No.

In the Supreme Court of the United States

DUNNET BAY CONSTRUCTION COMPANY,
an Illinois corporation,

Petitioner,

v.

RANDALL S. BLANKENHORN, in his official capacity as Secretary of Transportation, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff required to choose between engaging in discrimination on the basis of race or losing a government benefit has suffered an injury in fact sufficient to establish its standing to challenge the adverse state action.

2. Whether an equal protection challenge to a state program requiring that a contractor meet subcontracting "goals" for disadvantaged business enterprises (DBEs) may be rejected on the ground that the program complies with applicable federal regulations—without any inquiry whether the State applied its program in a manner that violates equal protection.

RULE 14.1(b) STATEMENT

Petitioner Dunnet Bay Construction Company was the plaintiff-appellant in the court below. The defendants-appellees were the Illinois Department of Transportation (IDOT) and its Acting Secretary, Erica J. Borggren. Acting Secretary Borggren has since been replaced by Secretary Randall S. Blankenhorn.

RULE 29.6 STATEMENT

Petitioner Dunnet Bay Construction Company has no parent corporation. No publicly held company owns 10% or more of its stock.

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Fed. Hwy. Admin., *Moving Ahead for Progress in the 21st Century Act (MAP-21)*, July 17, 2012, https://www.fhwa.dot.gov/map21/summaryinfo.cfm 25

TABLE OF AUTHORITIES—continued

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Ill. Dep't of Transp., List of Prequalified Firms, http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Specialty-Lists/Highways/Construction/Prequal-Lists/Preqlist.xls.....32

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dunnet Bay Construction Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 799 F.3d 676. The opinion of the district court (App., *infra*, 48a-122a) is reported at 2014 WL 552213.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2015. App., *infra*, 47a. On November 10, 2015, Justice Kagan extended the time for filing a petition for a writ of certiorari to January 5, 2016. On December 23, 2015, Justice Kagan further extended the time for filing a petition for a writ of certiorari to and including January 15, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 124a.

STATEMENT

Petitioner, a highway construction contractor, was the low bidder for a federally funded highway construction project on Chicago's Eisenhower Expressway. Its bid was nonetheless rejected by the Illinois Department of Transportation ("IDOT") on the ground that petitioner was unable to meet the project's 22% Disadvantaged Business Enterprise ("DBE") participation goal. Although applicable federal regulations permitted that goal to be waived if the contractor had made substantial efforts to satisfy it, evidence in the record indicated that IDOT, at the instigation of the Illinois Governor's office, in fact applied a "no-waiver" policy that transformed the aspirational DBE goals into a prohibited quota.

Notwithstanding that evidence, the court of appeals rejected petitioner's equal protection challenge. Disagreeing with three other circuits, the court below held that petitioner lacked standing to challenge IDOT's actions because being conscripted by the federal government into unlawfully discriminating on the basis of race in hiring subcontractors did not constitute injury in fact.

Even though it held that petitioner lacked standing, the court of appeals went on to address petitioner's equal protection claim on the merits. The court recognized that it was required to apply strict scrutiny to the racial classifications employed by IDOT's DBE program, but—employing a rule unique to the Seventh Circuit—held that strict scrutiny was satisfied as long as IDOT had complied with applicable federal statutes and regulations. It refused to inquire whether IDOT's decisions in this circumstance were intended to, and/or did, apply prohibited quotas or whether, as evidence in the record suggested, IDOT

had been "motivated by * * * simple racial politics." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

This case thus presents two important issues on which the lower courts are divided: whether a person who is required to discriminate based on race in order to participate in a government program has standing to challenge the constitutionality of that obligation and whether a State's compliance with applicable federal statutes and regulations is by itself sufficient to satisfy strict scrutiny.

Both issues are extremely important to the many businesses that operate in areas (such as highway construction) that depend on the availability of state and/or federal funding. Review by this Court is plainly warranted.

A. Legal Background.

The federal government provides funds to the States for highway construction under the Transportation Equity Act for the 21st Century, 112 Stat. 107, P.L. 105-178 (1998), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 23 U.S.C. § 101 Note, 119 Stat. 1144, P.L. 109-59 (2005) ("TEA-21").

