplier diversity and began requiring each state agency to have a supplier diversity plan and coordinator. The Division also provides technical assistance to each agency and sets up M/WBE vendor fairs that include agency procurement officers. |
| Maryland | The Governor's Commission on MBE Reform was convened to identify and solve problems with the state's M/WBE program. Governor Ehrlich directed each state agency to make necessary changes and instituted uniform procurement data collection and reporting, including payment data. |
| Ohio | Created the Encouraging Diversity, Growth and Equity (EDGE) program. State agencies have a 5% goal for contracting with EDGE-certified firms. Small businesses can be EDGE certified if they are M/WBEs or if they are located in an area with high unemployment (federal HUB zone). |
| Delaware | Expanded its race- and gender-neutral supplier diversity program with the adoption of a systematic electronic vendor notification system targeting M/WBE firms and M/WBE business development associations, including the innovative DeIEXCHANGE. |

2004

- | | |
|----------------|---|
| Tennessee | Passed legislation that required all state agencies to implement supplier diversity practices, with assistance and tracking provided by the Office of Diversity Business Enterprise, which was created by Governor Bredesen in December 2003. |
| Arizona | Governor Napolitano's Equity in State Contracting Initiative established an Executive Oversight Committee to examine state purchasing from M/WBEs, a plan to enhance M/WBE procurement, and an electronic vendor directory which includes M/WBE status, and required M/WBE bidders on state contracts under \$50,000. |
| Massachusetts | New legislation required that any local government body that receives state-funding for construction-related projects must have goals for MBE and WBE participation. MA also improved monitoring of its M/WBE program. |
| North Carolina | The state helped fund and establish the Minority Business Enterprise Center, along with the NC Institute of Minority Economic Development and the SBA. The MBEC provides technical and financial assistance to MBEs. |

Pennsylvania As a result of identifying problems in an administrative audit, the Commonwealth overhauled its M/WBE certification process and required each state agency to have a supplier diversity plan and coordinator.

Minnesota Its Targeted Group and Economically Disadvantaged small business program nearly doubled state M/WBE procurement from 2003, the biggest upswing since the late 1990s.

2005

Missouri Faced with the end of its race- and gender-conscious goals program, due to a legal challenge, Governor Blunt established the Office of Supplier and Workforce Diversity (OSWD) to ensure that each state agency continues to pursue supplier diversity in a race- and gender-neutral fashion.

2006

Colorado Governor Ritter established the Minority Business Advisory Council to review the operations and effectiveness of the state Minority Business Office and to support MBE development. In addition, the state established an agreement with the City/County of Denver that all state spending in Denver, starting with construction, would be subject to M/WBE goals, based on results of Denver's recent disparity study.

Illinois IDOT disparity study demonstrated continued need for a race- and gender-conscious DBE program and established a 22.77% DBE goal for FHWA funds, the highest in the country.

Washington Following a disparity study, the state DOT reestablished race- and gender-conscious contracting, with an 18.77% DBE goal for FY06-07 FHWA funds, one of the highest rates in the country. Race- and gender-conscious contracting had been suspended following the Western States Paving court decision in 2005.

Virginia Changed procurement manual and procedures for its small-, women-, and minority-owned business (SWaM) program, requiring each agency to have a SWaM plan which may include specific aspirational WBE and MBE sub-goals. Governor Kaine moved the SWaM office from Commerce to Administration to align state procurement practices.

New Jersey Governor Corzine signed Executive Order 34, establishing a Division of Minority and Women Business Development. The goal of this division is to leverage the state's purchasing power to help facilitate growth among New Jersey's small-, minority- and women-owned businesses, and to ensure equal opportunity access to the state's marketplace.

2007

Massachusetts Required each state agency to have an affirmative marketing program and coordinator.

New York

Governor Spitzer established an M/WBE Executive Leadership Council and M/WBE Corporate Roundtable to identify problems and recommend fixes to the state's M/WBE program.

At the same time, eight states have suspended or curtailed their inclusive business policies between 2003 and 2006. The first example is New Jersey, which suspended its M/WBE program due to a consent decree in 2003. The state is conducting a disparity study which may lead to the re-initiation of its program. Missouri dismantled its affirmative procurement program in 2004 following a legal challenge. Missouri instituted a voluntary supplier diversity program in 2005, which was fully implemented in 2007. The 2005 *Western States Paving* decision caused Washington, Oregon, Idaho, California, and Nevada to suspend the race- and gender-conscious portions of their DBE programs. Many of these states have re-initiated race- and gender-conscious DBE goals based on disparity studies. Finally, the Proposal 2 ballot measure in Michigan, passed in November 2006, eliminated most state and local race- and gender-conscious contracting programs.

IV. RECOMMENDATIONS

This report is not meant to be prescriptive. Rather, our goal has been to scan and categorize all of the various inclusive business programs and practices, to provide states or other government entities with the type of detailed information that will allow them to make informed choices that align with each state's political, legal, and social context. Nevertheless, we believe that there are several specific practices that stand out as 'best practice' among inclusive business programs:

- **Inclusive business policies.** Policies that support the development and growth of M/WBEs, in addition to and in coordination with policies that support all small businesses, are the most effective. Small business programs should address the barriers to growth that all small businesses face. M/WBE business programs should address the additional barriers faced by minorities and women.
- **Rigorous disparity studies.** Studies which demonstrate the disparity between the availability of MBEs and WBEs and their procurement levels provide the basis for a goal-based affirmative procurement program. Better research methods and availability of business data have greatly improved the quality and utility of disparity studies in the last few years.
- **Combining geographic with race- and gender-based programs.** This approach combines a small business procurement goal in economically distressed areas as well as an M/WBE procurement goal throughout the state.
- **Supplier diversity coordinators and plans.** A designated supplier diversity coordinator in each government agency or public university who is charged with implementing an agency-specific affirmative procurement plan has worked well in a number of states.
- **Performance reviews** of agency heads that take into account implementation of inclusive business practices
- **Streamlining the certification process** for M/WBEs already certified by other entities, including the SBA, the Department of Transportation, or a private supplier diversity council. This eases the burden on firms to participate in the public procurement process in a goals-based program.
- **Electronic notification** to certified or registered M/WBEs on all public lettings.
- **Positive or negative publicity tactics.** Publicity tactics, such as public presentation of awards or online report cards, which shower either praise or shame on purchasing agents and prime contractors/suppliers depending on whether they do or do not practice supplier diversity, are an effective 'voluntary' measure.
- **Targeted vendor outreach events**, including vendor fairs or 'matchmaking' events with public agency procurement officers.

- **Funding or forming partnerships** with nonprofit organizations, university centers, small business development centers, procurement technical assistance centers, business associations and chambers, and private supplier diversity councils in order to provide vendor outreach, business services, or business information to M/WBEs.
- **Business development services** tailored to the distinct capacity levels of M/WBEs, such as micro-enterprises; start-ups; young, thriving firms; and established small firms ready to expand to the next level. For example, mentor-protégé programs are an innovative model that may work well with the latter two groups of firms.
- **Targeted finance programs**, including M/WBE low-interest loan programs, loan guarantees, and equity capital investment funds.

Implementation of these inclusive business practices will help minority- and women-owned businesses to overcome the specific barriers that they face. They also make economic sense for the state by building a stronger base of suppliers to the state, increasing the tax base, and spreading wealth within diverse communities.

APPENDIX A – TYPOLOGIES AND DEFINITIONS

TABLE A1 - Typology of Inclusive Business Public Policies and Programs

Type of Inclusive Business Activity		Example of Inclusive Business Practice Taken by a Governmental Agency
LEADERSHIP	Hortatory Efforts	<ul style="list-style-type: none"> ■ Organizational (i.e. staff and budgetary) and top down leadership commitment ■ Rewarding and recognizing governmental agencies and personnel responsible for setting and achieving M/WBE utilization goals
	Goal Setting	<ul style="list-style-type: none"> ■ Setting prime contracting goals for the utilization of M/WBEs ■ Setting subcontracting goals for the utilization of M/WBEs ■ Setting hiring goals of minorities and/or women for contractors
	Information Tracking and Public Disclosure of Data	<ul style="list-style-type: none"> ■ Certifying M/WBEs ■ Tracking utilization of M/WBEs as prime contractors and subcontractors ■ Tracking amount and percentage of total procurement budget going to M/WBEs ■ Reporting and publicizing results
	Enforcement and Accountability	<ul style="list-style-type: none"> ■ Enforcing nondiscrimination policies in contracting ■ Accountability for <i>not</i> meeting statutory-required M/WBE utilization goals ■ Enforcing substantial penalties for noncompliance of contract (e.g. penalties to M/WBE front companies for fraud)
EXPANDING OPPORTUNITY	Outreach/ Increasing Access	<ul style="list-style-type: none"> ■ Offering vendor outreach sessions ■ Hosting of or participation in conferences, teleconferences, tradeshows, etc. ■ Widely advertising government contracting opportunities (searchable databases or email listserves) ■ Unbundling large contracts into smaller contracts to increase access by all small businesses, including small M/WBEs ■ Providing clear written materials on the contracting process
	Mandatory Goals, Set Asides and Incentives	<ul style="list-style-type: none"> ■ Mandatory goal of participation by M/WBEs in sub-contracts (or good-faith effort waiver) ■ Providing preferential treatment to M/WBEs in obtaining contracts ■ Restricting competition for certain contracts to M/WBEs ■ Providing price evaluation credits to M/WBE suppliers

