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2020 STATE OF COLORADO DISPARITY STUDY Executive Summary



Prepared for

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**Executive Summary
November 2020**

EXECUTIVE SUMMARY.

2020 State of Colorado Disparity Study

Keen Independent Research LLC

The State of Colorado seeks to ensure that there is a level playing field for historically disadvantaged businesses to compete for State contracts. Because it had never examined equity in its contracts statewide, in 2019, the Legislature authorized a study of the utilization and availability of Historically Underutilized Businesses (HUBs) regarding State contracts. Senate Bill 19-135 defined HUBs to be businesses owned by people of color, women, persons with physical or mental disabilities and members of the LGBT community.

In January 2020, the State engaged Keen Independent Research LLC (Keen Independent) to conduct this disparity study. Keen Independent prepared a 700+ page report documenting methodology, results and recommendations. The Executive Summary includes:

- A. Background on the study;
- B. Quantitative and qualitative information for the Colorado marketplace;
- C. Disparity analysis for State contracts;
- D. Conclusions; and
- E. Recommendations.

A. Background on the Study

The legal framework for the study and programs operated by the State are summarized below.

Legal framework for the disparity study. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to create and operate Minority Business Enterprise (MBE) programs or any other initiatives benefitting a group based on race. Legal restrictions also apply to gender-conscious measures such as Women Business Enterprise (WBE) programs. State and local governments that have successfully defended these types of programs often have disparity studies and other evidence supporting the need for such efforts. Successful defense of the City and County of Denver program is one example.

Different legal standards pertain to programs that base eligibility on factors other than race or gender. If legally challenged, state and local governments with procurement equity programs focusing on small businesses or companies owned by persons with disabilities, for example, need only show that the law authorizing those preferences is rationally related to a legitimate government interest. (Chapter 2 and Appendix B of the report discuss the legal framework in detail, including analysis of U.S. Supreme Court decisions and other cases.)

Current programs operated by the State. As discussed later in this Executive Summary, the State currently operates programs that provide preferences based on business size or ownership by specific groups, but they are limited in scope.

Disparity study research activities. The Keen Independent study team began work in January 2020 and completed a draft report in November 2020. Local team members included Taloma Partners and CREA Results in Denver; Combs Communication in Aurora; and Distel Consulting in Grand Junction. Team members from outside Colorado were Holland & Knight, Customer Research International and Donaldson Consulting.

State contracts and subcontracts. The legislation authorizing the study required examination of State procurements between July 1, 2014 and June 30, 2018 for all State executive agencies and community colleges except for the institutions of higher education that have opted out of the State Procurement Code. The judicial and legislative branches of State government are also outside the scope of the study.

Keen Independent examined data from State procurement information systems to identify contracts and subcontracts awarded within the study period. Keen Independent also reached out to prime contractors to secure additional subcontract information. In total, Keen Independent analyzed 21,588 contracts and subcontracts totaling \$3.2 billion.

Relevant geographic market area. Not including purchases state governments typically make from national markets, 83 percent of State contract dollars went to firms with locations in Colorado. Therefore, Keen Independent focused on firms in Colorado when performing the marketplace and availability analyses in the disparity study.

Analysis of marketplace conditions. The study team compiled and analyzed quantitative information about outcomes for people of color, women and persons with disabilities in Colorado and the businesses owned by those groups. There was little available information on LGBT-owned businesses in Colorado, however.

The study team conducted in-depth interviews with business owners and trade association representatives across Colorado. Interviews included business owners of color, women, persons with disabilities and members of the LGBT community. Additional business owners answered questions about marketplace barriers in the study team's availability survey. Overall, Keen Independent obtained input from more than 700 business owners, trade association representatives, focus group participants and others providing qualitative information.

Nearly all business owners indicated to the study team that they had been impacted by the COVID-19 pandemic. However, the interviews, focus groups and surveys primarily concentrated on long-term conditions in the marketplace and experiences with State contracts.

Availability, utilization and disparity analyses. Disparity analyses for a state or local government compare the percentage of that organization's contract dollars going to different groups of firms with what might be anticipated given the relative availability of those groups for those contracts.

- Data for the availability analysis came from Keen Independent's online and telephone surveys that reached thousands of companies in Colorado. Firms were asked about their qualifications and interest in contracts with the State and their availability for different types, sizes and locations of prime contracts and subcontracts.

