SB161_L.002

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-161 be amended as follows:

Amend printed bill, page 10, line 10, strike "If," and substitute "(a) THE DIVISION OR COURT, AS APPLICABLE, MAY AWARD THE EMPLOYER REASONABLE COSTS INCURRED IN THE ADMINISTRATIVE CLAIM OR CIVIL ACTION IF, WITHIN FOURTEEN DAYS AFTER A WRITTEN DEMAND LETTER IS SENT OR AN ADMINISTRATIVE CLAIM OR A CIVIL ACTION IS SENT TO OR SERVED ON THE EMPLOYER FOR UNPAID WAGES OR COMPENSATION:

(I) THE EMPLOYER MAKES FULL LEGAL TENDER OF ALL AMOUNTS DEMANDED FOR ALL EMPLOYEES; AND

(II) THE EMPLOYEES RECEIVING SUCH TENDER:

(A) ARE HIGHLY COMPENSATED EMPLOYEES, AS DEFINED IN THE ANNUAL COLORADO OVERTIME AND MINIMUM PAY STANDARDS (COMPS) ORDER ADOPTED BY THE DIRECTOR, WHO PROCEED WITH AN ADMINISTRATIVE CLAIM OR CIVIL ACTION SEEKING MORE THAN FIFTY THOUSAND DOLLARS IN WAGES OR COMPENSATION PER EMPLOYEE; AND

(B) ULTIMATELY FAIL TO RECOVER A TOTAL SUM THAT IS GREATER THAN THE AMOUNT THE EMPLOYER TENDERED.

(b) If,".

** *** ** *** **

LLS: Christy Chase x2008

SB161_L.003

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-161 be amended as follows:

Amend printed bill, page 4, line 11, after "CONTINUES." add "THE DIVISION SHALL TRANSMIT ANY PENALTY IMPOSED AND COLLECTED PURSUANT TO THIS SECTION TO THE STATE TREASURER, WHO SHALL CREDIT THE MONEY TO THE WAGE THEFT ENFORCEMENT FUND CREATED IN SECTION 8-4-113 (3).

SECTION 2. In Colorado Revised Statutes, 8-1-116, **amend** (2) as follows:

8-1-116. Investigators to have access to premises - penalty. (2) Any person who hinders or obstructs the director or any ~~such~~ person authorized by the director in the exercise of any power conferred by this article 1, or any employer who in bad faith refuses reasonable access to the employer's premises, or any person who gives advance notice of any inspection to be conducted under this article 1 without authority from the director or the director's designee ~~commits a class 2 misdemeanor~~ IS SUBJECT TO A PENALTY OF NOT LESS THAN FIFTY DOLLARS FOR EACH DAY THAT THE CONDUCT CONTINUES. THE DIVISION SHALL TRANSMIT ANY PENALTY IMPOSED AND COLLECTED PURSUANT TO THIS SECTION TO THE STATE TREASURER, WHO SHALL CREDIT THE MONEY TO THE WAGE THEFT ENFORCEMENT FUND CREATED IN SECTION 8-4-113 (3).

SECTION 3. In Colorado Revised Statutes, 8-1-117, **amend** (2) as follows:

8-1-117. Director to have access to books - penalty. (2) Any employer ~~who~~ THAT refuses to exhibit and furnish ~~said~~ THE director or any agents of the division an inspection of any books, records, and payrolls of ~~such~~ THE employer, showing or reflecting in any way upon the amount of wage expenditure of ~~such employers~~ THE EMPLOYER, and other data, facts, and statistics appertaining to the purposes of this ~~article~~ ARTICLE 1 or ~~who~~ THAT refuses to admit ~~such~~ THE director or any agent of the division to any place of employment shall pay a penalty of not less than fifty dollars for each day that ~~such~~ THE failure, neglect, or refusal continues. THE DIVISION SHALL TRANSMIT ANY PENALTY IMPOSED AND COLLECTED PURSUANT TO THIS SECTION TO THE STATE TREASURER, WHO SHALL CREDIT THE MONEY TO THE WAGE THEFT ENFORCEMENT FUND CREATED IN SECTION 8-4-113 (3).

