

Report on the Impact of the Disadvantaged Business Enterprise Program Waiver & Removing Non-Minority Women from the Presumption of Social Disadvantage

History of the Waiver

On March 28, 2014, the Washington State Department of Transportation (WSDOT) submitted a Disadvantaged Business Enterprise (DBE) Program waiver request based upon the results of a 2012 DBE Program Disparity Study conducted by BBC Research & Consulting. This DBE Program Disparity Study analyzed contracting data from Federal Fiscal Years (FFY) 2009 through 2011 and demonstrated that non-minority woman-owned DBEs did not face substantial disparity. Based on the results of this study, and in order to maintain a legally defensible and narrowly tailored DBE Program, WSDOT requested a waiver to remove non-minority woman-owned DBEs from the race and gender-conscious component of the DBE Program. After careful review and consideration, on December 8, 2016, the United States Department of Transportation (USDOT) approved WSDOT's DBE Program waiver. WSDOT implemented the DBE Program waiver on WSDOT-awarded construction contracts advertised after June 1, 2017. Work awarded to non-minority women-owned DBEs no longer counted toward project goals, while all other DBEs not owned by non-minority women were classified as Under-utilized Disadvantaged Business Enterprises (UDBEs) and allowed to count toward project goals.

On April 1, 2016, WSDOT executed a contract with Colette Holt & Associates to conduct an updated DBE Program Disparity Study. This new DBE Program Disparity Study, published September 11, 2017, analyzed contracts from Federal Fiscal Years 2012 through 2015 and demonstrated that all presumptively disadvantaged groups, including women, were underrepresented to a statistically significant degree in state-funded only highway contracting. Stated differently, in the absence of race and gender-conscious DBE participation goals, minorities and women continued to experience disparate outcomes in the Washington highway contracting market. When USDOT approved the waiver on December 8, 2016, Secretary Anthony Foxx stipulated that, "If WSDOT obtains data from a disparity study or other source that would lead to termination or modification the terms of the waiver ... WSDOT must provide this information to the Department through FHWA." Following this directive, WSDOT on September 13, 2017, provided FHWA with a copy of the Disparity Study and asked to rescind the waiver based on the results of the 2016 Disparity Study.

On December 13, 2019, WSDOT received a response from Steven G. Bradbury, Acting Deputy Secretary and General Counsel, denying our request to rescind the waiver and requesting that WSDOT submit a report to USDOT by the end of March detailing the impact of the waiver and whether a continuing need for the waiver exists. This document responds to that request.

As discussed below, the evidence shows that non-minority women DBEs were, and are still, negatively affected by their exclusion from credit towards meeting DBE contract goals. The decision to continue to impose this exclusion is not supported by the evidence. Non-minority women continue to face severe and pervasive gender-based barriers to successfully running a business in the Washington highway construction industry and to obtaining contracts funded by WSDOT on a fair and equal basis. This report describes these facts, including:

- Data on the financial impact of the exclusion from 2015, 2017, 2018, and 2019.
- Comparative evidence from other disparity studies conducted in the state.
- Comparative evidence from disparity studies conducted in the states of Idaho and Oregon.
- U.S. Census Bureau data on business formation rates, revenue, and wage earnings of women-owned businesses.
- Statistical analysis of probabilities based on American Community Survey Data.
- Results from a February 2020 survey of all non-minority women DBEs about the waiver’s impact.

Financial Impact Analysis

The exclusion from credit toward meeting DBE contract goals has a clearly adverse impact on non-minority women DBEs. After the waiver was implemented in 2017, the amount of federal dollars awarded to non-minority women businesses on FHWA funded contracts fell by about \$15 million. This negative trend continues.

Table 1
Amount of dollars paid to Non-Minority Women DBEs¹

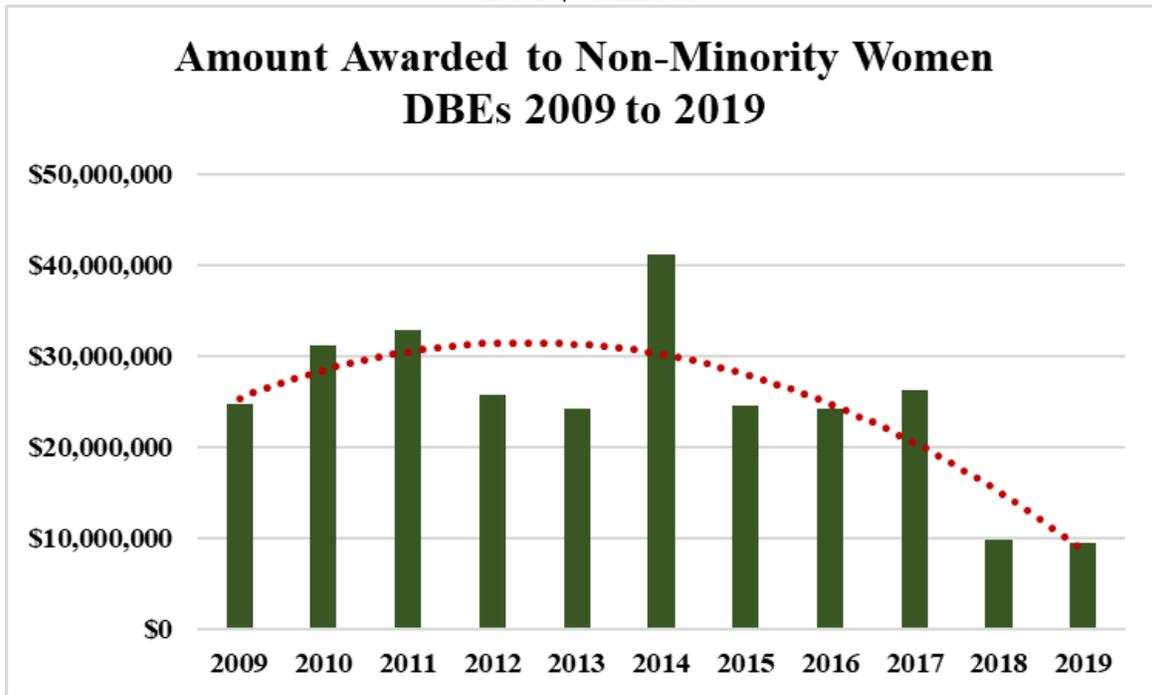
Year	Total Dollars to non-minority women DBEs	Percent of change
2009	\$24,728,690	-4%
2010	\$31,098,637	26%
2011	\$32,761,627	5%
2012	\$25,724,195	-21%
2013	\$24,269,594	-6%
2014	\$41,178,742	70%
2015	\$24,492,822	-41%
2016	\$24,235,229	-1%
2017	\$26,311,014	9%
2018	\$9,851,472	-63%
2019	\$9,566,274	-3%