Type of Inclusive Business Activity		Example of Inclusive Business Practice Taken by a Governmental Agency
CAPACITY BUILDING	Training and Education	<ul style="list-style-type: none"> ■ Management or technical assistance to M/WBEs suppliers ■ Mentor-protégé program to M/WBE suppliers ■ One-on-one counseling for M/WBE suppliers ■ Regional training and conferences for M/WBEs
	Financial Assistance	<ul style="list-style-type: none"> ■ Surety bonding assistance to M/WBEs ■ Loans and loan guarantees to M/WBEs ■ Grants for education and training to M/WBEs ■ Quick pay provisions

TABLE A2 – Definition of Inclusive Business Terms

Affirmative Action: This is a political term rather than a legal term or business term. In public contracting, it generally refers to any procurement or business development process that attempts to level the playing field for the firms owned by groups that have been historically underutilized. In addition to race- and gender-conscious activities, certain race- and gender-neutral activities may also be considered as affirmative action.

Aspirational Goal: Refers to an agency-wide or state-wide percentage goal of aggregate M/WBE procurement, which may be achieved through either race- and gender-conscious or race- and gender-neutral strategies.

Business Owner Status Certification Programs

Small Business or SBE. The federal Small Business Administration (SBA) certifies and defines a small business in terms of average annual receipts or number of employees for each industry sector. For example, general building and heavy construction contractors have a size standard of \$31 million in average annual receipts. Special trade construction contractors have a size standard of \$13 million. For the service industries, the most common size standard is \$6.5 million in average annual receipts. Some states have a small business enterprise (SBE) certification, with size standards generally similar to those of the SBA.

ESB – Emerging Small Business. A few states have a certification for very small businesses. States may use a different acronym. The size limit varies with each state that has this certification.

SDB – Small, disadvantaged business. This is a certification by the SBA and used throughout federal agency procurement. It is nearly equivalent to the MBE certification used by many states. It is a Small Business with owner net worth and compensation limits, unconditionally owned & controlled by one or more socially & economically disadvantaged individuals who are citizens of the United States.

African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Native Americans are presumed qualify. Other individuals can qualify if they show by a “preponderance of the evidence” that they are disadvantaged.

8(a) – This is an SBA certification that is a subset of the SDB firms. In addition to the SDB definition above, businesses must be incorporated for at least two years and demonstrate potential for success. In addition, business owners receiving this certification must pass a “good character” test, e.g., firms may be declined if any of its principals demonstrate any lack of character. Firms certified under 8(a) are privy to certain non-competitive bids not open to other small businesses as well as to particular low-interest loan programs.

DBE – Disadvantaged Business Enterprise. This includes both minority-owned businesses and women-owned businesses, with a small business standard similar, but not equivalent, to the SBA. This is a certification used by the U.S. Department of Transportation and by extension any state, airport, or transit agency that receives federal highway (FHWA), airport (FAA), or transit (FTA) funds.

MBE – This is a certification for minority-owned business enterprises used in many states. The definition is usually similar to the federal SDB definition although some states have no size limit.

WOSB – SBA definition, women-owned small business. It is a Small Business, at least 51% owned by one or more women, *and* management & daily business operations controlled by one or more women. Unlike SDB, there are no owner wealth or income limits.

WBE – Several state have a women-owned business enterprise (WBE) certification that is similar to the SBA WOSB certification.

HUB – The SBA defines HUB Zones as any area with a historically underutilized business community. Practically this is defined as a high unemployment rate or low median income. A HUB certified business is any Small Business that is based in a HUB zone and with at least 35% of employees living in a HUB zone. Some states have used the federal HUB zone in the creation of state programs, such as the EDGE program in Ohio. In Texas and North Carolina HUB has a second meaning: it is used to refer to a historically underutilized business itself rather than to a geographic definition. A HUB certification in those states is similar to an MBE or M/WBE certification in other states.

Good faith effort: The demonstration of effort by bidders responding to bid requests to look for disabled, female, minority, and veteran business enterprises as sub-contractors when bidding public jobs. The firm’s good faith effort is used as an evaluation tool by the jurisdiction during the contract letting process and/or the annual review of contractors and suppliers.

Preference: A bid percentage discount given to certain preferred firms (e.g., M/WBEs, emerging small business, or in-state small business) when considering the bid dollar

amount on certain bids or a point bonus given on a bid submitted by certain preferred firms when bids are scored in a point system.

Race- and gender-conscious: This refers to a contracting process where race and gender are considered in the evaluation of bids for the contract. The considerations may include a preference bonus or discount, a set-aside, or the requirement of a good faith effort at including MWBEs as sub-contractors. Federal law directs states or local jurisdictions to use a race- and gender-conscious contracting process when race- and gender-neutral strategies have led to disparities in utilization of certain groups in certain industries.

Race- and gender-neutral: This refers to a contracting process where race and gender are not considered in the evaluation of bids for the contract. Targeted vendor outreach, financing, and business services to MWBEs are generally considered race- and gender-neutral activities. Certification of and tracking procurement to MWBEs are also considered race- and gender-neutral activities.

Set aside: This refers to certain classes of contracts being open for bidding by only a restricted group of bidders. Within federal agencies, certain contracts may be set-aside for only 8(a) certified bidders. Most set-aside contracts at the state level are for small businesses, emerging small businesses, or disabled-veteran-owned businesses.

Supplier diversity: The focus of supplier diversity is both on changing the nature of the purchasing body, e.g., having more diverse suppliers is an asset to the purchaser (product quality and public image of purchaser) as well as on increasing opportunity for a diverse pool of firms who are suppliers and contractors. Affirmative action, on the other hand, is generally framed as having only the latter impact. Some do not consider capacity building activities, such as business development assistance and increasing access to financing, as part of supplier diversity.

TABLE A3 – List of Public Agency Inclusive Business Activities

Inclusive business activities by government bodies may include any of the following activities, some of which have traditionally been considered ‘affirmative action’ while others may not be:

- Internal mechanisms within public agencies to encourage supplier diversity within all agencies, including inclusion of supplier diversity efforts in performance reviews; mandatory diversity plans; aspirational or laudatory goals of M/WBE spend achievement on agency discretionary funds; workshops or one-on-one assistance with agency procurement officers; and positive or negative recognition for supplier diversity efforts such as awards or report cards.
- Mandatory good-faith effort to engage participation of minority-owned business enterprises (MBEs) and/or women-owned business enterprises (WBEs) as sub-contractors on large projects, based on availability and/or disparity study.
- Bid preference discount or ranking points for bids which include M/WBEs, as prime- or sub- contractor/supplier, usually based on disparity study.

- Requiring sub-grantees such as local government bodies to also have M/WBE spending goals and/or supplier diversity plans.
- Setting spending goals or providing preferences to firms located in impoverished areas which may be more likely to be MBEs than firms located in other parts of the state.
- Certification of M/WBEs to assist firms in their marketing, to enable the agency to track its procurement, and to pre-qualify firms for various business development services.
- Tracking and auditing the amount of spend to M/WBEs by various agencies to determine level of supplier diversity and monitor compliance with Title VI of the Civil Rights Act.
- Monitoring, investigation of possible abuse, and enforcement of compliance with federal and/or state requirements related to procurement, certification, and contracting.
- Publicity events, such as awards or report cards, which shower either praise or shame on prime contractors/suppliers, depending on whether they *do* or *do not* practice supplier diversity in their contracts with the agency.
- Targeted vendor outreach events, including vendor fairs or matchmaking events with public agency procurement officers.
- E-bid-notification to certified or registered M/WBEs on all public lettings.
- Targeted business financing including loan funds and loan guarantee programs. Assistance with or waiver of bonding requirements for M/WBEs.
- Technical assistance related to the procurement process, cost estimation, bidding, certification, or project management.
- Technical assistance related to business development including business plan formation, accounting, marketing, management skills, or joint venture formation. Often this assistance is provided through a mentor – protégé program.
- Ensuring that a certain portion of contracts are of a limited size, making them more accessible for small businesses.
- Funding or forming partnerships with nonprofit organizations, university centers, small business development centers, or private supplier diversity councils in order to provide business services or business research and information to M/WBEs.

APPENDIX B

THE FEDERAL GOVERNMENT PROCUREMENT PROCESS

The General Services Administration (GSA) procures some common supplies for government-wide use; however, most agencies make purchases directly from vendors, especially for uncommon or program-specific procurement.