SECTION 4. In Colorado Revised Statutes, 8-1-140, **amend** (2) as follows:

8-1-140. Violation - penalty. (2) If any employer, employee, or any other person fails, refuses, or neglects to perform any duty lawfully enjoined within the time prescribed by the director or fails, neglects, or refuses to obey any lawful order made by the director or any judgment or

decree made by any court as provided in this ~~article~~ ARTICLE 1, for each such violation, ~~such~~ THE employer, employee, or any other person shall pay a penalty of not less than one hundred dollars for each day ~~such~~ THE violation, failure, neglect, or refusal continues. THE DIVISION SHALL TRANSMIT ANY PENALTY IMPOSED AND COLLECTED PURSUANT TO THIS SECTION TO THE STATE TREASURER, WHO SHALL CREDIT THE MONEY TO THE WAGE THEFT ENFORCEMENT FUND CREATED IN SECTION 8-4-113 (3).

SECTION 5. In Colorado Revised Statutes, **amend** 8-1-142 as follows:

8-1-142. Collection of penalties. All penalties provided for in this ~~article~~ ARTICLE 1 shall be collected in a civil action brought against the employer or employee in the name of the director, WHICH CIVIL ACTION MAY BE AN ADMINISTRATIVE ACTION OR A JUDICIAL ACTION AUTHORIZED BY LAW. Any fine provided in this ~~article~~ ARTICLE 1 is considered a penalty and recoverable in a civil action as provided in this section unless the violation of this ~~article~~ ARTICLE 1, for the punishment of which said fine is provided, is designated as a misdemeanor or other crime.".

Renumber succeeding sections accordingly.

Page 4, strike lines 23 through 25 and substitute "SECTION.".

Page 6, line 18, strike "~~at the time of such discharge~~" and substitute "at the time of ~~such discharge~~ EMPLOYEE SEPARATION OR".

Page 7, line 20, strike "If" and substitute "ON OR AFTER JANUARY 1, 2023, if".

Page 8, line 7, strike "THREE" and substitute "THE GREATER OF TWO".

Page 8, line 8, strike "compensation," and substitute "compensation".

Page 8, line 9, strike "FOR THE EMPLOYER'S FIRST".

Page 8, strike lines 10 and 11 and substitute "OR ONE THOUSAND DOLLARS; OR".

Page 8, line 12, strike "THE" and substitute "IF THE EMPLOYEE CAN SHOW THAT THE EMPLOYER'S FAILURE OR REFUSAL TO PAY WAGES OR COMPENSATION WAS WILLFUL, THE WAGE CLAIM IS FOR LESS THAN FIFTY THOUSAND DOLLARS, AND THE EMPLOYEE IS NOT A HIGHLY COMPENSATED EMPLOYEE, AS DEFINED IN THE ANNUAL COLORADO OVERTIME AND MINIMUM PAY STANDARDS (COMPS) ORDER ADOPTED BY THE DIRECTOR,

THE".

Page 8, strike lines 14 through 27 and substitute "THREE thousand ~~five hundred~~ DOLLARS.

(c) ~~If the employee can show that the employer's failure to pay is willful, the penalty required under paragraph (b) of this subsection (3) shall increase by fifty percent.~~ Evidence that a judgment OR WAGE DETERMINATION OF THE".

Page 9, line 3, after "conduct." add "AN EMPLOYER'S FAILURE OR REFUSAL TO PAY WAGES OR COMPENSATION IS PER SE WILLFUL IF THE EMPLOYEE CAN SHOW THAT THE CLAIM FOR WHICH A PENALTY UNDER SUBSECTION (3)(b) OF THIS SECTION IS ASSESSED IS THE EMPLOYER'S SECOND OR SUBSEQUENT FAILURE OR REFUSAL TO PAY WAGES OR COMPENSATION WITHIN THE FIVE YEARS IMMEDIATELY PRECEDING THE CLAIM.".

Page 12, line 22, strike "(A)".

Page 13, line 1, strike "(B)" and substitute "(II)".

Page 13, strike lines 7 through 14.

Page 14, line 14, strike "AND ANY PENALTY".

Page 15, strike lines 12 through 16.

Page 15, line 17, strike "OF THE COURT. THE" and substitute:

"(c) (I) UPON RECORDING PURSUANT TO SUBSECTION (2)(b) OF THIS SECTION, THE".

Page 15, strike lines 23 through 25.

Page 15, line 26, strike "AND PENALTIES".

Page 15, line 27, after "section" insert "OR SECTION 8-1-114 (2), 8-1-116 (2), 8-1-117 (2), OR 8-1-140 (2)".