¹ Data is from the annual FHWA awards and commitment report from 2009 to 2019. All the reports can be viewed in exhibit 1.

As shown in Table 1, the amount of dollars awarded to Non-Minority Women DBEs had remained well above \$20 million prior to implementation of the waiver. The average yearly total awards for non-minority women for 2009 to 2017 was \$28 million. However, starting in 2018, the amount of awards to non-minority women fell by 60 percent to a low of \$9.8 million. The award amount fell further in 2019 to a new low of \$9.5 million. The uniform reports containing these amounts can be found in Exhibits 1 through 10. The trend is further illustrated in Figure 1.

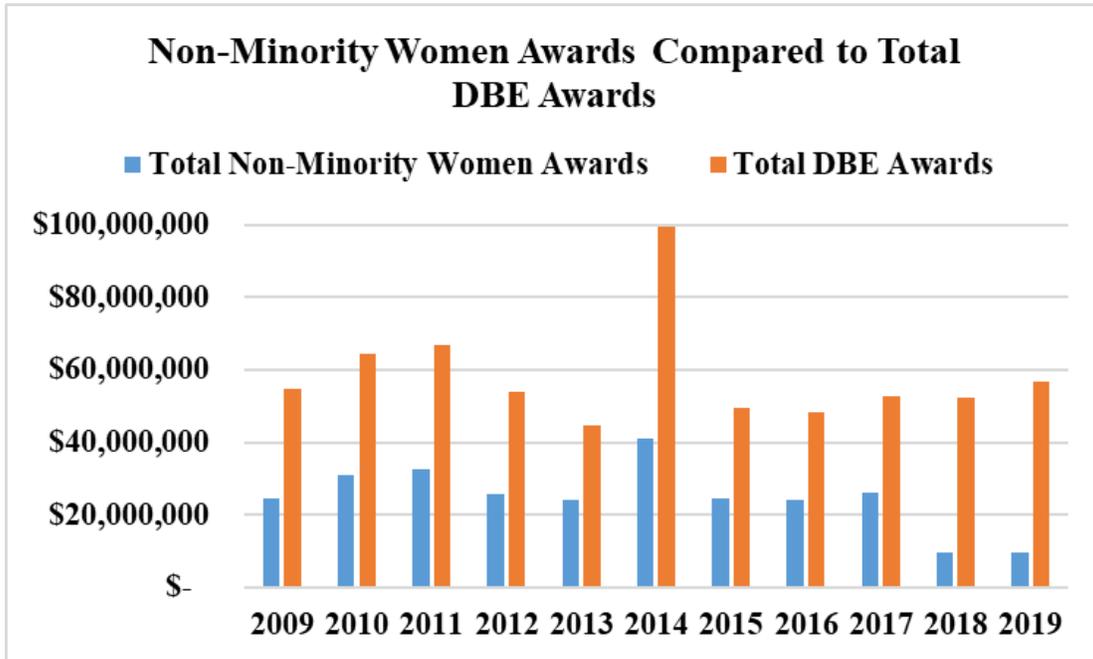
Figure 1

Amount of dollars received by non-minority women DBEs from 2009 through 2019. The award amount remained consistently above \$20 million until 2018 where it hit a low of just under \$9 million.



The decrease was also independent from the overall payments WSDOT made to DBEs. The total amount of dollars paid to DBEs increased and resulted in a growing gap between total DBE spending and the spending received by non-minority women DBEs.

Figure 2
Amount of dollars awarded to DBEs overall compared to non-minority women DBEs



The decrease occurred despite an increase in the number of certified non-minority women DBEs. From FFY 2015 through FFY 2019, non-minority women DBEs increased from 295 to 387 DBEs, described in Table 2.

Table 2
Number of Certified Non-Minority Women DBEs

Federal Fiscal Year	No. of Certified Non-Minority Women DBEs*
FFY 2019	387
FFY 2018	375
FFY 2017	379
FFY 2016	285
FFY 2015	263