Contracting with the United States is a very structured, restricted and complex process. The Federal Acquisition Regulation (FAR)⁸³ provides a standardized set of baseline regulations specifying every step in the procurement process by which all federal agencies follow to purchase goods and services. In addition, each federal agency may have its own supplemental regulations. One of the best-known examples of supplemental regulations is the Defense Federal Acquisition Regulation Supplement used by the Department of Defense.

The four major methods of contracting with the federal government are:

- Simplified Acquisition Procedures
- Sealed Bidding
- Contracting by Negotiation
- Consolidated Purchasing Vehicles

Each one has its own solicitation process. These methods and their related solicitation procedures are outlined in greater detail in Table B1.

TABLE B1 - Definition of Contracting Methods and Solicitation Processes

CONTRACTING METHOD	SOLICITATION PROCESS
<p>Simplified acquisition procedures are streamlined government acquisition processes that apply to contracts under \$100,000 (i.e. “small purchases”). Simplified acquisition procedures require fewer administrative details, lower approval levels, and less documentation. Also, competition and advertising</p>	<p>Micro-purchasing is an example of a simplified acquisition procedure whereby purchases can be made using a Government Purchase Card (credit card), without soliciting competitive quotes if the product(s) and/or service(s) do not cost more than \$2,500.</p>
	<p>Oral solicitation is a solicitation method that applies to small purchases (under \$100,000) where the contract officer will solicit oral quotations from, generally, three potential suppliers.</p>

⁸³ The FAR and Agency Supplemental Regulation can be found at <http://acquisition.gov>

CONTRACTING METHOD	SOLICITATION PROCESS
<p>requirements are limited. Simplified acquisition procedures make it easier for contractors to do business with the government, while making it simpler and more efficient for agencies to solicit and process procurements.</p>	<p>Request for Quotation a solicitation method whereby the contracting officer requests written or electronic quotations from potential suppliers. A contract is established not when the prospective contractor submits a quote but when the government makes an offer to supplier based on the quote offered (and other specified terms and conditions) and in response the supplier accepts.</p>
<p>Sealed Bidding is used generally for well defined products or services worth more than \$100,000.</p>	<p>Invitation for Bid is the solicitation method used for a sealed bid process whereby the contracting officer requests competitive bids from potential suppliers for products or services which have clear, accurate and complete requirements. Bids are sealed and opened publicly at the time designated in the invitation. The contract is awarded to the lowest bidder determined to be responsive to the specified needs.</p>
<p>Contracting by Negotiation is the most flexible, but sometimes most complicated, method for procuring goods and services. It is used when, unlike in sealed bidding, contracting officers cannot clearly define all the requirements of procurement or when factors other than price are important enough to require evaluation.</p>	<p>Request for Proposal a solicitation method whereby the contracting officer requests written, detailed proposals from potential suppliers. An RFP is more demanding than an RFQ in that, in addition to proposing a quote, the proposal is required to describe how the prospective contractor intends to provide the good or service. Accepted proposals are subject to negotiation after they have been submitted.</p>
<p>Consolidated Purchasing Vehicles are interagency purchasing programs that centralize the purchasing of certain common types of products or services so that economies of scale can be achieved. The three largest interagency consolidated purchasing programs are administered by the General Services Administration, the Defense Logistics Agency, and the Department of Veteran Affairs.</p>	<p>Multiple Award Contracts are acquisition vehicles used in consolidated purchasing programs that encourage long-term vendor agreements with fewer vendors. They allow government buyers to quickly acquire goods or services by issuing purchase orders against existing contracts and schedules without starting a new procurement action from scratch. Multi-agency contracts, government-wide acquisition contracts, and the expanded use of GSA federal supply schedules are examples of multiple award contracts and consolidated purchasing.</p>

A significant acquisition reform was enacted in 1994 with the intent to modernize federal acquisition. The Federal Acquisition Streamlining Act (FASA) had a substantial impact on the procurement process. More than 225 provisions of law were repealed or notably

changed to reduce paperwork burdens, facilitate the acquisition of commercial products, increase the use of simplified procedures for small purchases, transform the acquisition process to electronic commerce, and improve the efficiency of the laws governing the procurement of goods and services.

It is possible that these changes, though intended to simplify the government buying process, have limited the access of small business to the federal government market. Since most M/WBEs are small businesses, the acquisition reforms of the 1990s disproportionately affect M/WBEs. Table B2 highlights the legislative actions enacted in 1990s, including FASA, and their impacts on small businesses.

TABLE B2 Acquisition Reforms of the 1990s

Legislation	Highlights	Impact on Small Business
Federal Acquisition Streamlining Act of 1994	<ul style="list-style-type: none"> ■ Authorized multiple-award contracts ■ Created new procurement category for micropurchases up to \$2,500 ■ Exempted micropurchases from the Buy American Act ■ Established 5% federal contracting goal from women-owned small businesses 	<ul style="list-style-type: none"> ■ Multiple-award contracts hurt 8(a) companies, since the dollar volume and size of multiple-award contracts are beyond the reach of many small businesses ■ No competition is required for micro purchase contracts
National Defense Authorization Act of 1994	Authorized use of “other transactions.” This term refers to transactions other than contracts, grants or cooperative agreements, which are entered into under the authority of 10 U.S.C. 2371	These are not governed by FAR and the Small Business Act requirements for small business participation. A recent example is the Army’s Future combat systems overhaul, where Boeing has signed a \$14.78 billion “other transactions” agreement and serves as the general contractor.
Clinger-Cohen Act of 1996	<ul style="list-style-type: none"> ■ Authorized credit cards for use by more employees for purchases up to \$2,500 ■ Authorized multi-agency contracts for information technology ■ Repealed GSA’s central acquisition authority for information technology 	The Act specified no small business requirement for credit card purchases.

Legislation	Highlights	Impact on Small Business
Administrative Dispute Resolution Act of 1996	District court jurisdictions on bid protest cases were sunset on January 1, 2001	There are a limited number of places where small businesses can file a claim.
Small Business Reauthorization Act of 1997	Increased annual goal for small business procurements by federal agencies from 20 to 23 percent	This increases the number of opportunities for small businesses to do business with the federal government.

Source: "The Future of Small businesses in the US Federal Government Marketplace", Clark and Moutray, 2004

In addition to the differing general contract methods, the federal procurement process also differs by the amount of the contract. If the contract or purchase order is less than \$100K, a simplified process is used. A contract under \$25K has no advertising requirement although for amounts between \$2,500 and \$100,000, contracts can be reserved for small businesses. Further, contracts greater than \$100,000 can be reserved for special categories of small business including minority-owned businesses.

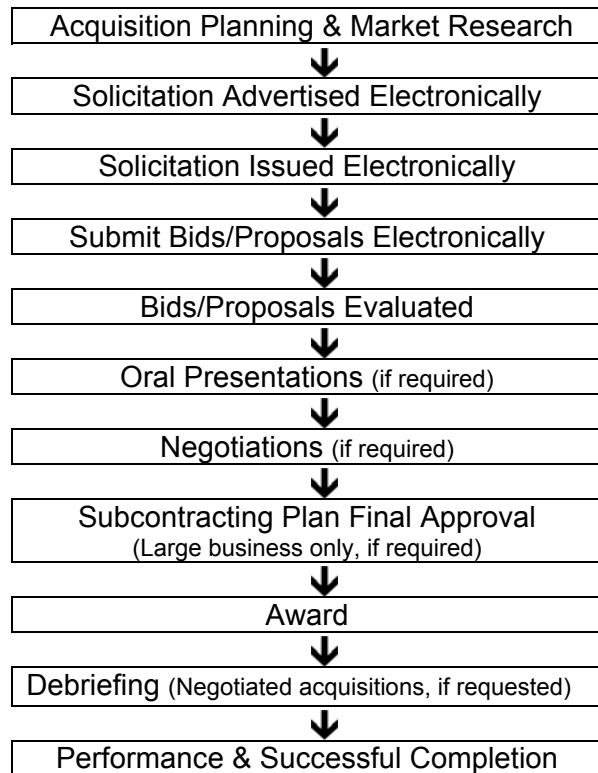
The contracting methods and solicitation procedures, as reformed by FASA, are summarized *by contract value* in TableB3 below.

TABLE B3 - Contracting Methods by Contract Value

Contract Value	Contract Method	Advertising Requirement	Restricted Competition Requirement	Solicitation Procedure
\$2,500 or Less	Micro-purchase	Not Advertised	No longer reserved for small businesses since FASA	N/A; Government Purchase Card (credit card)
Between \$2,500 and \$25,000	Simplified Acquisition Procedure	Not Advertised (sometimes posted locally)	Reserved for small businesses if offers are made by two or more small businesses that are competitive on price, quality and delivery.	Oral Solicitation or Request for Quotation
Greater than \$25,000 and less than \$100,000	Simplified Acquisition Procedure	Advertised on www.FedBizOpps.gov*	Reserved for small businesses if offers are made by two or more small businesses that are competitive on price, quality and delivery.	Oral Solicitation or Request for Quotation
Greater than \$100,000	Sealed Bidding or Contract Negotiation	Advertised on www.FedBizOpps.gov*	Reserved if two or more capable 8(a)/ HUBZone/ SD-VOSB/ SB will submit offers at fair market price	Invitation for Bid or Request for Proposal

*Most federal contracting opportunities and requirements above \$25,000 are posted on www.fedbizopps.gov

Figure B4: Sample Process for Contracts Greater than \$100,000



The General Services Administration

One of General Service Administration's (GSA) primary responsibilities is the procurement of many goods and services needed by federal agencies. GSA administers government supply schedules, which are contracts for which firms agree to supply materials and services at set prices for a limited time period. Government offices and programs can place orders for routine purchases and contracts directly with GSA-approved vendors on these lists or schedules, reaping the benefits of volume-discounted prices, lower administrative regulatory costs, and access to pre-approved vendors within various procurement categories.