Page 16, line 13, strike "IF" and substitute "ON OR AFTER JANUARY 1, 2023, IF".

Page 17, line 6, strike "ASSETS," and substitute "ASSETS THAT IS FILED LATER IN TIME;".

Page 17, strike lines 7 and 8.

Page 21, strike lines 11 through 27.

Page 22, strike lines 1 through 6.

Renumber succeeding sections accordingly.

Page 23, line 15, after "(2);" add "AND".

Page 23, strike line 16.

Renumber succeeding subparagraph accordingly.

Page 26, strike lines 18 through 27.

Strike pages 27 through 35.

Page 36, strike lines 1 through 20.

Renumber succeeding section accordingly.

Page 36, line 21, strike "This" and substitute "Section 6 of this act takes effect January 1, 2023, and the remainder of this".

Page 37, line 2, strike "governor." and substitute "governor; except that section 6 of this act takes effect on January 1, 2023.".

** *** ** *** **

SB161_L.004

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-161 be amended as follows:

Amend proposed committee amendment (SB161_L.003), page 3, line 12, after "PAY" insert "TO EMPLOYEES", and after "COMPENSATION" insert "OF THE SAME OR SIMILAR TYPE".

** *** ** *** **

LLS: Christy Chase x2008

SB161_L.005

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-161 be amended as follows:

Amend printed bill, page 7, line 16, strike "OWED," and substitute "OWED FOR ANY VIOLATION OF THIS ARTICLE 4,".

Page 7, line 21, strike "an employee's" and substitute "~~an employee's~~ ALL".

** *** ** *** **

LLS: Christy Chase x2008

SB161_L.006

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-161 be amended as follows:

Amend printed bill, page 10, strike lines 4 through 7 and substitute "~~under this subsection (3).~~ If, ~~an~~ WITHIN FOURTEEN DAYS AFTER A WRITTEN DEMAND IS SENT TO OR AN ADMINISTRATIVE CLAIM OR A CIVIL ACTION IS SENT TO OR SERVED ON THE EMPLOYER, THE employer makes a FULL legal tender of ~~the full amount claimed in the action within fourteen days after service of the complaint or other document commencing the action~~ ALL AMOUNTS DEMANDED FOR ALL EMPLOYEES, the employee shall dismiss the action.".

** *** ** *** **

LLS: Christy Chase x2008

SB163_L.001

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-163 be amended as follows:

Amend printed bill, page 18, after line 23 insert:

"(d) A REPRESENTATIVE OF A STATEWIDE TRADE ASSOCIATION WHOSE MEMBERSHIP INCLUDES GENERAL AND SPECIALITY COMMERCIAL CONTRACTORS THAT CONSTRUCT STATE PROJECTS;".

Reletter succeeding paragraphs accordingly.

** *** ** *** **

LLS: Jason Gelender x4330

SB163_L.002

SENATE COMMITTEE OF REFERENCE AMENDMENT

Committee on Business, Labor, & Technology.

SB22-163 be amended as follows:

Amend printed bill, page 3, strike lines 5 and 6 and substitute:

"REMEDIATION OF STATE PROCUREMENT DISPARITIES THAT AFFECT HISTORICALLY UNDERUTILIZED BUSINESSES".

Page 4, line 3, strike "TITLED".

Page 4, strikes lines 4 through 27.

Strike pages 5 through 9.

Page 10, strike lines 1 through 16 and substitute: "IT FOUND, DETERMINED AND DECLARED, IN SECTION 24-103-1001, THE IMPORTANCE OF ENSURING AN EQUITABLE STATE PROCUREMENT PROCESS;

(b) AS REQUIRED BY SENATE BILL 19-135, THE DEPARTMENT CONTRACTED WITH AN ENTITY INDEPENDENT OF THE DEPARTMENT TO CONDUCT A STATE DISPARITY STUDY REGARDING THE PARTICIPATION OF HISTORICALLY UNDERUTILIZED BUSINESSES, WHICH INCLUDED A REVIEW OF MINORITY-OWNED BUSINESSES, WOMEN-OWNED BUSINESSES, BUSINESSES OWNED BY PERSONS WITH DISABILITIES, AND BUSINESSES OWNED BY MEMBERS OF THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY, IN STATE CONTRACTS ENTERED INTO BY ANY DEPARTMENT, AGENCY, OR INSTITUTION OF THE EXECUTIVE BRANCH OF STATE GOVERNMENT;