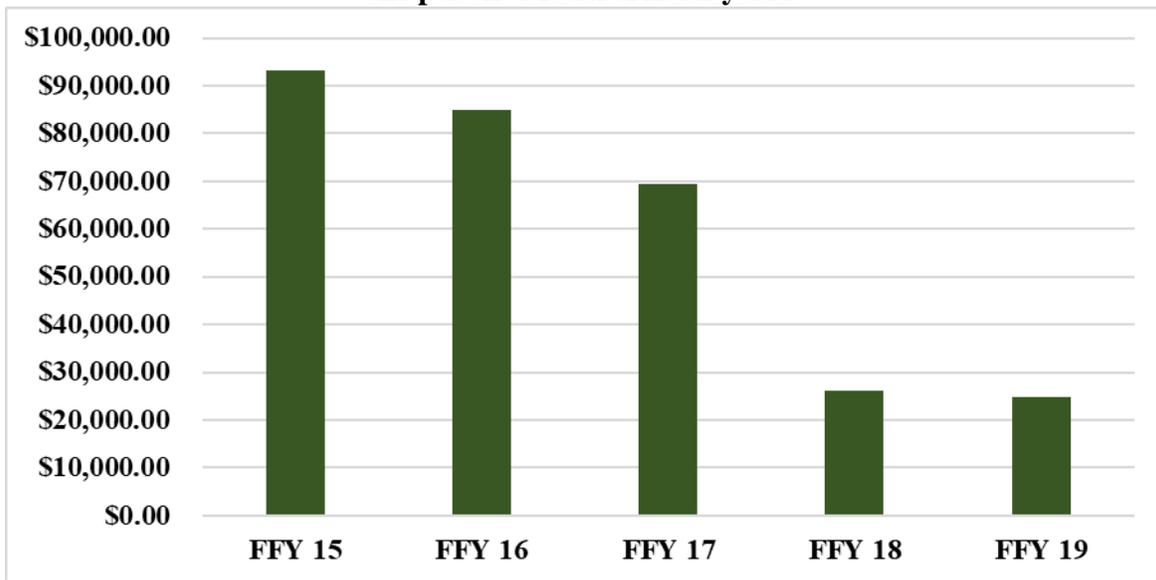
On a per capita basis, the dollars received by all non-minority women DBEs has fallen from a high of \$36,539.07 to a low of \$24,719.05. The result presented in Table 3 is calculated by dividing the total numbers awarded by the number of certified non-minority women DBEs.

Table 3
Per capita dollars paid to non-minority women DBEs²

Federal Fiscal Year	No. of Certified Non-Minority Women DBEs ³	Total WSDOT dollars awarded	Non-minority women per capita
FFY 19	387	\$9,566,274	\$24,719.05
FFY 18	375	\$9,851,472	\$26,270.59
FFY 17	379	\$13,848,309	\$69,422.20
FFY 16	285	\$24,235,229	\$85,035.89
FFY 15	168	\$15,750,296	\$93,128.60

In spite of the increase in WSDOT’s spending, the per capita of project awards for non-minority women DBEs fell from a high of \$93,128.60 in 2015 to a low of \$24,719.05 per capita of total awarded funds in 2019. Data does not support that such a drastic drop occurred due to chance, but rather that it occurred as the result of the exclusion of these firms from contract goal credit.

Figure 3
The figure below shows the per capita funds awarded to non-minority women DBEs over the past five federal fiscal years.

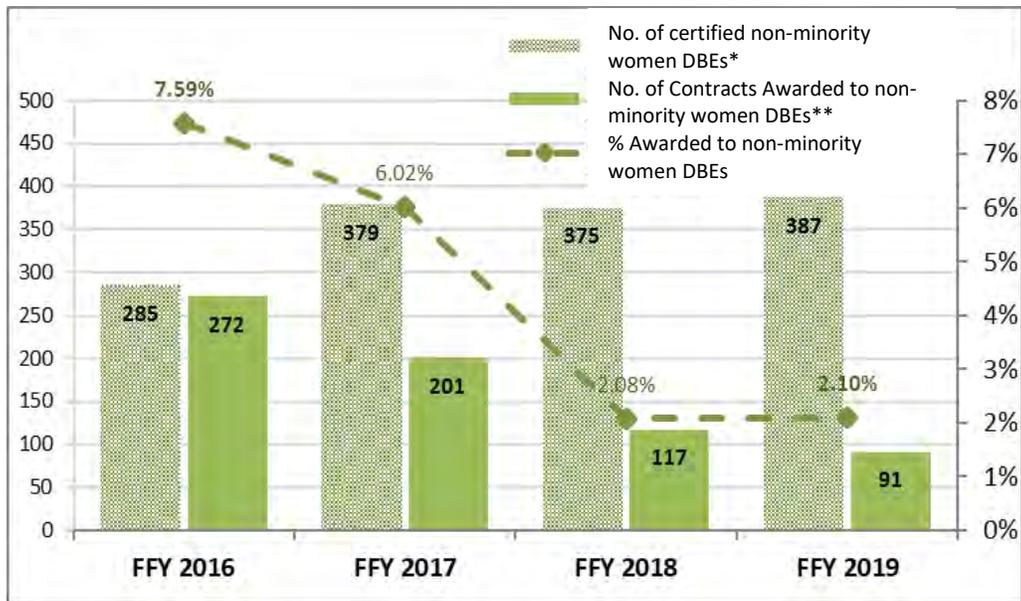


The combination line and bar chart in Figure 3 further illustrates the fall in the amount of dollars awarded to non-minority women businesses.

² Per capita is measuring the quantity per DBE. The per capita is calculated by dividing the total amount of dollars paid by the total amount of white women DBEs to get an equal distribution of all dollars paid to each white women DBE.

³ Number of certified non-minority women firms based on amounts listed on WSDOT’s webpage on diverse spend: <https://www.wsdot.wa.gov/about/secretary/strategic-plan/dashboard/inclusion/diverse-business-spending.htm>

Figure 4
Comparison of the number of non-minority women DBEs to the numbers of federally funded contracts awarded



The data clearly indicates that the decrease in the amount of funds awarded to non-minority women businesses is highly correlated with the waiver’s implementation. The decrease started when the waiver was implemented. The drop was not immediate as non-minority women businesses awarded contracts prior to the waiver’s implementation continued to count towards goals. However, as those projects closed, the drop in the amount of awarded funds fell dramatically in 2018 and has continued into 2019. USDOT’s decision to not rescind the waiver is perpetuating the challenges faced by non-minority women owned DBEs.