GSA Business Service Centers promote the participation of businesses, especially small firms, in government contracting. The centers provide information and counseling on how to obtain government contracts.

GSA Federal Supply Schedules list goods and services government agencies purchase on a regular basis as well as possible vendor sources. Small businesses may also apply to be listed on GSA schedules: (202) 708-5804.

Federal Small Business Certification Programs

TABLE B5: Comparison of Federal Small Business Certifications

	Certification Type		
	8(a)	SDB	HUB Zone
Small Business Definition	Small business by SBA size standards for primary NAICS Code	Same as 8(a)	Same as 8(a)
Required Ownership and Control	At least 51% ownership and unconditional control by U.S. citizens that are socially and economically disadvantaged	Same as 8(a)	100% ownership by U.S. citizens; no ownership by another company
Socially Disadvantaged Groups	Blacks, Hispanics, Native Americans, Asians, Subcontinent Asians, Indian Tribes, Native Hawaiian Organizations, and Alaska Native Corporations are presumed to be socially disadvantaged; Individuals not members of above groups must demonstrate their individual social disadvantage	Same as 8(a)	Not required
Economic Disadvantage Metrics	None for Alaska Native Corporations; for all others: Adjusted net worth of owner(s) <\$250K Assets of owner(s) <\$4M Average two-year compensation of owner(s) <\$200K	Same as 8(a)	None
Years in Business Requirement	2 years in business or meet waiver provisions	None	None
Good Character Test	Yes, firms may be declined if concern or any of its principals demonstrate any lack of character	No	No
Certification Term	9 years, one-time annual compliance review	3years, renewable	Business must self certify annually

	Certification Type		
	8(a)	SDB	HUB Zone
Reciprocity Among Certifications	Yes: All 8(a) firms are SDB's;	No: All SDB firms are not 8(a) certified	None
Other Required Qualifications	Applicants must demonstrate "potential for success" Brokers are not eligible	Brokers are not eligible	Principal office must be located in HUBZone At least 35% of employees must be HUBZone residents Affiliation permitted as long as SBA's size regulations are met for combined entities

Table B6: Certification Benefits of 8(a), SDB, and HUBZone Small Business Certifications

	Certification Type		
	8(a)	SDB	HUB Zone
Set Aside Contract Conditions	Sole source: <\$5M manufacturing <\$3M all other NAICS Competitive: >\$5M manufacturing >\$3M all other NAICS	Sole source: None Competitive: None	Sole source: <\$5M manufacturing <\$3M all other NAICS Competitive: >\$5M manufacturing >\$3M all other NAICS
Competitive Price Adjustment Evaluation and Proposal Evaluation credits	Full & Open: Same as SDB	Full & Open: Price evaluation adjustment of up to 10% Qualified prime contractors can receive a Proposal evaluation credit when using SDBs as subcontractors.	Full & Open: Price evaluation adjustment of up to 10%
Procurement Goals – FY 2005	3% of Federal prime contract award dollars	5% of Federal prime contract award dollars, inclusive of SDB 8(a) contract awards.	3% of Federal prime and subcontractor award dollars
Contract Award Dollars – FY 2004	\$8.4 Billion	\$18.5 Billion	\$4.8 Billion
Value as Procurement Assistant Tool	*****	*****	*****

SELLING TO THE FEDERAL GOVERNMENT IN 14 STEPS

Step 1: Identify your product or service by the North American Industry Classification System (NAICS) code and the Federal Supply Classification (FSC) code. Most federal government product/service listings and procurements are identified by their NAICS code and/or FSC code. Find the codes relating to your business at these web sites: NAICS codes: <http://www.census.gov/epcd/www/naics.html> and FSC codes: <http://fpdcapp.gsa.gov/pls/fpdsweb/PscWiz> .

Step 2. Check with the Small Business Administration (SBA) to determine whether your business falls within the established table of small business size standards matched to NAICS industries. <http://www.sba.gov/size/> .

Step 3: Obtain a DUNS Number from Dun & Bradstreet. This is a business identification number that is used much like a person's social security number. There is no charge for assigning a DUNS number and you must have one to proceed. Call Dun & Bradstreet at (866) 705-5711 or use its website <https://eupdate.dnb.com/requestoptions/government/ccrreg/> .

Step 4: Register in the Centralized Contractor Registration (CCR) System. With very limited exception, you must be registered in CCR to be awarded a contract from any federal agency. Small businesses also must complete the Small Business Supplemental Page within CCR. CCR is a database designed to hold contractor information required for Federal procurement and financial transactions. The information in the CCR also facilitates fast electronic payment of contractor invoices. <http://www.ccr.gov> . Effective October 1, 2003, Federal Acquisition Regulation require contractors to register in CCR prior to award of any contract, basic agreement, basic ordering agreement, or blanket purchase agreement.

Step 5: Determine if your small business qualifies for 8(a), SDB or HUBZone certification. These certifications are detailed. (See Table X.X for small business definitions). They are essentially for small businesses that are owned and controlled by socially and economically disadvantaged individuals or small businesses with a "principal office" in a historically underutilized business zone. When contracting, the Federal Government sometimes sets aside procurements for or offers preferences to 8(a), SDB, WSB, or HUBZone certified business concerns. <http://www.sba.gov/gcbd/> .

Step 6: Register in Online Representations and Certifications Application (ORCA). ORCA is a recent e-Government initiative that was designed to replace the paper based Representations and Certifications process. ORCA is the primary federal government repository for all of your company's required representations and certifications and can be accessed by federal procuring agencies. <http://orca.bpn.gov> .

Step 7: Begin to search for current Federal Government procurement opportunities. Identify current procurement opportunities in your product or service area by visiting the FedBizOpps web site at <http://www.fedbizopps.gov> which is the federal government's single point of entry for business opportunities over \$25,000.

Step 8: Familiarize yourself with contracting regulations. The Federal Acquisition Regulation (FAR) can be found at <http://www.arnet.gov/far/>. Individual federal agencies also have supplemental procurement regulations, such as the Defense Federal Acquisition Regulation Supplement (DFARS) located at <http://www.acq.osd.mil/dpap/dars/dfars/index.htm>. These are the legal regulations for federal acquisitions.

Step 9: Investigate if getting on the GSA Schedule is right for you. Federal agencies can use Government-wide Acquisition Contracts (GWACs) and General Services Administration's (GSA) Federal Supply Service (FSS) Schedule Contracts to make purchases. These pre-approved contracts are used to buy commonly used products, services, and solutions needed to fulfill their missions and day-to-day operations. These opportunities are rarely announced on the FedBizOpps site as stated in Step 7 above, but are normally competed amongst pre-qualified vendors already under contract. <http://www.gsa.gov> .

Step 10: Seek additional assistance, as needed. Procurement Technical Assistance Centers (PTACs) are federally-funded organizations that offer free help. PTACs can be found at <http://www.dla.mil/db/procurem.htm> .

Step 11: Familiarize yourself with the procurement forecasts for your targeted agencies. Each federal agency typically produces an Annual Procurement Forecast, as required by the Small Business Act, which is maintained by their Office of Small and Disadvantaged Business Utilization (OSDBU) or equivalent. You may contact each agency OSDBU for specifics - www.firstgov.gov. Use this procurement forecast to determine good prospects for you.

Step 12: Explore subcontracting opportunities. Although there is no single point of entry for subcontracting opportunities in the federal or civilian procurement marketplace, SBA's SUB-Net is a valuable resource for obtaining information on subcontracting opportunities. Prime contractors, government, commercial, and educational entities, may post solicitations or notices on that website. <http://www.web.sba.gov/subnet/> For DoD, the Office of Small Business Programs (OSBP) Website lists all major DoD prime contractors by state and provides a point of contact for each prime contractor. Investigate potential opportunities with these firms. Many of these firms also have websites that may be useful. <http://www.acq.osd.mil/sadbu/> .

Step 13: Investigate government programs. There are several SBA programs that may be of interest to you, such as the 8(a) Business Development Mentor-Protégé Program, the Office of Women's Business Ownership Entrepreneurial Development (<http://www.sba.gov/aboutsba/sbaprograms/onlinewbc>) including independent women's business centers that the SBA funds in all 50 states, the Small Business Innovation Research Program (SBIR), the Small Business Technology Transfer Research Program (STTR), and the Technology Resources Network. <http://www.sba.gov/gcbd/> . Other federal resources include the state-by-state Small Business Resource Guide of HUD - <http://www.hud.gov/offices/osdbu/resource/guide/local.cfm>, and the Department of Commerce's Minority Business Development Agency (<http://www.mbdba.gov/>) including the Minority Business Development Centers in over 30 states.