- After completing surveys with 17,052 businesses in Colorado, the study team developed a database of 2,140 businesses reporting that they were available for specific types of State contracts and subcontracts. Of those businesses:
 - 17 percent were minority-owned (MBEs);
 - 20 percent were white women-owned (WBEs);
 - 6 percent were owned by persons with disabilities; and
 - Less than 1 percent were LGBT-certified.

Note that a firm could be minority or white woman-owned *and* be owned by a person with a disability *and* be LGBT-certified, which is why there were three separate disparity analyses when examining these groups.

- Keen Independent then determined the availability of HUBs and other businesses for each of the more than 21,000 State procurements examined in the study (including subcontracts). For some procurements, HUBs were a relatively large percentage of total firms available. There were other contracts for which only a few firms were available and none were HUBs. Keen Independent combined the results of these contract-by-contract availability analyses to calculate overall availability benchmarks for each HUB group.

Based on this availability analysis, one might expect MBE/WBEs to have received about 28 percent of State contract dollars during the study period. The dollar-weighted availability figure was 12 percent for businesses owned by persons with disabilities and 0.02 percent for LGBT-certified businesses.

Keen Independent compared the share of contract dollars going to MBEs (by racial and ethnic group), WBEs, firms owned by persons with disabilities, and LGBT-certified firms (“utilization”) with what might be expected for each group based on the availability analysis.

Public participation in the study. The State and Keen Independent implemented an extensive public participation process as part of the study. These activities included:

- An External Stakeholder Group and an Internal Stakeholder Group that met with the study team throughout the project.
- Distribution of information to more than 20,000 businesses and other groups.
- A website, telephone hotline and email address for anyone wishing to comment.
- Email and telephone surveys that reached more than 17,000 companies.
- In-depth personal interviews and focus groups with more than 100 business owners, trade association representatives and others.

Because of the COVID-19 pandemic, interviews and meetings from mid-March 2020 through the end of the study were held virtually. The pandemic did not negatively affect the comprehensiveness of the study.

B. Quantitative and Qualitative Information for the Colorado Marketplace

Keen Independent examined marketplace conditions based on U.S. Census data, survey information, in-depth interviews, focus groups and other sources.

Marketplace conditions for minority- and women-owned businesses. There is quantitative and qualitative information suggesting that there is not a level playing field for minority- and women- owned businesses in the Colorado construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment industries. This includes evidence of unequal opportunities to:

- Enter and advance as employees within certain industries;
- Start and operate businesses; and
- Obtain financing and bonding to start, operate and expand their businesses.

Business outcomes also differed for MBE/WBEs compared with majority-owned companies, including disparities in total business revenue.

Results for businesses owned by persons with disabilities. Persons with disabilities in Colorado are less likely than other groups to own businesses in the study industries. There is also evidence that persons with disabilities who own businesses earn less than other business owners.

Results for LGBT-certified firms. There was very limited information available regarding members of the LGBT community — there were no data on employment outcomes for LGBT individuals and there was no information about members of the LGBT community in U.S. Census Bureau data — however, qualitative evidence indicated that members of the LGBT community experience unequal treatment, negative stereotypes and other forms of discrimination in the Colorado marketplace.

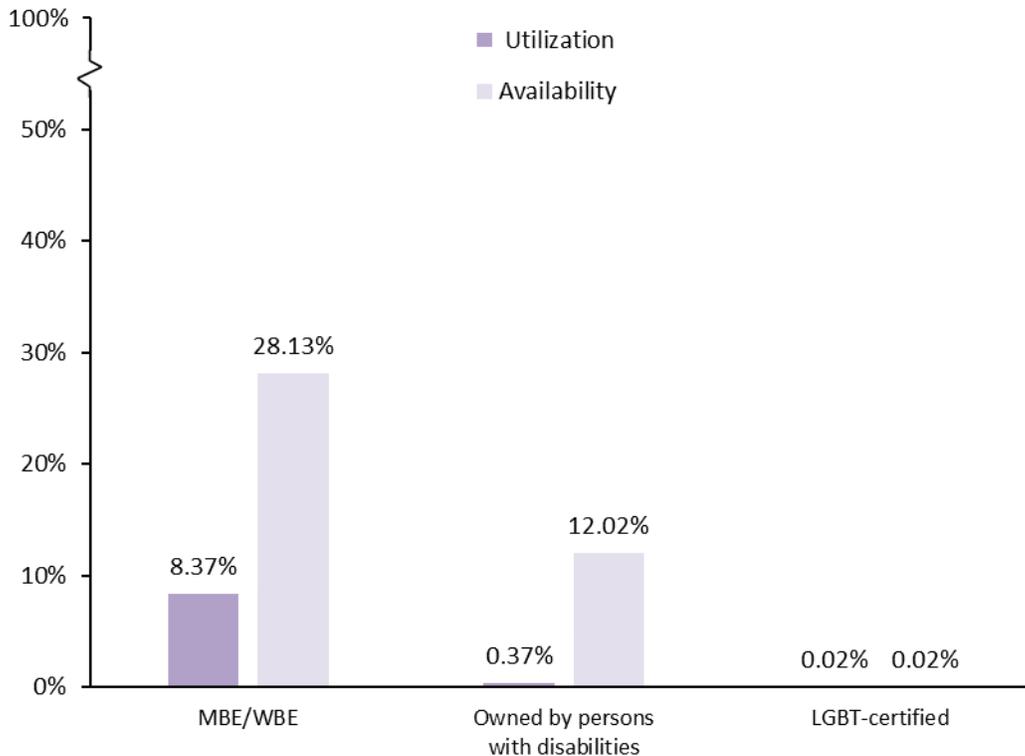
C. Disparity Analysis for State Contracts