(c) THE STATE DISPARITY STUDY EXAMINED WHETHER A DISPARITY EXISTS BETWEEN THE PERCENTAGE OF STATE CONTRACT DOLLARS GOING TO HISTORICALLY UNDERUTILIZED BUSINESSES AND THE PERCENTAGE THAT MIGHT BE EXPECTED TO GO TO THOSE BUSINESSES BASED ON THE RELATIVE NUMBER OF THOSE BUSINESSES THAT ARE READY, WILLING AND ABLE TO PERFORM DIFFERENT TYPES, SIZES AND LOCATIONS OF STATE CONTRACTS;

(d) THE INDEPENDENT ENTITY COMPLETED THE REQUIRED STATE DISPARITY STUDY AND ISSUED THE "2020 STATE OF COLORADO DISPARITY STUDY FINAL REPORT" IN NOVEMBER 2020, WHICH FOUND THAT:

(I) MINORITY-OWNED AND WOMEN-OWNED BUSINESSES RECEIVED ABOUT EIGHT PERCENT OF STATE CONTRACT DOLLARS, BELOW THE TWENTY-EIGHT PERCENT EXPECTED FROM THE AVAILABILITY ANALYSIS;

(II) UTILIZATION OF FIRMS OWNED BY PERSONS WITH DISABILITIES WAS LESS THAN ONE PERCENT OF CONTRACT DOLLARS, BELOW THE TWELVE PERCENT EXPECTED FROM THE AVAILABILITY ANALYSIS,

(III) A VERY SMALL PERCENTAGE OF CONTRACT DOLLARS WENT TO

BUSINESSES CERTIFIED AS BEING OWNED BY MEMBERS OF THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY (LGBT-CERTIFIED BUSINESSES), BUT BECAUSE A VERY SMALL NUMBER OF BUSINESSES IN THE AVAILABILITY ANALYSIS WERE LGBT-CERTIFIED BUSINESSES, THAT UTILIZATION IS COMPARABLE TO THE AVAILABILITY BENCHMARK FOR LGBT-CERTIFIED BUSINESSES;

(IV) THERE WAS A SUBSTANTIAL DISPARITY BETWEEN UTILIZATION AND AVAILABILITY FOR FIRMS OWNED BY AFRICAN AMERICAN PERSONS, HISPANIC AMERICAN PERSONS, NATIVE AMERICAN PERSONS, WHITE WOMEN, AND PERSONS WITH DISABILITIES FOR STATE CONSTRUCTION, CONSTRUCTION-RELATED PROFESSIONAL SERVICES, OTHER PROFESSIONAL SERVICES, GOODS AND OTHER SERVICES CONTRACTS;

(V) THERE WAS A SUBSTANTIAL DISPARITY FOR BUSINESSES OWNED BY ASIAN-AMERICAN PERSONS FOR OTHER PROFESSIONAL SERVICES CONTRACTS;

(VI) FOR STATE BROKERAGE AND INVESTMENT CONTRACTS, THERE WERE SUBSTANTIAL DISPARITIES BETWEEN UTILIZATION AND AVAILABILITY OF BUSINESSES OWNED BY AFRICAN AMERICAN PERSONS, HISPANIC AMERICAN PERSONS, NATIVE AMERICAN PERSONS, AND WHITE WOMEN;

(e) AS DETAILED IN THE STATE DISPARITY STUDY REPORT, THE RESULTS OF THE STUDY INDICATE THAT DISPARITIES BETWEEN AVAILABILITY OF HISTORICALLY UNDERUTILIZED BUSINESSES AND UTILIZATION OF SUCH BUSINESSES EXISTS IN STATE CONTRACTING;

(f) ALTHOUGH THE STATE IS ALREADY ENDEAVORING TO HELP SMALL BUSINESSES OBTAIN STATE CONTRACTS, IT IS DOING SO WITH LIMITED TOOLS AND RESOURCES;

(g) THE DISPARITIES IDENTIFIED IN THE STATE DISPARITY REPORT ARE LIKELY TO PERSIST UNLESS FURTHER ACTION IS TAKEN; AND

(h) THE STATE DISPARITY STUDY REPORT RECOMMENDED THAT THE GENERAL ASSEMBLY CONSIDER ENACTING LEGISLATION TO AUTHORIZE AND FUND A PROCUREMENT EQUITY PROGRAM TO ADDRESS THE SPECIFIC DISPARITIES SHOWN IN THE STATE DISPARITY STUDY REPORT FOR HISTORICALLY UNDERUTILIZED BUSINESSES BASED ON INDUSTRY AND BUSINESS OWNERSHIP.".