Results from Other Washington State Disparity Studies

The results from other disparity studies conducted in Washington state show a consistent pattern of disparities for non-minority women construction and construction-related businesses.

The 2019 Washington State Airports Disparity Study found that non-minority women-owned firms in the state’s construction industry continue to face an un-level playing field. Contract data for 54 Washington State Airports that received FAA grants for fiscal years 2012 through 2016 were analyzed. The 2019 Disparity Study determined that non-minority women had a disparity ratio of 52.3 percent, meaning that non-minority women’s actual utilization on Airport contracts, as measured by the total amount awarded to non-minority women firms, was 52.3 percent of non-minority women’s availability in the market.⁴ The study also found that data from the Census Bureau’s Survey of Business Owners indicate large disparities between minority- and

⁴ Washington State Airports Disparity Study 2019. Accessed at <file:///C:/Users/spectoa/Documents/Temp/OEO-Washington-State-Airports-Disparity-Study-2019.pdf> on February 4, 2020.

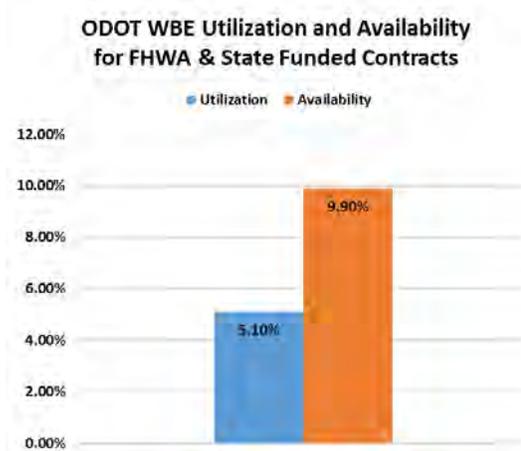
women-owned firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms.

In addition, the Washington State Airports Disparity Study gathered anecdotal evidence of the continuing existence of barriers and disparities based on gender. This anecdotal evidence includes the experiences of non-minority women DBEs in the wake of the WSDOT waiver, and the devastating impact to their businesses. The non-minority women DBEs reported they had received work as the result of the DBE program, and now that they are no longer eligible to be counted towards contract goals, many have been shut out of the market. Additionally, Prime contractors who had used them for years are no longer accepting their bids and several non-minority women DBEs are facing bankruptcy.

These results are consistent with the findings of the 2019 Washington State Disparity Study, led by the Washington State Department of Enterprise Services. This study analyzed all Washington state agency contracting. Once outliers were removed, the disparity ratio for non-minority women was 54.4 percent. As with the Washington State Airports Disparity Study and WSDOT's 2017 Study, women reported they often found their business opportunities limited by sexism and they continue to experience sexual harassment and hostile work environments. Further, interview subjects in the transportation industry specifically reported that they had thriving businesses before the waiver was imposed, in large part because of DBE contract goals. The effects of no longer being counted towards DBE contract goals have been immediate, ongoing, and distressing.

The Results of Disparity Studies in Other States

An extensive number of local and national disparity studies by multiple research firms across the country provides convincing evidence that bias and discriminatory practices negatively affect access to opportunities for women businesses.⁵ For example, the Oregon Department of Transportation's 2016 Disparity Study, conducted by Keen Independent Research, found that there was "quantitative evidence of disparities for non-minority women-owned firms in ODOT contracts and in the Oregon transportation contracting industry."⁶ The Oregon Study found that the Women Business Enterprise (WBE) utilization for FHWA and state-funded contracts was only 5.1 percent, which was below the 9.9 percent availability for



⁵ Reducing Disparities for Women and Minority Business in Public Contracting Work: A Call for Social Virtuousness, Audrey J. Murrell and Ralph Bangs, *Frontiers in Psychology*, 2019, accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6558044/#:po=22.7273> on February 4, 2020.

⁶ Oregon Department of Transportation 2016 Availability and Disparity Study, Keen Independent Research, accessed at <https://www.oregon.gov/ODOT/Business/OCR/Documents/keen-independent-2016-odot-disparity-study-final-report-06302016.pdf> on February 5, 2020.

WBEs. Overall, WBEs only received 3 percent of total dollars.

Table 4: The table below shows the number of contracts, the percent of total contracts, amount of dollars paid, and the percent of total dollars awarded to non-minority women DBEs compared to all non-DBE companies for FHWA and State-funded ODOT projects.

Ownership	No. of Contracts	Percent of Contracts	Dollars paid (\$1,000)	Percent of Dollars
WBE (non-minority women-owned)	823	10.3%	\$57,621	3.0%
Non-DBE	6,764	84.3%	\$1,790,254	92.9%
Total	8,027	100.0%	\$1,926,277	100.0%

Although it is possible that Oregon’s market could be different from the market in Washington, this is unlikely given the close proximity of Oregon and the degree to which its economy is intertwined with Washington’s economy. Moreover, the Idaho Transportation Department’s 2017 Disparity Study by BBC Research and Consulting found a substantial disparity for non-minority women on FHWA contracts.⁷ It is reasonable to infer that if a disparity for non-minority DBEs exists in Oregon and Idaho, it is likely true in Washington as well.

Multiple disparity studies using different methodologies support the conclusion of WSDOT’s Disparity Study that non-minority women DBEs continue to face discrimination and unequal opportunities in a variety of contracting markets in the Pacific Northwest. The impacts described above are neither the result of chance, nor an artifact of one particular methodology or market.