Results for minority- and women-owned firms, firms owned by persons with disabilities businesses and LGBT-certified firms are presented below in Figure ES-1.

- Minority- and women-owned businesses received about 8 percent of State contract dollars, below the 28 percent expected from the availability analysis.
- Utilization of firms owned by persons with disabilities was less than 1 percent of contract dollars. This was also below availability of those businesses for this work (12%).
- A very small percentage of contract dollars went to LGBT-certified firms (0.02%), but because a very small number of firms in the availability analysis were LGBT-certified, that utilization is comparable to the availability benchmark for LGBT-certified companies. (This result would be different if there were data for all firms owned by members of the LGBT community.)

Figure ES-1.

Utilization and availability of MBE/WBEs, businesses owned by persons with disabilities and LGBT-certified businesses in State of Colorado procurements, July 2014–June 2018



Source: Keen Independent Research utilization and availability analyses for State contracts.

Disparity indices. The study team compared utilization and availability results using a “disparity index,” which is calculated by dividing utilization by availability and multiplying by 100 (“100” is parity).

The disparity index for MBE/WBE utilization in State procurement is 30 (8.37% divided by 28.13%, multiplied by 100). Because the index is below 80, the disparity is “substantial,” according to guidance from the courts.

Figure ES-2 shows utilization, availability and disparity results for MBEs (by group) as well as white women-owned firms, firms owned by persons with disabilities and LGBT-certified firms.

Note that utilization and availability were both very low for LGBT-certified companies and would be higher if there were better data on non-certified firms owned by members of the LGBT community. (The disparity index is “107” because the calculation was made with results going out additional decimal places.)

Figure ES-2.

Disparity analysis for State procurements, July 2014–June 2018

| | Utilization | Availability | Disparity index |
|---|---------------|----------------|-----------------|
| African American-owned | 0.36 % | 5.66 % | 6 |
| Asian American-owned | 2.87 | 2.13 | 135 |
| Hispanic American-owned | 1.75 | 5.37 | 33 |
| Native American-owned | 0.11 | 2.93 | 4 |
| Total MBE | 5.09 % | 16.09 % | 32 |
| WBE (white women-owned) | 3.28 | 12.04 | 27 |
| Total MBE/WBE | 8.37 % | 28.13 % | 30 |
| Owned by persons with disabilities | 0.37 % | 12.02 % | 3 |
| LGBT-certified | 0.02 | 0.02 | 107 |

Note: Disparity index = 100 x Utilization/Availability.
Results rounded to the nearest one-hundredth of a percent, but disparity indices calculated using utilization and availability results that were not rounded.

Source: Keen Independent Research utilization and availability analyses for State contracts.

Summary of disparity results by industry. Finally, Keen Independent examined utilization and availability for each group for each of the industries specified in the State’s authorization of the disparity study: construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment contracts.

Results for State construction, construction-related professional services, other professional services, goods and other services contracts. In each of these industries, there was a substantial disparity between utilization and availability for firms owned by:

- African Americans;
- Hispanic Americans;
- Native Americans;
- White women; and
- Persons with disabilities.

Utilization of Asian American-owned firms exceeded what was expected from the availability analyses for construction, construction-related professional services, goods and other services contracts. There was a substantial disparity for Asian American-owned firms for other professional services contracts.