Page 10, after line 18 insert:

"(1) "CONSTRUCTION-RELATED PROFESSIONAL SERVICES" MEANS SERVICES WITH ARCHITECTURE AND ENGINEERING, SURVEYING, REAL ESTATE CONSULTING, AND RELATED WORK.

(2) "DISPARITY" MEANS AN INEQUALITY, DIFFERENCE, OR GAP BETWEEN AN ACTUAL OUTCOME AND A REFERENCE POINT OR BENCHMARK.

(3) "DISPARITY INDEX" MEANS A MEASURE OF THE RELATIVE

DIFFERENCE BETWEEN AN OUTCOME, SUCH AS PERCENTAGE OF CONTRACT DOLLARS RECEIVED BY A GROUP, AND A CORRESPONDING BENCHMARK, SUCH AS THE PERCENTAGE OF CONTRACT DOLLARS THAT MIGHT BE EXPECTED GIVEN THE RELATIVE AVAILABILITY OF THAT GROUP FOR THOSE CONTRACTS. IN THIS EXAMPLE, DISPARITY INDEX IS CALCULATED BY DIVIDING A NUMERATOR OF PERCENT UTILIZATION BY A DENOMINATOR OF PERCENT AVAILABILITY AND THEN MULTIPLYING THE RESULT BY 100. A DISPARITY INDEX OF 100 INDICATES "PARITY" OR UTILIZATION "ON PAR" WITH AVAILABILITY. DISPARITY INDEX FIGURES CLOSER TO 0 INDICATE LARGER DISPARITIES BETWEEN UTILIZATION AND AVAILABILITY.".

Renumber succeeding subsections accordingly.

Page 10, line 20, strike "PROFIT-MAKING" and substitute "BUSINESS, FOR-PROFIT".

Page 10, line 26, strike "GROUP" and substitute "GROUP; EXCEPT THAT A BUSINESS OWNED BY ASIAN AMERICAN PERSONS IS A HISTORICALLY UNDERUTILIZED BUSINESS ONLY WITH RESPECT TO STATE PROCUREMENT FOR "OTHER PROFESSIONAL SERVICES CONTRACTS", AS THAT TERM IS DEFINED IN THE STATE DISPARITY STUDY.".

Page 10, line 27, after "WOMEN;" insert "OR".

Page 11, line 1 strike "DISABILITIES; OR" and substitute "DISABILITIES; AND".

Page 11, strike lines 2 and 3.

Page 11, after line 5 insert:

"(5) "INDUSTRY" MEANS BUSINESSES WITHIN ONE OF THE FOLLOWING ECONOMIC SECTORS:

(a) CONSTRUCTION;

(b) CONSTRUCTION-RELATED PROFESSIONAL SERVICES;

(c) BROKERAGE AND INVESTMENT;

(d) OTHER PROFESSIONAL SERVICES; AND

(f) GOODS AND OTHER SERVICES.".

Renumber succeeding subsections accordingly.

Page 11, after line 16 insert:

"(9) "PRIME CONTRACT" MEANS A CONTRACT BETWEEN THE STATE AND A BUSINESS.

(10) "PRIME CONTRACTOR" MEANS A CONSTRUCTION BUSINESS THAT PERFORMS A PRIME CONTRACT FOR THE STATE.".

Renumber succeeding subsections accordingly.

Page 11, after line 21 insert:

"(13) "PROFESSIONAL SERVICES" MEANS TYPES OF WORK IN THE SERVICE SECTOR REQUIRING SPECIAL TRAINING. SOME PROFESSIONAL SERVICES SUCH AS ACCOUNTING AND LAW, REQUIRE HOLDING PROFESSIONAL LICENSES.".

Renumber succeeding subsections accordingly.

Page 11, line 24, strike "MEANS:" and substitute "MEANS INDIVIDUALS WHO BELONG TO ONE OR MORE RACIAL OR ETHNIC GROUPS IDENTIFIED IN 49 CFR SECTION 26.5:".