Key indicators show a persistent disparity in economic performance for women owned businesses

According to the most current data from the Census Bureau’s Survey of Business Owners, disparities for women-owned businesses remain consistent across multiple factors such as sales receipts, number of paid employees, and annual payroll.

⁷ 2017 Disparity Study, BBC Research & Consulting, accessed at https://apps.itd.idaho.gov/apps/ocr/documents/2016_ITD_DISPARITY_STUDY_FINAL.pdf on February 5, 2020.

Table 5: Table showing the percentages received on key census indicators by non-minority men compared to non-minority women.

Ownership	Percent of Firms	Sales Receipts – All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts –All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual Payroll (\$1,000)
Non-minority men	39.94%	22.73%	43.95%	22.02%	35.57%	25.21%
Non-minority women	27.29%	3.28%	15.00%	2.83%	5.69%	3.87%

Despite owning 27.29 percent of all firms, the non-minority women’s share of sale receipts for all business was 3.28 percent.

A key question is whether firms owned by non-minority women face disparate treatment in the marketplace. According to data from the Census Bureau’s American Community Survey, gendered differences exist in the wage and salary income received by private sector workers. This may help to explain the disparity in the rate of business formation by non-minority women. A key determinant of business formation is the pool of financial capital at the disposal of the prospective entrepreneur. The size of this pool is related to the income level of the individual, either because the income level impacts the amount of personal savings that can be used for start-up capital, or the income level affects the ability to borrow funds. Consequently, non-minority women receiving lower wages and salaries end up with limited access to a sufficient pool of financial capital, which reduces their likelihood of forming businesses entirely.

Table 6: This shows the probabilities of wages and business earnings of non-minority women relative to non-minority men. The probabilities were found to be statistically significant at the 0.001 level and the 0.05 level respectfully.

	Wages Relative to Non-minority Men (% Change)	Earnings Relative to Non-minority Men (% Change)
Non-minority women	-43.4%	-112.0%

An extensive body of scholarly work has been conducted on the relationship between personal wealth and successful entrepreneurship. There is a consensus that disparities in personal wealth translate into disparities in business creation and ownership. Based on the 2017 Disparity Study’s analysis of available census data, non-minority women are more likely to face challenges in business creation and ownership, the very conditions that the DBE program was designed to mitigate.

Results from a February 2020 December Survey of Non-Minority Women DBEs and the Waiver’s Impact

On February 11, 2020, WSDOT sent out a survey to all non-minority women DBEs regarding the impact the waiver had on their businesses. WSDOT used the Office of Minority and Women’s Business Enterprises (the Unified Certification Program for Washington state)’s, certified directory to create a list of all non-minority women DBEs. The survey received 91 responses. All original responses can be viewed in Exhibit 2.

Two questions asked respondents about how the amount of contracts their business had been awarded and the amount that revenue had changed since 2017.

Figure 5

An uneven distribution can be seen for the results of the question about how the number of awarded contracts had changed since 2017.

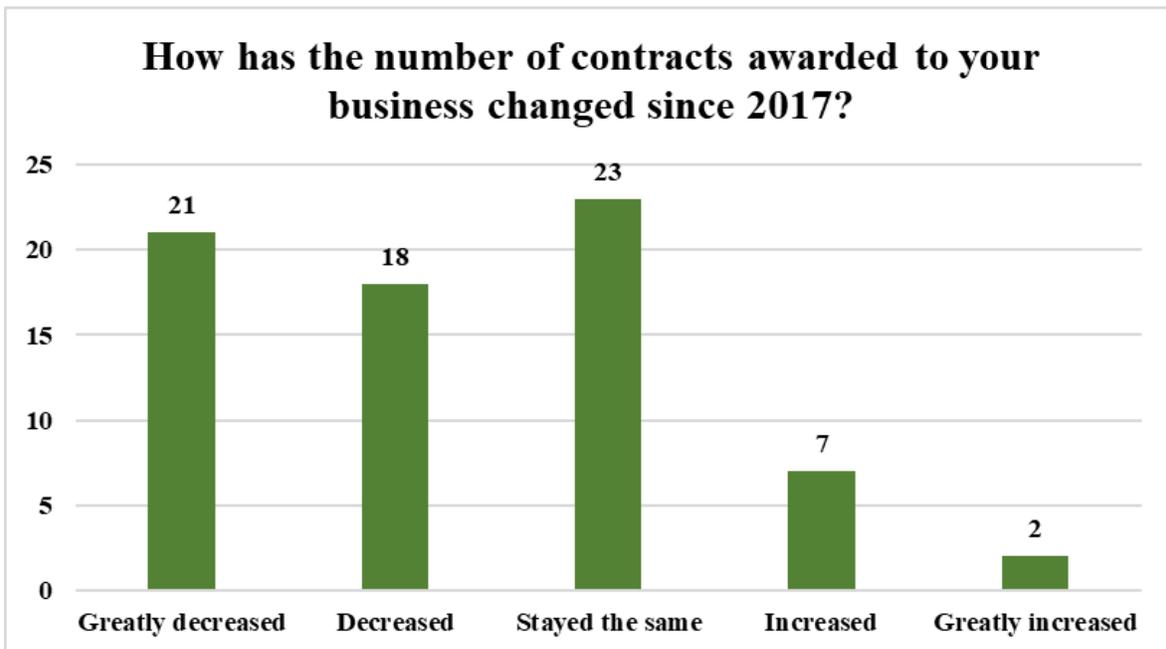
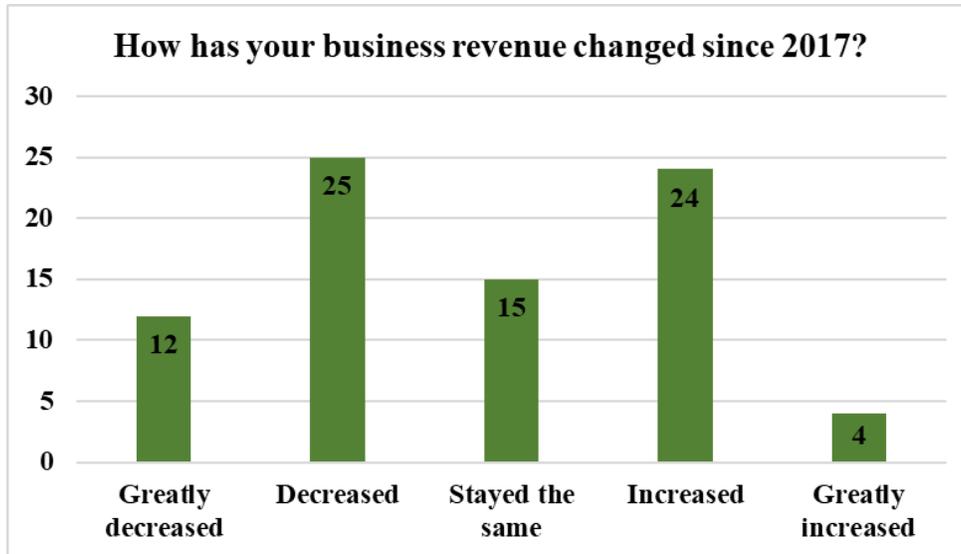