Step 14: Market your firm to the right contacts. Identify the federal agencies likely to be your prospective customers. Research their requirements, and familiarize yourself

with applicable procurement regulations and strategies. When it is time to market your product or service, present your capabilities directly to the people who buy it, wherever possible. Provide catalogues and brochures to key personnel within the agencies. Many federal agencies hold small business fairs or matchmaking sessions that emphasize how to do business with the government, and provide information regarding their program activities.

Table B7 - Procurement to Women-owned Small Businesses (WOSBs) by Federal Agencies, 2005

Department Name	Contracts to WOSBs, 2005	Dollar Value of Contracts to WOSBs, 2005	Average Contract Value to WOSBs, 2005	Portion of all contract dollars to WOSBs, 2005	Portion of Small Business (SB) contract \$'s to WOSBs, 2005	Portion of Small Business (SB) contract \$'s to WOSBs, 2000	Percentile Change, 2000-05, SB Contract \$'s to WOSBs
Total Federal	346,685	\$ 10,494,302,639	\$ 30,270	3.3%	13%	10%	+ 3.0%
HUD	984	\$ 260,722,123	\$ 264,962	24.3%	38%	26%	+ 12.3%
EDUCATION	290	\$ 31,558,545	\$ 108,823	2.5%	27%	8%	+ 19.1%
COMMERCE	2,701	\$ 182,713,517	\$ 67,647	9.6%	19%	19%	- 0.1%
JUSTICE	15,008	\$ 266,874,873	\$ 17,782	6.4%	18%	9%	+ 9.1%
TREASURY	1,758	\$ 129,772,619	\$ 73,818	6.7%	18%	18%	0.0%
GSA	16,255	\$ 269,065,285	\$ 16,553	6.2%	18%	9%	+ 8.6%
Dept of STATE	4,769	\$ 131,535,930	\$ 27,581	6.2%	18%	9%	+ 8.9%
VA	101,289	\$ 457,782,228	\$ 4,520	4.7%	16%	14%	+ 2.4%
INTERIOR	7,700	\$ 242,270,096	\$ 31,464	9.0%	16%	7%	+ 9.1%
LABOR	764	\$ 87,315,037	\$ 114,287	5.3%	16%	16%	- 0.2%
TRANSPORTATION	941	\$ 99,285,636	\$ 105,511	6.6%	15%	8%	+ 6.6%
SOCIAL SECURITY	739	\$ 45,090,947	\$ 61,016	5.2%	15%	11%	+3.2%
NASA	1,568	\$ 255,739,581	\$ 163,099	2.1%	14%	15%	- 0.8%
ENERGY	1,162	\$ 131,290,230	\$ 112,986	0.6%	14%	8%	+ 5.6%
EPA	1,598	\$ 68,302,534	\$ 42,743	4.7%	14%	13%	+ 0.8%
HHS	5,347	\$ 460,325,340	\$ 86,090	5.0%	14%	15%	- 1.3%
DEFENSE	168,683	\$ 6,586,186,327	\$ 39,045	3.0%	12%	9%	+ 2.9%
AGRICULTURE	6,771	\$ 209,897,130	\$ 30,999	5.3%	11%	7%	+ 3.6%
HOMELAND SCRTY	3,999	\$ 437,658,396	\$ 109,442	4.5%	10%		
FEMA	35	\$ 6,701,192	\$ 191,463	1.3%	3%	20%	- 17.2%

Table B7 - Procurement to Minority-owned Small Businesses by Federal Agencies, 2005

Department Name	Contracts to SDBs, 2005	Dollar Value of Contracts to SDBs, 2005	Average Contract Value to SDBs, 2005	Portion of all contract dollars to SDBs, 2005	Portion of Small Business (SB) contract \$'s to SDBs, 2005	Portion of Small Business (SB) contract \$'s to SDBs, 2000	Percentile Change, 2000-05, SB Contract \$'s to SDBs
Total Federal	286,851	\$21,715,093,160	\$ 75,702	6.9%	27%	29%	- 1.9%
HUD	1,668	\$ 398,985,491	\$ 239,200	37.2%	59%	23%	+ 35.6%
NASA	2,724	\$ 793,377,220	\$ 291,254	6.5%	45%	48%	- 3.4%
FEMA	62	\$ 102,254,722	\$ 1,649,270	19.4%	42%	39%	+ 3.5%
INTERIOR	6,484	\$ 585,039,080	\$ 90,228	21.7%	39%	28%	+ 11.4%
Dept of STATE	3,375	\$ 280,399,053	\$ 83,081	13.3%	38%	53%	- 14.9%
EPA	2,113	\$ 180,504,452	\$ 85,426	12.3%	36%	33%	+ 3.3%
LABOR	908	\$ 185,350,313	\$ 204,130	11.2%	33%	34%	- 0.6%
ENERGY	1,867	\$ 309,945,696	\$ 166,013	1.4%	33%	37%	- 4.3%
EDUCATION	237	\$ 37,918,358	\$ 159,993	3.0%	33%	41%	- 8.7%
VA	118,924	\$ 898,091,367	\$ 7,552	9.2%	32%	29%	+ 3.6%
GSA	11,576	\$ 468,709,253	\$ 40,490	10.8%	31%	38%	- 6.6%
COMMERCE	2,598	\$ 294,507,757	\$ 113,359	15.5%	30%	39%	- 9.2%
TRANSPORTATION	1,240	\$ 189,488,430	\$ 152,813	12.7%	28%	33%	- 4.7%
SOCIAL SECURITY	538	\$ 87,528,443	\$ 162,692	10.1%	28%	35%	- 7.1%
DEFENSE	111,849	\$14,522,598,044	\$ 129,841	6.6%	27%	26%	+ 1.0%
HHS	4,687	\$ 767,888,838	\$ 163,834	8.3%	23%	41%	- 17.9%
TREASURY	999	\$ 151,645,347	\$ 151,797	7.8%	21%	34%	- 13.1%
AGRICULTURE	5,130	\$ 329,614,465	\$ 64,252	8.3%	17%	24%	- 7.0%
HOMELAND SCR TY	4,080	\$ 730,571,425	\$ 179,062	7.6%	16%		
JUSTICE	3,341	\$ 215,946,233	\$ 64,635	5.2%	15%	24%	- 8.6%

Note: SDB includes both SDBs and 8(a) certified SDBs.

APPENDIX C – STATE AND LOCAL GOVERNMENTS AS A CUSTOMER BASE

Note: All data from the 2002 Economic Census Survey of Business Owners.