Brokerage and investment. For State brokerage and investment contracts, there were substantial disparities between utilization and availability of:

- African American-, Hispanic American- and Native American-owned businesses; and
- White women-owned firms.

D. Conclusions

Keen Independent concludes the following based on the combined study information:

1. The State is already helping small businesses, including diverse businesses, but with limited tools and resources.
2. Based on the evidence examined in this study, there is not a level playing field in Colorado for businesses for certain groups.
3. Without further action, disparities in participation of diverse businesses will likely persist.
4. With legislation and resources, disparities can be narrowed or eliminated.
5. Addressing disparities needs to be a multi-year, phased effort.

1. The State is already helping small businesses, including diverse businesses, but with limited tools and resources. For many years, the State has reached out to diverse businesses and other small businesses to help companies learn about and bid on its contracts and subcontracts. It also provides information on available technical assistance.

In the past three years, the State worked with stakeholders to modernize its State Procurement Code and supporting rules to increase flexibility and transparency in its procurement. In August 2020, Governor Polis Executive Order D 2020 175 directed DPA and other agencies to review and dismantle barriers in procurement, including those identified as part of the disparity study.

The State assists diverse businesses through the other initiatives as well.

- The Colorado Department of Transportation (CDOT) operates the Federal Disadvantaged Business Enterprise (DBE) Program on its U.S. Department of Transportation-funded contracts. In addition to providing supportive services to DBEs, CDOT sets DBE contract goals on certain contracts.
- CDOT's Policy Directive 606.0 "Policy on Fostering Small Business Capacity" (March 23, 2018) includes tailoring and incentivizing contracts to encourage small business participation in CDOT contracts. CDOT's Emerging Small Business (ESB) Program is one element. CDOT-certified ESBs are eligible for evaluation points in point-based contract selections, financial incentives in cost-based contract selections and mentor-protégé programs. CDOT can identify contracts for which it will only solicit bids or proposals from ESBs.
- The State has set an overall goal that at least 3 percent of all contract dollars be awarded to service-disabled veteran-owned small businesses (SDVOSBs) (CRS 24-103-905). The State can use preferences to encourage participation of SDVOSBs.
- Finally, the State has a Disability Set Aside program that encourages purchases from non-profit agencies employing persons with severe disabilities. (C.R.S. 24-103-801).

Programs operated by some states increase the participation of diverse businesses in their contracts to levels much higher than found for the State of Colorado. They use the following tools:

- Contract goals;
- Price or point preferences; and
- Sheltered market or restrictive bidding programs.

5. Addressing disparities needs to be a multi-year, phased effort. Finally, Keen Independent concludes that any State actions to address identified disparities must be part of a sustained, multi-year effort.

- It will take time for the State to put all the needed tools in place.
- The State has decentralized procurement (as do many other states), which might slow implementation of new programs.
- The State’s procurement functions must continue to operate while making any changes.
- Building a vendor base of diverse firms and certification of those firms for any new programs occurs over years, not months.
- Some of the diverse firms that might eventually be involved in State contracts and subcontracts are not fully ready to compete for this work.
- CDOT’s experience with its ESB Program shows that new programs take time to launch, refine and become effective.

E. Recommendations

Keen Independent recommends that the State authorize and implement a multi-part program to assist socially and economically disadvantaged businesses for the types of contracts and State agencies examined in this study.

Overall recommendations. Keen Independent recommends that the Legislature authorize and fund a program addressing the disadvantages for diverse firms identified in this study.

1. Establish policy and overall annual aspirational goals for eligible contracts;
2. Remove barriers to small business participation;
3. Work with partners to increase the readiness of diverse businesses for State contracts;
4. Authorize and implement new equity tools in State procurement; and
5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement.

Figure ES-4 summarizes examples of initiatives the State might consider in pursuing these objectives. Chapter 8 discusses each recommendation in further detail.