Figure 6
A two peaked distribution can be seen for the results of the question about how business revenue had changed since 2017.



Respondents were also asked to select the amount they agreed or disagreed with a series of statements. The figures below show the results.

Figure 7
Respondents were asked to select whether they agreed or disagreed with the statement that the waiver had no negative impact on their business. A majority indicated they disagreed or strongly disagreed with that statement.

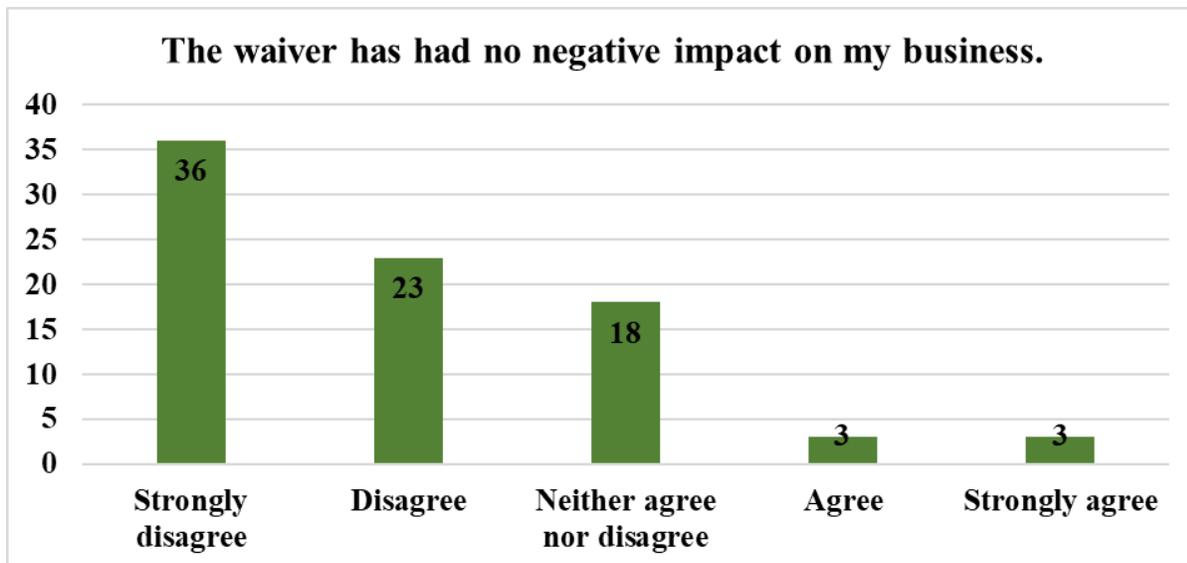


Figure 8

A majority of respondents agreed or strongly agreed with the statement that the waiver had made it more difficult to compete for WSDOT projects.