Figure C1

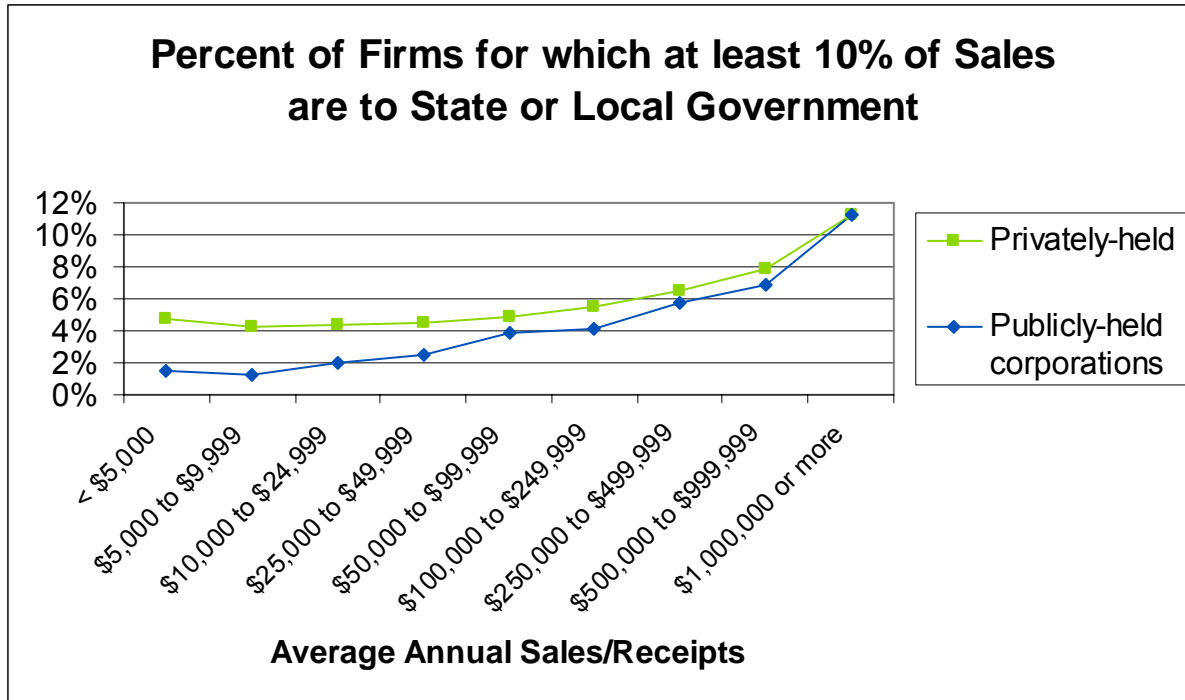


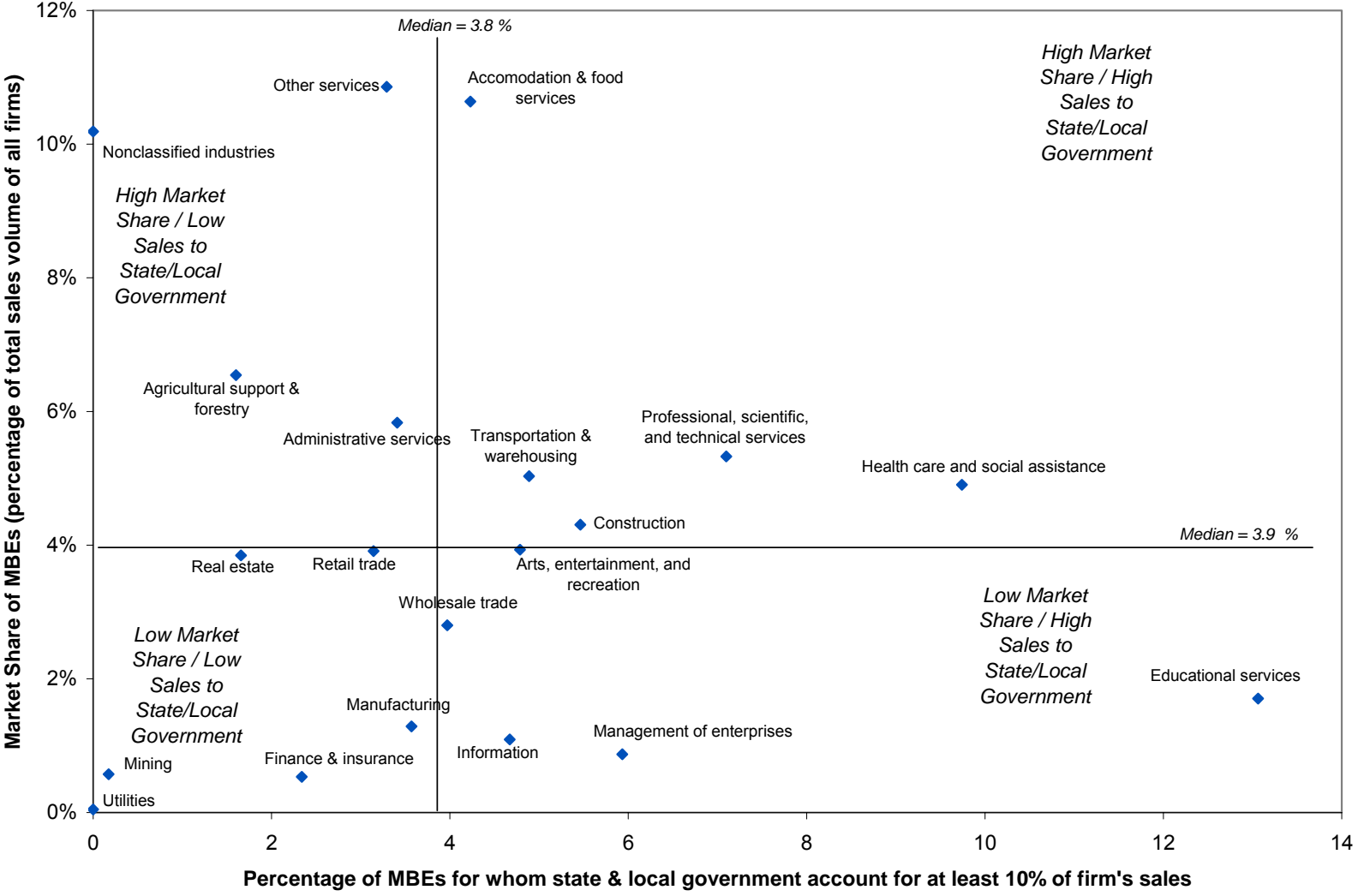
Figure C2: Percent of Respondent Firms That Said \geq 10% of Sales are to State or Local Governments

NAICS	Industry	All respondent firms	American Indian and Alaska Native firms	Asian firms	Black or African American respondent firms	Hispanic or Latino respondent firms	Native Hawaiian and Other Pacific Islander	Female-owned respondent firms	Male-owned White respondent firms	Publicly held and other firms whose owners' characteristics are indeterminate
0	Total for all sectors	5.3	7.6	4.2	7.5	4.8	8.3	5.4	5.3	6.0
11	Forestry, fishing & hunting, & ag support services (113-115)	2.5	4.5	0.0	3.2	3.0	0.0	4.5	2.2	2.0
21	Mining	3.2	4.3	0.0	0.0	0.0	0.0	3.8	3.3	1.8
22	Utilities	7.9	0.0	0.0	0.0	0.0	0.0	11.5	8.8	5.4
23	Construction	5.0	7.6	5.9	6.4	4.1	9.8	8.6	4.6	6.3
31-33	Manufacturing	5.2	3.8	3.0	4.9	3.7	11.4	5.4	5.2	3.8
42	Wholesale trade	6.3	8.6	2.0	8.7	4.3	10.2	6.8	6.8	4.3
44-45	Retail trade	4.0	4.7	2.7	3.5	3.4	6.6	2.6	5.2	4.7
48-49	Transportation & warehousing	5.0	7.9	4.7	6.7	4.0	8.8	6.8	4.5	4.9
51	Information	5.6	7.4	4.4	4.5	4.9	0.0	5.8	5.5	7.3
52	Finance & insurance	2.3	1.7	1.2	4.2	3.4	0.0	2.7	2.0	3.6
53	Real estate & rental & leasing	1.8	2.4	1.2	3.1	1.7	0.0	1.2	2.1	1.1
54	Professional, scientific, & technical services	7.3	10.2	5.5	8.5	8.4	13.0	7.1	7.5	7.2
55	Management of companies & enterprises	8.0	15.1	3.7	11.0	6.2	0.0	9.1	6.0	10.2
56	Administrative & support & waste management & remediation service	5.0	7.8	2.6	6.0	3.1	0.0	4.6	5.3	7.9
61	Educational services	17.0	24.2	7.2	22.3	16.9	0.0	18.9	17.1	9.4
62	Health care & social assistance	9.1	12.7	9.3	12.0	9.0	16.4	8.7	8.4	17.5
71	Arts, entertainment, & recreation	5.7	9.5	3.8	9.2	4.0	0.0	4.8	6.4	5.1
72	Accommodation & food services	3.9	6.1	4.0	5.8	3.8	0.0	4.6	3.4	4.2
81	Other services (except public administration)	3.8	5.1	2.7	5.7	2.9	7.3	2.7	4.5	3.6
99	Industries not classified	3.1	0.0	0.0	0.0	0.0	0.0	5.4	2.3	0.0