Page 12, after line 13 insert:

"(16) "REMEDIAL MEASURE" MEANS AN ACTION DESIGNED TO ADDRESS BARRIERS TO FULL PARTICIPATION OF A TARGETED GROUP.".

Renumber succeeding subsections accordingly.

Page 13, after line 13 insert:

"(23) "SUBSTANTIAL DISPARITY" MEANS A DISPARITY WHERE THE DISPARITY INDEX IS LESS THAN 80, WHICH CAN INDICATE EVIDENCE OF DISCRIMINATION AFFECTING THE OUTCOME.

(24) "UTILIZATION" MEANS THE PERCENTAGE OF TOTAL CONTRACT DOLLARS OF A PARTICULAR TYPE OF WORK GOING TO A SPECIFIC GROUP OF BUSINESSES.

(25) "WOMEN-OWNED BUSINESS" OR "WBE" MEANS A BUSINESS THAT IS AT LEAST FIFTY-ONE PERCENT OWNED AND CONTROLLED BY ONE OR MORE INDIVIDUALS THAT ARE NON-MINORITY WOMEN.".

Page 14, strike lines 7 through 16 and substitute:

"(b) THE GOAL OF THE PROGRAM IS TO REDUCE DISPARITIES IDENTIFIED IN THE STATE DISPARITY STUDY REPORT BETWEEN THE AVAILABILITY OF HISTORICALLY UNDERUTILIZED BUSINESSES AND THE UTILIZATION OF SUCH BUSINESSES IN STATE PROCUREMENT.".

Page 14, line 17, strike "PRELIMINARY".

Page 14, strike lines 19 through 25.

Reletter succeeding paragraphs accordingly.

Page 15, line 14, strike "SMALL" and substitute "HISTORICALLY UNDERUTILIZED".

Page 15, strike lines 19 through 23 and substitute "OPPORTUNITY.".

Page 16, line 10, strike "IT IS NOT REQUIRED TO IMPLEMENT" and substitute "ARE NOT REQUIRED TO BE IMPLEMENTED".

Page 16, strike lines 26 and 27.

Page 17, strike lines 1 through 8 and substitute:

"(a) THE STATE SEEKS RECOMMENDATIONS FROM STATE PROCUREMENT STAKEHOLDERS, AS CONVENED PURSUANT TO SUBSECTION (2) OF THIS SECTION FOR THE IMPLEMENTATION OF REMEDIAL MEASURES, INCLUDING REMEDIAL MEASURES USING PROCUREMENT EQUITY TOOLS, AND QUANTIFICATION OF THE AMOUNT OF ADDITIONAL FUNDING AND PERSONNEL REQUIRED TO BOTH IMPLEMENT SPECIFIC REMEDIAL MEASURES AND FULLY IMPLEMENT THE PROGRAM; AND".

Page 17, line 9, strike "ENSURE THAT" and substitute "SUPPORT".

Page 17, line 11, strike "IS ACHIEVED".

Page 17, line 14, strike "STAKEHOLDERS," and substitute "STAKEHOLDERS AS CONVENED PURSUANT TO SUBSECTION (2) OF THIS SECTION,".

Page 17, line 15, strike "DEPARTMENT" and substitute "MINORITY BUSINESS OFFICE".

Page 17, line 16, strike "ROBUST".

Page 17, line 18, strike "COMPRISED" and substitute "THAT MAY BE COMPRISED, TO THE EXTENT PRACTICABLE,".

Page 17, line 22, after "BUSINESSES," insert "GOVERNMENTAL ENTITIES, FEDERAL AND LOCAL ORGANIZATIONS THAT PROVIDE PROCUREMENT TECHNICAL ASSISTANCE OR OUTREACH TO HISTORICALLY UNDERUTILIZED BUSINESSES AND SMALL BUSINESSES,".

Page 17, line 24, strike "DEPARTMENT" and substitute "MINORITY BUSINESS OFFICE".

Page 17, strike lines 26 and 27 and substitute:

"(2) THE MINORITY BUSINESS OFFICE SHALL CONVENE AND ENGAGE IN CONSULTATION WITH A STAKEHOLDER GROUP, WHICH, TO THE EXTENT PRACTICABLE MAY CONSIST OF:".

Page 18, line 9, after "24-48.5-127;" add "AND".

Page 18, strike line 10.

Renumber succeeding subparagraph accordingly.