Figure ES-4.
Recommended contract equity program for the State of Colorado

| Recommendations |
|--|
| 1. Establish policy and overall annual aspirational goals for eligible contracts |
| <ul style="list-style-type: none"> a. Set separate annual statewide goals for the utilization of the following four groups: MBEs, WBEs, businesses owned by persons with disabilities and firms owned by members of the LGBT community b. Set department-specific goals for all diverse businesses combined c. Implement systems to track and report progress in reaching these goals d. Develop new certification system |
| 2. Remove barriers to small business participation |
| <ul style="list-style-type: none"> a. Increase the threshold when it requires bid, payment and performance bonds for its contracts b. Address any overly restrictive insurance requirements c. Ensure that evaluation criteria used in qualifications-based awards do not have unintended negative effects on smaller or newer businesses d. Consolidate and simplify the process to register as a potential bidder e. Reach out to expand the number of diverse businesses registered with the State f. Consistently require prime contractors to identify the subcontractors they use on State contracts g. Expand CDOT's subcontractor payment notifications system to other departments |
| 3. Work with partners to increase the readiness of diverse businesses for State contracts |
| <ul style="list-style-type: none"> a. Continue to partner with others to provide business assistance b. Provide real-time training on how to win and perform State contracts and subcontracts c. Partner with others to provide training and resources for business insurance d. Create bonding assistance program e. Create working capital program for diverse businesses winning State contracts f. Expand CDOT's mentor-protégé program statewide |
| 4. Authorize and implement new equity tools in State procurement |
| <ul style="list-style-type: none"> a. Implement a contract goals program b. Implement a sheltered market program c. Implement a price and evaluation preference program d. Regularly evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset |
| 5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement |
| <ul style="list-style-type: none"> a. The legislative and judicial branches of the State and institutions of higher education that have not reviewed equity in their contracts should do so b. Local governments in Colorado should also review equity in their contracts |

New equity tools in State procurement. Recommendation #4 in Figure ES-4 suggests that the State consider the following programs found in other states and used by CDOT and the City and County of Denver:

- Contract goals program;
- Sheltered market program; and
- Price and evaluation preference program.

a. Implement a contract goals program. CDOT operates contract goals programs for DBEs on its USDOT-funded contracts. It also can apply ESB goals for certain contracts. Prime contractors bidding on a contract with a goal must either include DBE or ESB participation at a level that meets the goal or show good faith efforts to do so. CDOT sets contract goals specific to each contract.

Based on its Uniform Reports, firms certified as DBEs received 12 percent of contract dollars on in its Federal Highway Administration-funded contracts for FFY 2013–FFY2017, much higher than found for all minority- and women-owned firms on other State construction contracts. Much of CDOT’s DBE participation came from DBE contract goals for those contracts.

The State should consider authorizing a contract goals program for large construction contracts and other contracts with meaningful subcontract opportunities and operate it like CDOT’s contract goals programs. Eligibility of firms for the program is discussed later in this Executive Summary.

b. Implement a sheltered market program. CDOT also operates a sheltered market program for ESBs on certain small contracts. The State should consider expanding a sheltered market program across its agencies. Under that program, the State would be allowed to limit its solicitation of bids and proposals for certain small contracts to certified firms.

- The State typically publicly advertises procurements of \$25,000 or more through its electronic procurement systems. For purchases under \$25,000, departments can directly make purchases without competition. The State might adopt a policy that staff first consider certified firms for those purchases (based on an electronic list of those firms).
- For purchases between \$25,000 and \$150,000, the State might consider operating the sheltered market program where it would seek competitive bids either from certified firms or all small businesses (if there is insufficient availability of certified businesses). Only eligible firms would receive solicitations to provide these quotes.

c. Implement a price and evaluation preference program. States such as Minnesota have a price or evaluation preference for certified firms, sometimes with a cap on the amount of price preference that can be considered. For the State of Minnesota, a certified firm is selected for an award if its price is within 6 percent of the low bidder unless the price difference exceeds \$60,000. The State of Minnesota can also give up to 6 out of 100 points to a proposer that is a certified firm on qualifications-based awards. Keen Independent’s 2017 Minnesota Joint Disparity Study determined that minority- and women-owned firms received 11 percent of State of Minnesota contract dollars (higher than the State of Colorado) even though availability of MBE/WBEs for State of Minnesota contracts was lower than for the State of Colorado.

The State of Colorado should consider authorizing a price and evaluation preference program. If it also implements a sheltered market program, the price and evaluation preference program might apply to procurements of \$150,000 or more.

d. Evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset. The State will need to decide the eligibility criteria for any contract goals, sheltered market or preference program based on the evidence in this report and other information available to the State. Participation in those programs would be limited to firms receiving certification that meet those criteria. For example, the State might consider a program for socially and economically disadvantaged businesses. Firms would need to meet criteria for both social and economic disadvantage to be certified, as explained below.