TEA-21 encourages participation in highway construction projects by "Disadvantaged Business Enterprises," or "DBEs." It provides that "not less than 10 percent of the amounts made available for any program under * * * [TEA-21] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." TEA-21 § 1101(b)(3).

Regulations issued by the U.S. Department of Transportation's ("USDOT") define a DBE as a for-profit entity that is at least 51 percent owned and controlled by individuals who are "socially and economically disadvantaged." 49 C.F.R. § 26.5. The regulations create a rebuttable presumption that women and persons who are members of a racial minority (including African- and Hispanic-Americans) are socially and economically disadvantaged. *Ibid.* DBEs also must be small businesses. *Id.* § 26.65.

A state agency administering the expenditure of federal funds under TEA-21 must adopt an annual DBE Program that sets an overall percentage goal for funds paid to DBEs. 49 C.F.R. § 26.45. The agency must initially attempt to achieve that goal through race-neutral measures, and may employ specific DBE contract participation goals only if the overall DBE participation goal cannot be met through race-neutral means. *Id.* § 26.5(d). Contract goals typically require the successful bidder to make efforts to subcontract a designated percentage of the contract work to a DBE, but this requirement is not mandatory. Rather, a contract must be awarded to the low bidder if it either meets the assigned DBE goal *or* shows that it made good faith efforts to do so. *Id.* § 26.53(a).

The contracting procedures of the Illinois Department of Transportation provide that a contractor that does not meet the goal but has made good faith efforts to do so may seek a "waiver" of that DBE goal. R. 2300-01.[1]

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[1] All citations marked "R." are to the paginated electronic record, which is ECF Document No. 43 in the appellate record.

B. The Illinois DBE Program.

In late 2009, IDOT prepared to accept bids on several resurfacing contracts for Chicago's Eisenhower Expressway, which were scheduled to be awarded (or "let") on January 15, 2010. This case involves the application of DBE requirements to one of those contracts—Contract No. 60I57.[2]

The request for bids and award of contracts took place in the context of a hotly-contested Democratic gubernatorial primary. The incumbent, Governor Patrick Quinn, had been elected as Lieutenant Governor and became Governor after Rod Blagojevich was removed from office. He faced stiff competition in the primary held on February 2, just 18 days after the scheduled award of the contracts. Illinois' then-Secretary of Transportation, Gary Hannig, had been appointed by Governor Quinn. Hannig, a state legislator for more than 30 years, was a close political ally of Governor Quinn, having worked for him in every political campaign for decades. R. 1665.

1. *DBE Goals*. The Eisenhower projects' DBE goals were initially set at 8% for three of the contracts and 10% for the fourth. R. 3240. Director of Highways Christine Reed and her staff determined that these goals were aggressive but appropriately set according to the goal-setting methodology applied by IDOT. R. 1994-95, 2035-36.

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[2] The district court granted summary judgment in favor of respondents and therefore was "required to view all facts and draw all reasonable inferences in favor of" petitioner. *Brosseau* v. *Haugen*, 543 U.S. 194, 195 n. 2 (2004) (per curiam). The discussion of the relevant factual background is based on that standard.

The Governor's Office did not agree, and directed IDOT not to seek bids for the contracts on that basis. R. 1996-97. After speaking with Darryl Harris, Governor Quinn's Director of Diversity Enhancement, and with the Governor's Deputy Chief of Staff, Secretary Hannig told IDOT staffers that "we need to get the Eisenhower up to 20% minority participation." R. 1749-52.

IDOT engineers revised and expanded the projects' scope to make new categories of work eligible for DBE consideration—such as landscaping and pavement patching—that previously had not been included in resurfacing contracts. R. 2867-68.[3] By December 15, 2009, a month before the scheduled letting, the weighted average goal of 20% had been reached or exceeded, which more than doubled the original goal. R. 3253. IDOT was then permitted to seek bids based on the higher goals. R. 2040-41.

This change in DBE goals was not a one-off occurrence. On December 23, 2009, as IDOT was preparing to let the Eisenhower projects, Secretary Hannig met with IDOT's Regional Engineers and district Equal Employment Opportunity ("EEO") officers, who were responsible for setting contract goals in their respective districts. Hanning instructed them to be "much more aggressive" in setting DBE goals. R. 2056-57. Some attendees recalled the mes-

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[3] For example, landscaping was initially supposed to be a separate Small Business Initiative ("SBI") project. R. 2865. SBI projects, which are normally let separately, are meant to give DBEs the opportunity to act as prime contractors rather than as subcontractors. Pavement patching, which had to be completed before resurfacing, was not normally included in DBE-eligible items due to the potential for traffic delays and safety concerns. R. 1990-91.

sage as being "get on board with this program or else we will find someone else that will," R. 3216, or that those who did not set goals aggressively would lose their jobs. R. 2058.