Page 18, line 24, strike "AN" and substitute "TO THE EXTENT PRACTICABLE, AN".

Page 19, line 7, after "PERSONS;" add "AND".

Page 19, strike lines 10 through 12.

Page 19, lines 13, strike "AN" and substitute "TO THE EXTENT PRACTICABLE, AN".

Page 19, line 21, strike "AND".

Page 19, after line 24 insert:

"(IV) WITH CONSIDERATION FOR THE VOLUME OF CONSTRUCTION CONTRACTS AWARDED ANNUALLY BY THE STATE, A REPRESENTATIVE OF THE ASSOCIATED GENERAL CONTRACTORS; AND".

Page 20, line 1, strike "DEPARTMENT" and substitute "MINORITY BUSINESS OFFICE".

Page 20, line 13, strike "POLICY RECOMMENDATIONS" and substitute "FINDINGS, REMEDIAL MEASURES, AND RECOMMENDATIONS".

Page 20, line 15, strike "RECOMMENDATIONS IN" and substitute "RECOMMENDATIONS OUTLINED IN".

Page 20, lines 16 and 17, strike "INCLUDE, WITH WRITTEN EXPLANATIONS, POLICY RECOMMENDATIONS" and substitute "INCLUDE WRITTEN EXPLANATIONS OF RECOMMENDATIONS".

Page 20, line 18, strike "IMPLEMENTED, AND".

Page 20, strike lines 19 through 24 and substitute: "IMPLEMENTED AND THE REMEDIAL MEASURES THAT WILL BE TAKEN TO SUPPORT PROGRAM IMPLEMENTATION IN A MANNER THAT IS SUFFICIENTLY COMPREHENSIVE TO MEET THE STATE'S GOAL OF REDUCING DISPARITIES BETWEEN THE AVAILABILITY OF HISTORICALLY UNDERUTILIZED BUSINESSES AND THEIR UTILIZATION IN STATE PROCUREMENT AND INCREASING SUCH UTILIZATION.".

Page 20, after line 24 insert:

"(II) CONFIRMATION OR REFUTATION OF THE DISPARITY STUDY REPORT FINDING OF NO SUBSTANTIAL DISPARITY BETWEEN AVAILABLE AND UTILIZED LESBIAN, GAY, BISEXUAL, AND TRANSGENDER BUSINESSES;

(III) CONFIRMATION OR REFUTATION OF THE DISPARITY STUDY REPORT FINDING OF NO SUBSTANTIAL DISPARITY BETWEEN AVAILABILITY AND UTILIZATION OF BUSINESSES OWNED BY ASIAN AMERICAN PERSONS FOR CONSTRUCTION, CONSTRUCTION-RELATED PROFESSIONAL SERVICES, GOODS AND OTHER SERVICES CONTRACTS, BROKERAGE, AND INVESTMENT;".

Renumber succeeding subparagraphs accordingly.

Page 20, line 19, strike "THE POLICY".

Page 21, strike line 1.

Page 21, line 2, strike "REQUIRED BY" and substitute "RECOMMENDATIONS AND REMEDIAL MEASURES IN ACCORDANCE WITH".

Page 21, line 13, after "RECOMMENDATIONS" insert "AND ANY SUGGESTED REMEDIAL MEASURES".

Page 21, line 14, "strike "PLANS AND RECOMMENDATIONS OF THE DEPARTMENT" and substitute "PLANS, RECOMMENDATIONS, AND REMEDIAL MEASURES THAT THE DEPARTMENT HAS TAKEN".

Page 21, line 17, strike "2023" and substitute "2024".

** *** ** *** **

KEEN INDEPENDENT RESEARCH

Market research · Policy analysis
Business strategy · Implementation

100 Fillmore Street, 5th Floor
Denver CO 80206

www.keenindependent.com

2020 STATE OF COLORADO DISPARITY STUDY
Executive Summary

Prepared for

State of Colorado
Department of Personnel & Administration (DPA)
1525 Sherman Street
Denver CO 80203

Prepared by

Keen Independent Research LLC
100 Fillmore Street, 5th Floor
Denver CO 80206
Phone: 303-385-8515
www.keenindependent.com

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.