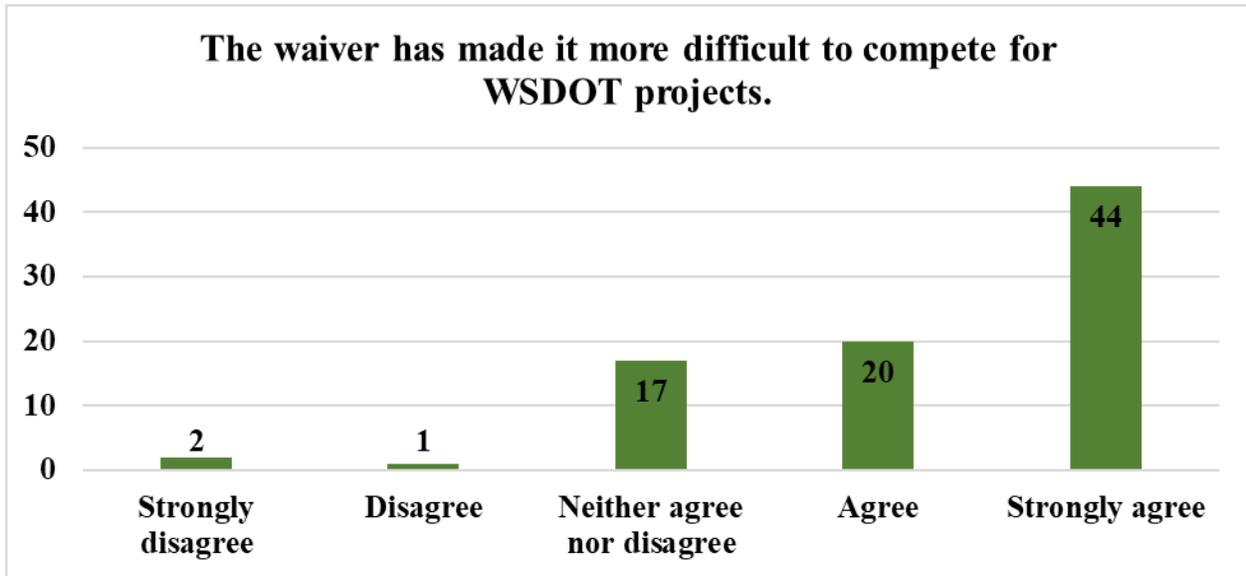


Figure 9

A clear majority agreed or strongly agreed that they continue to face barriers and challenges in public contracting.

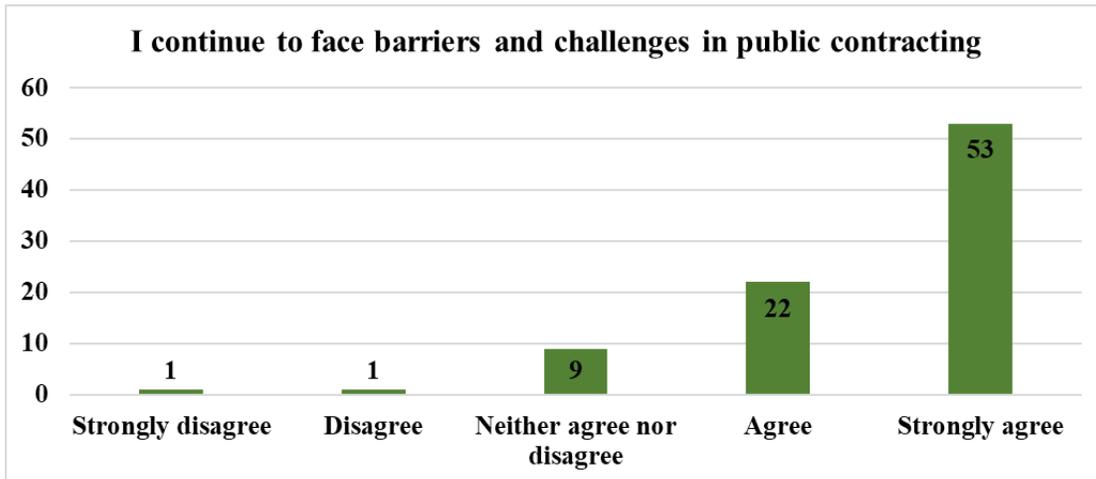
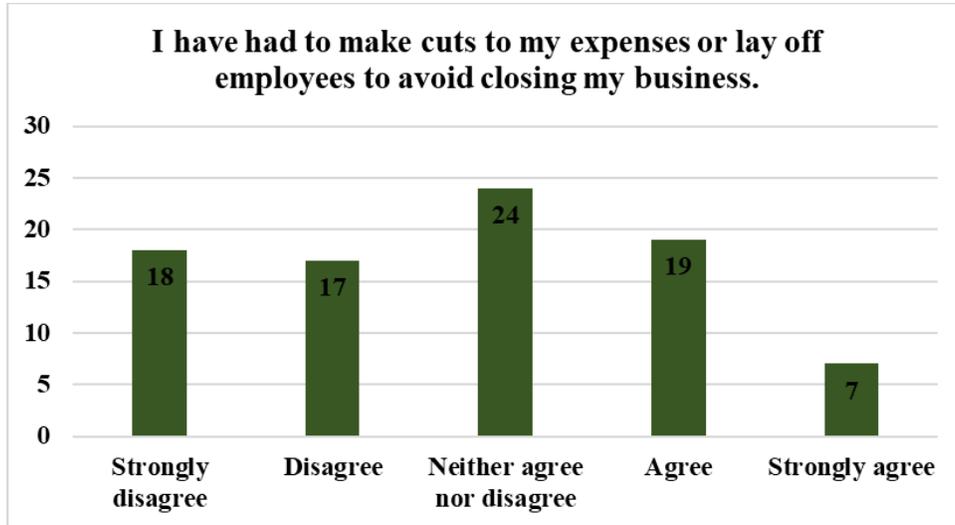


Figure 10

A standard normal distribution can be seen for the responses to the statement that respondents have had to make cuts to expenses or lay off employees to stay in business. A plurality disagreed or strongly disagreed with that statement.



In addition to the multiple choice questions, respondents were given an opportunity to provide feedback. Overall, 67 respondents provided comments. Many of the comments were not directly related to the waiver, but instead were general criticisms of the program or agency. Approximately 25 respondents provided feedback directly relevant to the waiver and its impact. Some select comments have been provided below. All responses can be viewed in the exhibits section.

Respondent Feedback on the Waiver's impact

As a woman owned small marine construction company, I believe this waiver has had a negative impact on my company.

I hear that the following disparity study actually overturned this decision but the communication and reversal to policies hasn't been good or expedient. The prime contractors are struggling because many of their go-to firms who have proven themselves over the years are no longer eligible. As I have heard multiple times now, if this continues, it will take us back to the days where contracts are given to firms who could either not perform quality work, had no idea how to run a business, or simply did not have the capacity to take on the scope offered, so primes would make payments to those firms to basically do nothing (or have to re-do the work) in order to achieve the imposed percentages of participation. Criminal.