During this same time period, IDOT was also preparing engineering contracts for two large rail projects, with a combined value of $50 million. R. 2064. A lobbyist for an association of Hispanic-American contractors emailed Secretary Hannig and Director of Highways Reed the night that the terms of the contracts were published, complaining about the 20% DBE goal. R. 1812-13. Subsequently, the posting was revised on December 30, 2009, to set a 30% DBE goal as a result of a telephone conversation between Hannig, Reed and the Governor's Director of Diversity Enhancement. *Id.* at 2063-70. No written analysis justified the $5 million, 10% DBE goal increase. R. 2066-68.

2. *The No Waiver Policy in Late 2009 and Early 2010.* Although the governing federal regulations and IDOT procedures permitted a low bidder to obtain a waiver of the DBE goal upon a showing of good faith efforts to meet the goal, IDOT Secretary Hannig repeatedly stated his opposition to such waivers.

For example, notes taken by Director of Highways Reed during a meeting with Hannig stated "RE Meeting = no waivers IAPA Speech, no waivers." R. 3959. (The term "RE" refers to the five Regional Engineers responsible for administering IDOT's nine highway districts.)

In deposition testimony, Reed stated that she didn't "recall [Hannig's] exact words but his message was very clear that waivers would not be part of a

common practice of his administration." R. 2173. Reed told the Regional Engineers who reported to her that "Secretary [Hannig] was not interested in entertaining waivers." *Ibid.*

Reed was also instructed by Hannig to tell members of the Illinois Asphalt Pavers Association ("IAPA"), a significant industry group, that waivers "would not be the practice of his administration." R. 2175. In her actual remarks, Reed softened the statement somewhat, telling IAPA members instead that "requests for waivers would be closely scrutinized and would be very difficult to get." R. 2175-76.

Hanning also discussed DBE goal waivers at the December 2009 meeting with regional engineers and EEO officials. One engineer present recalled Hannig saying that no waivers would be granted. R. 3281. Reed recalled that Hanning did not want to "be put in a position where he was forced to make a decision between goal attainment and [DBE] waivers and modifications." R. 2057.

Secretary Hannig's "no waiver" policy caused friction within IDOT. Carol Lyle, who had long been responsible for the administration of IDOT's DBE program, became increasingly concerned about IDOT's compliance with constitutional limitations on race-based programs under Secretary Hannig. R. 3314.

Lyle was responsible for evaluating contractors' efforts to meet DBE goals. If she thought a contractor had made a good faith effort, she would recommend a waiver to her superior, Larry Parrish, a political appointee, who would in turn make a recommendation to Hannig. R. 2289-90.

After Hannig became Secretary, it became increasingly difficult for Lyle to convince Parrish to agree to recommend a waiver or even to present a waiver request to Hannig. Parrish said he was under pressure not to forward waiver requests. R. 2317-18.

For example, in December 2009, Lyle recommended a waiver request to Parrish. In response Parrish gave her a copy of an e-mail from Hannig to Parrish, stating "Per the Secretary-We need to do better! NO[.]" R. 3314. Lyle responded that "[i]t's not a matter of 'doing better' – it is a matter of being in *compliance with the federal regulations, e.g., good faith efforts*." R. 3314.

Lyle became concerned that IDOT's DBE goals were being converted into quotas due to a categorical refusal to consider good faith efforts, which in her view could have jeopardized the entire program. R. 2321-22. She believed that Hannig and Parrish looked only at a contractor's failure to reach a stated goal, and not at whether the contractor had engaged in good faith efforts to meet a goal. *Ibid.*

Darryl Harris, Governor Quinn's Director of Diversity Enhancement, encouraged IDOT to employ a "no-waiver" policy. According to Highway Director Reed, Harris "was very explicit in his direction to [IDOT] that DBE participation was a top priority, and that exceptions to goals and modifications to goals would be, would not be looked upon favorably." R. 2087-88.