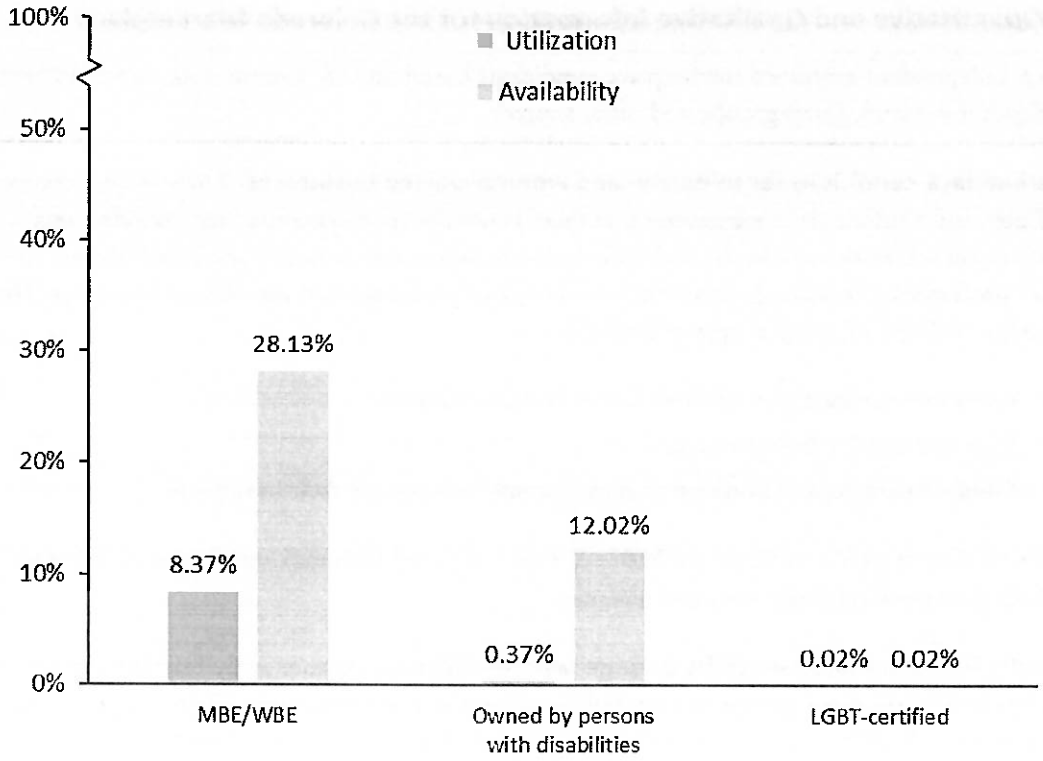
Results for LGBT-certified firms. There was very limited information available regarding members of the LGBT community — there were no data on employment outcomes for LGBT individuals and there was no information about members of the LGBT community in U.S. Census Bureau data — however, qualitative evidence 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).

2. Based on the evidence examined in this study, there is not a level playing field in Colorado for businesses owned by certain groups. For State contracts, Keen Independent identified disparities between the utilization and availability of businesses owned by:

- African Americans, Hispanic Americans, Native Americans, women and persons with disabilities in the construction, construction-related professional services, other professional services, goods and other services industries;
- Asian Americans in the other professional services industry; and
- African Americans, Hispanic Americans, Native Americans and women in the brokerage and investment industry.

There is evidence of discrimination for other groups, including businesses owned by members of the LGBT community, but the results of the disparity analysis for Colorado contracts either did not find disparities for those groups or were otherwise inconclusive.

3. Without further action, disparities in participation of diverse businesses will likely persist. Keen Independent concludes that the disparities identified in State contracts in this study are likely to persist in coming years without additional action. This is because:

- Where disparities were identified, they were large. In total, minority-owned firms obtained only one-third of the State contract dollars expected based on the availability analysis and white women-owned firms received about one-quarter of the contract dollars expected. Firms owned by persons with disabilities received just 3 cents out of every dollar anticipated from the availability analysis.
- The State already conducts outreach and provides other assistance. These efforts may be very helpful, but alone have shown to be insufficient to eliminate disparities.

4. With legislation and resources, disparities can be narrowed or eliminated. Programs operated by local governments in Colorado and by other states serve as examples for the State of Colorado. Figure ES-3 shows states that currently operate procurement equity programs.

Figure ES-3.
Examples of equity programs for state-funded contracts (shaded states)

Source: Keen Independent Research.

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
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
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
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
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
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	Presumption of 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.