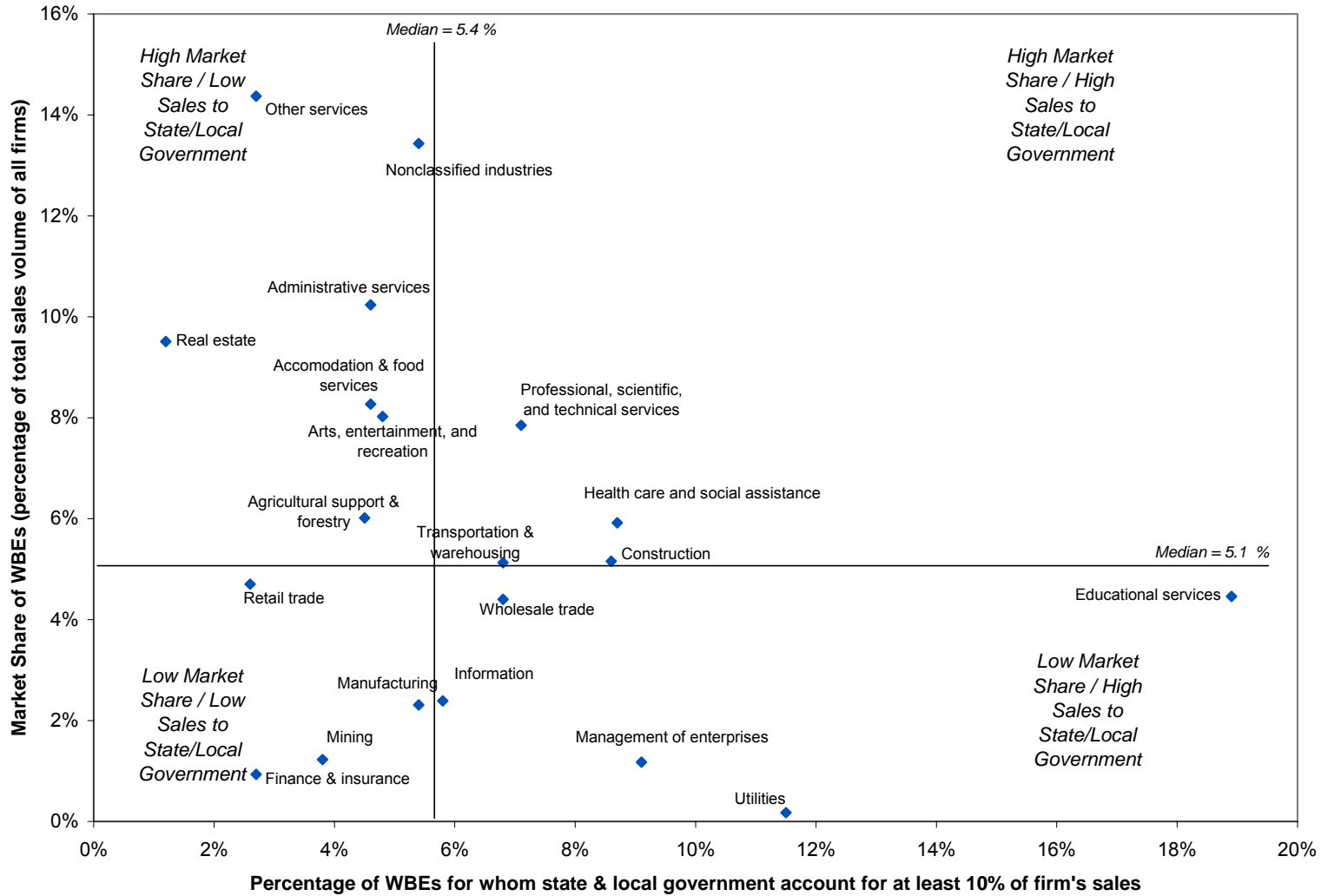
Note: Male-owned White respondents includes any male Hispanic or Latino business owners who said that their race was white.

Source: 2002 Economic Census Survey of Business Owners, accessed through American FactFinder, 6/21/07.

Minority-owned Businesses Market Share by State & Local Government Sales



Women-owned Businesses Market Share by State & Local Government Sales



APPENDIX D – STATE PROCUREMENT TRACKING

Figure D1: State M/WBE Procurement Tracking

State	Sub-Group	Fiscal Year	Amount of M/WBE Procurement	Percent of Total State Procurement	Total State Discretionary Procurement
Arizona	MBE	'05-'06	\$7.6 million	0.1%	\$6.0 billion
Arizona	WBE	'05-'06	\$1.0 million	< 0.1 %	\$6.0 billion
Connecticut	M/WBE	'05-'06	\$92 million	^C 15.8%	^C \$582 million
Connecticut	M/WBE	'06-'07	\$58 million	^C 11.5%	^C \$506 million
Delaware	M/WBE	'05-'06	\$36 million	2%	\$720 million
Florida	^{FT} M/WBE	'04-'05	\$1.60 billion	25%	\$6.4 billion
Illinois	M/W/DisBE	'02-'03	\$401 million	17.0%	\$2.36 billion
Illinois	M/W/DisBE	'03-'04	\$354 million	19.2%	\$1.85 billion
Illinois	M/W/DisBE	'04-'05	\$387 million	23%	\$1.69 billion
Illinois	M/W/DisBE	'05-'06	\$395 million	22%	\$1.83 billion
Iowa	M/WBE (TSB)	'05-'06	\$31.8 million	2.6%	\$1.23 billion
Maryland	^M M/W/DisBE	'02-'03	\$577 million	15.6%	\$3.69 billion
Maryland	^M M/W/DisBE	'03-'04	\$641 million	17.4%	\$3.69 billion
Maryland	^M M/W/DisBE	'04-'05	\$954 million	21%	\$4.55 billion
Maryland	^M M/W/DisBE	'05-'06	\$1.02 billion	22%	\$4.64 billion
Massachusetts	MBE	'04-'05	\$187 million	4.5%	\$4.21 billion
Massachusetts	WBE, white	'04-'05	\$204 million	4.8%	\$4.21 billion
Massachusetts	MBE	'05-'06	\$191 million	4.9%	\$3.91 billion
Massachusetts	WBE, white	'05-'06	\$236 million	6.0%	\$3.91 billion
Minnesota	MBE	'04-'05	\$72.3 million	5.2%	\$1.4 billion
New York	M/WBE	'05-'06	\$445 million	5.2%	\$8.5 billion
North Carolina	M/WBE (HUB)	'03-'04	\$334 million	7.3%	\$4.6 billion
North Carolina	M/WBE (HUB)	'05-'06	\$495 million	9.3%	\$5.3 billion
Ohio	MBE	'05-'06	\$109 million (non-construction)	5.8%	\$1.9 billion (non-construction)
Ohio	S/M/WBE (EDGE)	'05-'06	\$58.3 million (construction)	3.3%	\$1.8 billion (construction)

State	Sub-Group	Fiscal Year	Amount of M/WBE Procurement	Percent of Total State Procurement	Total State Discretionary Procurement
Pennsylvania	MBE	'03-'04	\$24.7 million	4.3%	\$572 million
Pennsylvania	MBE	'04-'05	\$20.5 million	3.0%	\$693 million
Pennsylvania	WBE	'03-'04	\$26.6 million	4.7%	\$572 million
Pennsylvania	WBE	'04-'05	\$29.5 million	4.3%	\$693 million
South Carolina	M/WBE	'04-'05	\$30 million	10%	\$300 million
Texas	^{FT} M/WBE-HUB	'03-'04	\$1.43 billion	14.5%	\$9.9 billion
Texas	^{FT} M/WBE-HUB	'04-'05	\$1.57 billion	13.8%	\$11.3 billion
Texas	^{FT} M/WBE-HUB	'05-'06	\$1.73 billion	13.7%	\$12.6 billion
Virginia	MBE	'98-'02	(5-year average)	0.44%	
Virginia	WBE, white	'98-'02	(5-year average)	0.83%	
Virginia	MBE	'04-'05	\$84 million	1.8%	\$4.7 billion
Virginia	WBE, white	'04-'05	\$79 million	1.7%	\$4.7 billion
Virginia	MBE	'05-'06	\$102 million	2.3%	\$4.4 billion
Virginia	WBE, white	'05-'06	\$102 million	2.3%	\$4.4 billion
Virginia	MBE	'06-'07	\$193 million	4.3%	\$4.4 billion
Virginia	WBE, white	'06-'07	\$170 million	3.8%	\$4.4 billion
Washington	MBE	'05-'06	\$33 million	1.2%	\$2.7 billion
Washington	WBE	'05-'06	\$48 million	1.8%	\$2.7 billion

^C The percentage and total state procurement for Connecticut are estimated based on SBE 25% goal.

^{FT} The Florida M/WBE program and the Texas HUB program do not have business size limits.

^M Maryland total includes businesses owned by people with disabilities, nonprofits that serve people with disabilities, and sheltered workshops. (See table below for break-out by sub-groups).

Figure D2: Florida M/WBE Procurement Tracking for Sub-groups, FY 2004-05

Sub-Group	Amount of M/WBE Procurement	Percent of Total State Procurement	Total State Procurement
Certified M/WBEs	\$693 million	10.8%	\$6.4 billion
Non-Certified M/WBEs	\$910 million	14.2%	\$6.4 billion
Nonprofit (certified)	\$1.57 billion	24.5%	\$6.4 billion
WBEs, white	\$782 million	12.2%	\$6.4 billion
African-American BE	\$351 million	5.5%	\$6.4 billion
Hispanic/Latino BE	\$371 million	5.8%	\$6.4 billion
Asian BE	\$88 million	1.4%	\$6.4 billion
Native American BE	\$14 million	0.2%	\$6.4 billion

Note: Nonprofit includes any nonprofit organization whose Board of Directors or employees consist primarily of persons of color or those which primarily serve communities of color. All sub-group totals consist of both certified and non-certified firms.

Figure D3: Illinois M/WBE Procurement Tracking for Sub-groups, FY 2004-05

Sub-Group	Amount of M/WBE Procurement	Percent of Total State Procurement	Total State Procurement
M/W/DisBE (All)	\$387 million	22.9%	\$1.69 billion
MBEs, male	\$170 million	10.1%	\$1.69 billion
MBEs, female	\$55 million	3.3%	\$1.69 billion
WBEs, white	\$142 million	8.4%	\$1.69 billion
Person-with-disability BE	\$20 million	1.2%	\$1.69 billion
African-American BE	\$123 million	7.3%	\$1.69 billion
Hispanic/Latino BE	\$59 million	3.5%	\$1.69 billion
Asian BE	\$43 million	2.5%	\$1.69 billion
Native American BE	\$90,000	< 0.1%	\$1.69 billion

Note: Total state procurement is that portion of state spending subject to goals.