In late 2009, in an e-mail to the Governor's Chief of Staff and Chief Operating Officer, Harris described a deal he had made with a female contractors' organization in which they dropped their opposition to changes in a different state contract "if

IDOT *fully implements, enforces and duplicates the Capital Development Board's no waiver policy*." R. 3326-30 (emphasis added). And in a January 2010 newspaper interview, Harris addressed waivers, boasting that higher DBE goals in state contracts demonstrated the Governor's "commitment to minority and female businesses":

> The Governor remains steadfast on a *no-waiver policy*. This has been a practice in [Capital Development Board] for several years. So, now we're encouraging [IDOT] to also have a no-waiver policy.
>
> * * * * * * * *
>
> Q: How will you deal with those entities that don't meet their goals?
>
> A: I kind of talked about that previously, but *our no-waiver policy is just that. You have to meet it.*

R. 3233-34 (emphasis added).

C. The January 15, 2010 Contract Letting.

Petitioner's approximately $10.5 million bid was the lowest submitted for Contract No. 60I57, which involved resurfacing and bridge repair on a specified section of the Eisenhower Expressway. R. 4385. The bid included 8.24% DBE participation, which would have satisfied the original DBE goal set by IDOT but did not meet the revised goal of 22%.

1. Petitioner's bid requested a waiver of the DBE goal based on its good faith efforts to meet the goal. R. 2696-97; *id.* at 2878-2912; *id.* at 2916-73, *id.* at 2999.

IDOT rejected all bids—including petitioner's—as non-responsive if the bidder failed to meet the DBE goal, regardless of the documentation of good faith efforts. R. 2420-23.

2. Petitioner requested reconsideration. R. 2452-53.

On Monday, January 18, 2009, the first weekday following the January 15 letting, Secretary Hannig e-mailed Governor Quinn's Chief of Staff and others, advising them of the results of the Eisenhower letting and requesting "direction on what to do." R. 1834-35. He followed that email with another on January 20 to the Governor's Director of Diversity Enhancement and another member of the Governor's staff, stating that petitioner's bid, though slightly over the budgeted amount ("but close"), was the only one that had not met the DBE goals. He added that "[u]nder our rules since the lowest bidder is close to our pre-bid estimate, he would normally be given the award if he could show a good faith effort to meet the DBE goals and was granted a waiver by I.D.O.T." R. 1838.

A series of meetings followed, some including representatives of the Governor's Office, to decide how to respond to the bids that had been received on the Eisenhower projects, including whether to award the contracts at all. R. 2440-42. Secretary Hanning told petitioner's president that he was under pressure not to approve any DBE waivers and that the Governor's Director of Diversity Enhancement was calling him daily and telling him not to grant waivers. R. 2755.

3. Secretary Hannig designated his own chief of staff—Bill Grunloh—as the reconsideration hearing

officer, replacing the IDOT employee who previously made reconsideration determinations. Grunloh was a political appointee and, like Hannig, a former state representative. R. 2829, 2831-32. He had never before presided over a reconsideration hearing. R. 2428-29.

Moreover, as Secretary Hannig's chief of staff, Grunloh had been present at the meetings at which Hannig had articulated his policy of discouraging or refusing waivers. R. 1952; *id.* at 1792.

Petitioner presented evidence of its efforts to meet the DBE goal. Petitioner explained that it had used procedures it had previously employed to successfully meet DBE goals for other contracts, which had been successful in the past. R. 2457-58.[4] Petitioner also noted that it did not regularly seek waivers, as some contractors did. R. 2461.[5] And petitioner pointed out that its inability to meet the revised goal resulted in part from IDOT's failure to include petitioner on the "For Bid List" published on the IDOT website shortly before the Eisenhower projects' let-

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[4] Petitioner's efforts to attract DBE subcontractors are described in detail in the district court's opinion. See App., *infra*, 63a-65a.