- **Social disadvantage.** Programs such as the City and County of Denver’s M/WBE program and the USDOT’s Federal DBE Program operated by CDOT certify firms for participation based in part on social disadvantage. In the Federal DBE Program and Denver’s program, firms that are owned by minorities and women have the rebuttable presumption of social disadvantage, but other firms can and do become certified as a DBE if they can show they are socially disadvantaged.

Given that broader definition, businesses that have been socially disadvantaged because they are owned by members of the LGBT community could be certified on a case-by-case basis if those firms can provide instances of such discrimination. Other firms facing social disadvantage could apply as well.

- **Economic disadvantage.** The second criterion for program participation is whether the firm is economically disadvantaged. A common measure is whether the firm is a small business under U.S. Small Business Administration (SBA) size standards for its industry. This is one of the criteria for economic disadvantage under the USDOT Federal DBE Program. Denver’s M/WBE program uses SBA size standards as well. CDOT’s ESB program has had a cap on revenue that is one-half of the SBA size limit, but is considering a new certification applying the full SBA small business standard.

Some programs also require that the company’s owner has personal net worth below a certain cap in order to be deemed to be economically disadvantaged. The USDOT Federal DBE Program currently has a \$1.32 million cap on the personal net worth of the business owner not including the value of the business or primary residence. Many state MBE/WBE programs do not include a cap on personal net worth.

Figure ES-5 on the following page summarizes results of the disparity analysis by industry for each group of businesses examined in the study. Based on whether or not there was a substantial disparity in State contracts (and considering other information in this study and outside the study), the State might choose to include a group of firms in an industry as socially disadvantaged based on their race, ethnicity, gender or other personal characteristics of the group.

Except for other professional services contracts, there was not a disparity in the utilization of Asian American-owned firms in State contracts. Therefore, the State might decide to not presumptively consider Asian American-owned companies in those other industries to be socially disadvantaged. Such firms could still apply for certification under the program but would need to demonstrate social disadvantage on an individual basis in their applications.

Each applicant for certification would also need to demonstrate economic disadvantage according to the standards set by the State, which might be as straightforward as being a small business (see the note “If small” in Figure ES-5).

Figure ES-5.
Implication of disparity results on presumptions of disadvantage

| Industry and business ownership | Substantial disparity for State contracts | Presumption of disadvantage | |
|--|---|-----------------------------|-----------------------|
| | | Social disadvantage | Economic disadvantage |
| Construction, Construction-related professional services, Goods, Other services | | | |
| African Americans | Yes | Yes | If small |
| Asian Americans | No | Case-by-case | If small |
| Hispanic Americans | Yes | Yes | If small |
| Native Americans | Yes | Yes | If small |
| WBE (white women) | Yes | Yes | If small |
| Persons with disabilities | Yes | Yes | If small |
| Members of LGBT community | Insufficient information | Case-by-case | If small |
| Other individuals | | Case-by-case | If small |
| Other professional services | | | |
| African Americans | Yes | Yes | If small |
| Asian Americans | Yes | Yes | If small |
| Hispanic Americans | Yes | Yes | If small |
| Native Americans | Yes | Yes | If small |
| WBE (white women) | Yes | Yes | If small |
| Persons with disabilities | Yes | Yes | If small |
| Members of LGBT community | Insufficient information | Case-by-case | If small |
| Other individuals | | Case-by-case | If small |
| Brokerage and investment | | | |
| African Americans | Yes | Yes | If small |
| Asian Americans | Insufficient information | Case-by-case | If small |
| Hispanic Americans | Yes | Yes | If small |
| Native Americans | Yes | Yes | If small |
| WBE (white women) | Yes | Yes | If small |
| Persons with disabilities | Insufficient information | Case-by-case | If small |
| Members of LGBT community | Insufficient information | Case-by-case | If small |
| Other individuals | | Case-by-case | If small |

Authorization, funding and sunset clause. Legislation authorizing a contract equity program should specify the types of additional tools that can be used in the procurement process, provide sufficient funding for a successful program and indicate a date that the program will expire unless it is reauthorized.

- Keen Independent recommends legislative authorization of the additional equity tools described in this report. The study team also recommends approval of additional staffing and other financial resources for program implementation, including new tracking systems and certification of firms.
- Federal courts have required a sunset clause for such equity programs. Programs can be reauthorized, but usually only based on updated disparity studies and other information about the marketplace. A future disparity study might indicate that certain programs are no longer needed or that stronger measures are warranted. States with programs often conduct disparity studies every four to five years to provide such information.