Figure D4: Maryland M/WBE Procurement Tracking for Sub-groups, FY 2004-05

Sub-Group	Amount of M/WBE Procurement	Percent of Total State Procurement	Total State Procurement
WBEs, all	\$261 million	5.7%	\$4.55 billion
Person-with-disability BE	\$28 million	0.6%	\$4.55 billion
Nonprofit (certified)	\$184 million	4.0%	\$4.55 billion
Sheltered workshops (cert)	\$140 million	3.1%	\$4.55 billion
African-American BE	\$184 million	4.0%	\$4.55 billion
Hispanic/Latino BE	\$58 million	1.3%	\$4.55 billion
Asian BE	\$90 million	2.0%	\$4.55 billion
Native American BE	\$11 million	0.2%	\$4.55 billion

Note: M/W/DisBE includes businesses owned by people with disabilities, nonprofit organizations serving people with disabilities, and sheltered workshops.

Figure D5: Washington M/WBE Procurement Tracking, FY 1992-2006

Fiscal Year	Amount of MBE Procurement	MBE Percent of Total	Amount of WBE Procurement	WBE Percent of Total	Total State Procurement
1992	\$17 million	1.9%	\$12 million	1.3%	\$882 million
1993	\$86 million	4.8%	\$71 million	3.9%	\$1.8 billion
1994	\$104 million	5.9%	\$87 million	4.9%	\$1.6 billion
1995	\$108 million	5.9%	\$97 million	5.3%	\$1.1 billion
1996	\$71 million	3.0%	\$72 million	3.1%	\$2.2 billion
1997	\$85 million	4.2%	\$85 million	4.2%	\$2.2 billion
1998	\$123 million	7.2%	\$105 million	6.1%	\$1.1 billion
1999	\$58 million	4.9%	\$65 million	5.5%	\$1.8 billion
2000	\$50 million	4.3%	\$50 million	4.2%	\$1.7 billion
2001	\$37 million	1.8%	\$42 million	2.0%	\$2.0 billion
2002	\$30 million	1.5%	\$33 million	1.7%	\$1.4 billion
2003	\$20 million	0.8%	\$28 million	1.2%	\$2.1 billion
2004	\$19 million	0.7%	\$25 million	1.0%	\$2.2 billion
2005	\$22 million	0.8%	\$33 million	1.2%	\$2.1 billion
2006	\$32 million	1.2%	\$48 million	1.8%	\$2.2 billion

APPENDIX E – LIST OF STATE INCLUSIVE BUSINESS POLICY CHANGES, 1996 TO 2006

Fig. 1

State Policy Trend on Inclusive Business Programs 1996 to 2006



States listed **above** the date indicate actions that enhanced inclusive business programs.
 States listed **below** the date indicate actions that diminished inclusive business programs by the state.

Narrative of Changes in Selected State Inclusive Business Programs, 1996-2006

Glossary:

MBE goal: Procurement goal for minority business enterprises

WBE goal: Procurement goal for women business enterprises

DBE goal: For USDOT funds; procurement goal for disadvantaged business enterprises, includes small MBEs and WBEs

Alaska, Nevada, and Oregon 2005:

All three states suspend race- and gender-conscious goals in its DBE programs to comply with *Western States Paving, Inc. vs. Washington DOT* decision of the 9th Circuit Court.

Arizona 2004:

Creates a plan to enhance M/WBE procurement and an electronic vendor directory which includes M/WBE status. It begins to require M/WBE bidders on state contracts under \$50,000.

California 1996:

Voters pass Proposition 209 which eliminated its 15% MBE and 5% WBE goal program on state funding and prevented local governments from having similar programs. **2006:** CALTRANS suspends race- and gender-conscious goals in its DBE programs to comply with *Western States Paving* decision.

Colorado 1996:

As a result of the *Adarand* Supreme Court decision, the CO DOT restricts firms that can certify as DBEs to only those that can certify disadvantage. **2006:** CO attaches mandatory M/WBE goals to state construction spending in Denver, based on city/county disparity study.

Delaware 2000:

Begins supplier diversity efforts and in 2001 begins procurement tracking. In **2003**, EO 52 establishes that any RFP over \$10,000 must be transmitted to M/WBE business development associations.

Florida 2000:

Eliminates its goals-based program, faced with the threat of a ballot initiative. It will be replaced by a supplier diversity program, but in the meantime, M/WBE procurement falls dramatically. **2000:** Republican Governor Jeb Bush announces the creation of the 'One Florida' supplier diversity program, with aggressive targeted outreach, to be led by the former head of a private sector supplier diversity council. After program planning and set-up, the program effectively is initiated in 2001. **2005:** State procurement percentage from certified M/WBEs nearly doubled in 2004-05 from the previous year, rising to 8.5% of total, as the One Florida program continues to gain momentum.

Illinois 2004:

Procurement from M/WBEs drops dramatically in FY2004 despite a strong affirmative action program on paper. **2006:** IDOT completes disparity study that lead to a 22.8% DBE goal on federal highway funds, the second highest rate in U.S.

Indiana 2001:

Creates an M/WBE procurement goals program, based on 1999 Disparity Study. **2003:** Creates an M/WBE advisory commission and a new administrative division to lead its supplier diversity effort. Each state agency is now required to have a supplier diversity plan and coordinator. The newly created division also provides technical assistance to each agency and sets up M/WBE vendor fairs.

Louisiana 1996:

Eliminates its mandatory goals program.

Maryland 2000:

Increases its procurement goal from 14% to 25%, based on a new disparity study. As part of the 25% goal, it establishes a 10% WBE goal and becomes the first state to set a specific African-American-owned business procurement goal of 7%. **2003:** Reorganizes its M/WBE program and institutes uniform procurement data reporting, including payment data. **2006:** MD completes comprehensive disparity study that leads to 24.3% DBE goal, the highest rate in U.S., and continued 25% M/WBE goal on state funds.

Massachusetts 1996:

Governor Weld introduces a goals-based procurement program, with E.O. 390. In **2004**, legislation passes that improves monitoring of its M/WBE program and requires local governments that receive state construction funding to have M/WBE participation goals.

Michigan 2006:

Voters pass Proposal 2, ending local government race- and gender-conscious contracting programs. State policies changed little since the state had no such program prior to Proposal 2.

Minnesota 1998:

Ends part of its formal goals program on state funds after a legal challenge. In 2003, the state's race- and gender-conscious goals for its DOT DBE program are upheld in *Sherbrooke Turf, Inc.* by 8th Circuit Court. Minnesota doubles procurement from M/WBEs from 2003 to **2004**, its largest increase in over 12 years.

Missouri 2004:

Eliminates its 15% M/WBE contract-specific goals program after a legal challenge. In **2005** the state sets up a voluntary supplier diversity program with voluntary goals and targeted outreach; gains momentum in **2006** and **2007**.

New Hampshire 1999:

Ends race- and gender-conscious goals for its DOT DBE program.

New Jersey 2003:

Eliminates its M/WBE goals program due to a lawsuit, replacing it with a 25% small business procurement goal.

North Carolina 1999:

Under EO 150 establishes the Office for Historically Underutilized Businesses (HUBs) and sets specific state HUB procurement goals.

Ohio 1998:

State's 15% MBE contract goal on construction projects is judged unconstitutional and eliminated. The MBE goal for other goods and services is suspended, but then restored in **1999** after successful appeal of a legal ruling. **2003:** The state creates the EDGE program, setting a 5% goal for contracting with EDGE-certified firms—small businesses located in an area with high unemployment or small M/WBEs.

Oklahoma 2001:

Eliminates its 5% M/WBE bid preference program after it unsuccessfully appealed a legal challenge.

Pennsylvania 2004:

Overhauls its M/WBE certification process and requires each state agency to have a supplier diversity plan and coordinator, after an administrative audit.

South Carolina 2006:

Overhauls its M/WBE program with new procedures and tracking measures to ensure implementation.

Tennessee 2004:

Passes legislation that requires all state agencies to implement supplier diversity practices, with assistance and tracking provided by the newly created Office of Diversity Business Enterprise.

Virginia 2006:

Sets up e-procurement system and requires each agency to have voluntary M/WBE sub-goals.

Washington 1998:

Voters pass Initiative 200 which reverses affirmative procurement efforts on the part of a few state agencies as well as local governments. The state begins supplier diversity plans in **2004**, with coordinators in each state agency. M/WBE procurement slowly increases after six years of decline post-I200. **2005:** Washington DOT dismantles the race- and gender-conscious portion of its DBE program on federal transportation funds after the *Western States Paving Inc.* The 9th Circuit Court found that its program was not narrowly tailored and the state must show concrete examples of discrimination. In late **2006**, WDOT completed a rigorous disparity study, demonstrating discrimination, and set a DBE goal of 18.8%, including race- and gender-conscious goals.

Note: Inclusive business policies and programs include mandatory or laudatory contract goals, certification programs, supplier diversity articulation across state agencies, DBE goal level on FHWA funds, and targeted business services and financing.