[5] USDOT permits consideration of a contractor's past success in meeting DBE goals in determining whether it has made good faith efforts. See U.S. Dep't of Transp., *Official FAQs on DBE Program Regulations (49 CFR 26)*, https://cms.dot.gov/partners/small-business/official-faqs-dbe-program-regulations-49-cfr-26. Lyle said she regularly considered that factor in making recommendations on waiver requests. R. 2555-56.

ting—a crucial source of information for DBEs. R. 2718-19.[6]

Carol Lyle, the IDOT official responsible for DBE compliance, who attended the hearing and who had "personally reviewed hundreds of IDOT contracts on the issue of a contractor's good faith efforts," App., *infra*, 69a, told Grunloh that she thought petitioner had shown sufficient good faith efforts. She cited, among other things, various steps petitioner had taken to attract DBE bidders, as well as IDOT's failure to include petitioner on the For Bid List. R. 2419-20. Lyle thought that petitioner's omission from that list was relevant to petitioner's good faith because it explained why other bidders had been able to meet the contract's DBE goal. R. 2604-05. In fact, Lyle could not think of anything else petitioner could have done to meet the goal. R. at 2461.

On January 26, 2010, Grunloh sent an email to IDOT officials stating that he had concluded that petitioner had failed to make good faith efforts to meet the DBE goal. He did not explain his decision and made no contemporaneous writing memorializing the reasons for his decision. Grunloh later testified that his decision was largely based on two factors: (1) petitioner's purported failure to contact IDOT's supportive services contractor; and (2) the fact that the

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[6] DBEs interested in obtaining subcontracts review the For Bid List in order to identify prime contractors to which they might submit bids, and DBEs do not routinely submit bids to contractors not on the list. R. 2410. In fact, after the Eisenhower letting, DBE subcontractors submitted late subcontract proposals to petitioner, and indicated that they would have submitted them earlier had they known that petitioner was bidding on the project. These late bids, had they been included, would have enabled petitioner to meet the revised goal. R. 2695-98.

second, third and fourth lowest bidders had been able to meet the DBE goal. R. 2847.

Secretary Hannig called petitioner's president and told him that petitioner's bid was being rejected because petitioner had not met the contract's DBE goal. R. 1891. Although Hannig later suggested that the bid could also have been rejected because it had exceeded IDOT's budget for the project, that reason was never cited to petitioner; IDOT's oral and written rejections rested solely on petitioner's failure to meet the DBE goal. R. at 1892-93, 3213.[7] No one at IDOT ever provided petitioner with any explanation why its good faith efforts to meet the DBE goal were found inadequate. R. at 2474.

IDOT re-let the contract and petitioner was not the low bidder. The contract was awarded to another company. App., *infra*, 18a.

D. Proceedings Below.

Petitioner instituted this action against Secretary Hannig and IDOT in the United States District Court for the Central District of Illinois, asserting claims under 42 U.S.C. §§ 1981 & 1983, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq*.), and the Illinois Civil Rights Act of 2003, 740 ILCS 23/1 *et seq*. It sought damages as well as declaratory and injunctive relief.

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[7] Although it exceeded the budgeted amount, petitioner's bid was 0.73% *below* IDOT's detailed engineer's estimate. R. 2077. The Regional Engineer for the relevant IDOT district concluded that the bid was therefore within the awardable range (R. 2076), and she recommended that the bid be accepted. R. 4396.

1. The district court granted respondents' motion for summary judgment. App., *infra*, 48a-122a. It held that, under the Seventh Circuit's decision in *Northern Contracting, Inc.* v. *Illinois*, 473 F.3d 715 (7th Cir. 2007), "any 'challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority.' Therefore, the Court must determine if IDOT exceeded its authority granted under the federal rules or if [petitioner's] challenge is foreclosed by *Northern Contracting*." App., *infra*, 107a (internal citation omitted). Finding that "the decision on reconsideration did not exceed IDOT's authority under federal law," the court rejected petitioner's claim of intentional discrimination. *Id*. at 114a.[8]

2. The court of appeals affirmed. App., *infra*, 1a-46a. It held that petitioner lacked Article III standing to challenge IDOT's rejection of its bid, because petitioner was neither excluded from competition for the contract on the basis of race nor compelled by force of law to discriminate based on race in its hiring of subcontractors. *Id*. at 30a, 33a.