I have had many prime firms to inquire about teaming with me on WSDOT pursuits (including transportation and fish passable culvert projects), but when they learn that I don't meet UDBE requirements they look elsewhere. Also, many of the Prime's don't understand what UDBE is, and I have to inform them that I don't qualify to fulfill their % requirements. This is a big problem and we are hoping that women owned businesses of any race will once again be able to qualify to meet WSDOT disadvantaged business goals.

I really don't know what else you need to know. Businesses have gone under because of the waiver, you have done research on this, you must know the damage that this has cause. To put one class or group of people ahead of others, you have surely cause heart break for many business owners. If we can't get work for our employees, they have to leave and find work to support their families. I worked all my life to build my company, trained my employees, got them the best paying jobs, have equipment I could finally purchased and build a reputation as one of the best companies around. This waiver has taken everything we have worked for away from our company and our hard working employees. What an awful thing to happen in our county.

I recently was not selected for a team I wanted to be on as a subconsultant, and I believe the waiver played into the reason why.

I simply don't go after WSDOT projects any longer.

In Eastern Washington, there are very few certified UDBE firms available. Of those, few are large enough to take on more than one project at a time. This directly affects the possibility of fulfilling the COA goals set for any WSDOT project. So these requirements not only affect my firm, but also all the primes trying to fulfill requirements with firms not qualified or able to perform.

It is difficult to watch out of town/out of state UDBE's take my jobs away.

Large companies regularly pair our firm services with their own internal staff resources for those same services - many would not bring us into projects without a DBE/WBE requirement. We have been specifically passed over for potential project teams since we are not classified as UDBE.

My company is a certified woman-owned OMWBE and a HUBZone certified business. We obtained our DBE certification as well with our #1 target customer being WSDOT. We were very disappointed to learn of the white woman exclusion. We continue to actively market our company to WSDOT, but with little success. Although WSDOT purchases a great deal of the products we sell (industrial and safety), their purchases from our company have been minimal.

Several times we have been invited to join a project team to prepare an RFQ for WSDOT projects, and then been uninvited once the prime realized our company does not fulfill the needed quota for UDBEs. This has cost us the chance to compete for several projects.

Since this waiver every year to stay in business has been a struggle. I would argue that this waiver requested by WSDOT has had the most catastrophic impact on women owned businesses that the state of Washington has ever seen. The impact has been felt especially strong in Eastern Washington where the majority of the DBE's available to do work are white women owned companies.

The waiver affected our business because we are still fighting against the "good ol' boy" network that is in place in the construction agency. We are still a minority when placed against White male owned companies. The Diversity program was in place for you to graduate from the program, not to get kicked out because a couple of business' did well to skew the numbers.

The waiver created an "open check" for UDBE contractors as the waiver eliminated at least 50% of the bidding pool. We have not picked up a WSDOT job since 2017 and a Fed Fund project since 2018.

There have been no requests from Primes for my services to support WSDOT projects since 2017. NONE AT ALL. I am luckily able to pursue other work, but this is impeding my growth. Thank you.

We are a growing company, but still very small (around 10 employees). It is difficult to find primary contractors to sub under when you are so small. The leg-up that the DBE waiver gives us is substantial, and since the white women waiver happened, we have not pursued WSDOT projects. I believe that HAD we not been excluded for being white women, we would have had a good chance at winning contracts on WSDOT projects since 2017. Diversity issues should not pit disadvantaged groups against each other, they should aim to elevate EVERYONE who is disadvantaged, and until women have equal power with men in our government and workforce, we are a disadvantaged group as a whole.

We are not considered for teams that are pursuing work with WSDOT because we don't count towards the project goals for diversity, so work with the agency is not attainable. This then hinders possible opportunities. The way things work in the consulting world, as a small woman owned firm we are not considered for teams established by large firms for WSDOT project opportunities unless there are diversity goals that we can fulfill.

We do work in a predominantly male industry and face challenges daily. WBE and DBE certifications make us more attractive to Prime contractors, but only if they are valued by the Client and required in the RFP to meet inclusion goals.

We have been told by multiple companies they are not willing or interested to do business with us since they get no credit for our WBE status.

We have increased our business in Oregon to offset the work, and the construction business is currently strong for everyone - but we have lost a great deal of Washington business.

We have spent an enormous amount of time writing fee proposals with no award or project cancellation. In addition, a significant amount of time is spent developing rate schedules. Consideration should also be given to fair industry billable rates for small businesses for principals and not based on salary as admin time affects small businesses differently than large businesses with more employees. Very frustrating only being awarded 1 very small project over the course of 6 years or more.

When responding to bids as a supplier, consideration was given in the past. Now you don't hear anything back, regardless of the follow ups.

As demonstrated by the survey responses and comments, a majority of non-minority women DBEs believe that the waiver has had a negative impact on their business. Some even strongly agreed with the statement that they had been forced to cut expenses or lay off employees since the implementation of the waiver. The survey results are anecdotal, and are consistent with the spend data showing a drop in funds awarded to non-minority women DBEs. In addition, many respondents reported having simply given up applying for WSDOT projects or being ignored by prime contractors because their business would not count towards DBE goals.

Conclusion

There is evidence and data to support that non-minority women continue to face barriers in public contracting. The existence of the waiver has deprived WSDOT of a tool used to mitigate those barriers.

The data clearly demonstrates a high likelihood that there is a causal relationship between the waiver's implementation and the decline in WSDOT spend on USDOT-assisted contracts going to non-minority women businesses. The objectives of the DBE program, to create a level playing field for all firms without regard to race and gender, have not yet been achieved. Some non-minority women businesses have either scaled back operations or closed since the waiver was put in place. These impacts to the non-minority women contracting community can be expected to continue as long as the 2016 waiver remains in place.