The Seventh Circuit expressly rejected the holdings of three other courts of appeals—which had concluded that a person who loses a government benefit because he or she refuses to discriminate based on race has standing to challenge that requirement, because being subjected to the choice of losing the benefit or engaging in discrimination constitutes injury in

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[8] The court also rejected petitioner's separate equal protection claim based on the preferential status accorded DBEs, holding that petitioner lacked standing to assert that claim because its size—and not just its non-minority status—precluded it from qualifying as a DBE. App., *infra*, 33a.

fact. See App., *infra*, 30a-31a, citing *Monterey Mech. Co.* v. *Wilson*, 125 F.3d 702, 707 (9th Cir. 1997); *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344, 350 (D.C. Cir. 1998); *Safeco Ins. Co. of Am.* v. *City of White House, Tenn.*, 191 F.3d 675, 707 (6th Cir. 1999).

The court rejected what it termed the "broad view of standing" announced in those cases, which, the court stated, merely amounted to standing based on a general grievance about a government program. App., *infra*, 31a-32a. According to the Seventh Circuit, such programs may be challenged only by a non-minority business injured by race-based decisionmaking, not by a business alleging that it was obliged to engage in race-based decisionmaking.

The court of appeals went on to address the merits of petitioner's equal protection claims. It first recognized that "[b]ecause IDOT's DBE program employs racial classifications, we apply strict scrutiny in addressing [petitioner's] constitutional challenge." App., *infra*, 38a. In applying that standard in this case, however, the court asked only whether the IDOT program complied with federal standards. Relying on its prior decisions in *Northern Contracting* and *Milwaukee County Pavers Ass'n* v. *Fielder*, 922 F.2d 419, 423 (7th Cir. 1991), the court held that a racially discriminatory program that complied with federal statutes and regulations *necessarily* satisfied strict scrutiny. App., *infra*, 38a-39a ("Thus, the issue is whether IDOT exceeded its authority under federal law.").

The court therefore refused to inquire whether the IDOT DBE program—as actually applied in this case—was narrowly tailored to serve the compelling interests that supported it. For example, the court

held that evidence that IDOT's setting of high DBE "goals" and its hostility to granting waivers was irrelevant to strict scrutiny because petitioner "ha[d] not identified any regulation or other authority that suggests that the political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal." App., *infra*, 40a.

The court's analysis therefore focused exclusively on whether IDOT complied with federal law, and did not assess whether IDOT engaged in a combination of actions designed to require prime contractors to adhere to race-based quotas.

REASONS FOR GRANTING THE PETITION

This case involves a challenge to the State of Illinois' implementation of one of the most expansive affirmative action programs in federal law: the requirement that States take steps to promote participation by "disadvantaged business enterprises" (DBEs) in federally-funded transportation contracts. Under this Court's precedents, that DBE requirement must be "justif[ied] * * * under the strictest judicial scrutiny." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995).

The court of appeals' decision creates two circuit conflicts and, in addition, significantly undermines the ability of affected parties to subject DBE programs to strict scrutiny. First, the decision below denies standing to contractors forced to choose between engaging in racial discrimination or losing a government benefit. Second, it holds that a DBE program is per se constitutional as long as it complies with the federal government's vague regulations. This Court should grant certiorari to resolve both conflicts and

ensure that State DBE programs are subject to meaningful judicial review.

I. The Court Of Appeals' Standing Decision Warrants Review.

Petitioner claims that the IDOT DBE program required it to discriminate on the basis of race—petitioner was obligated to choose subcontractors based on the racial characteristics of the subcontractors' owners, because the high numerical DBE goal combined with the refusal to grant a waiver transformed the goal into an impermissible racial quota. The court of appeals held that a prime contractor lacks standing to assert such a challenge; only the non-minority owned small businesses who lose work from such discrimination may assert a claim.

That holding expressly conflicts with the decisions of other courts of appeals and with this Court's repeated recognition that the use of government authority to obligate others to engage in racial discrimination is itself a violation of the Constitution.[9]

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[9] The court of appeals indicated that petitioner lacked standing for the additional reason that, even if the good faith waiver had been granted, IDOT would nonetheless have rejected petitioner's bid. For that reason, and because the contract was re-let, petitioner supposedly lacks a cognizable injury. App., *infra*, 34a. As the court of appeals itself recognized, however, "IDOT never reached the question of whether the bid was appropriate." *Ibid*. There was no basis for the court to uphold a decision on a ground not addressed by the administrative agency, cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943), particularly when the party opposing summary judgment (petitioner) introduced facts showing that it would have been awarded the contract, and therefore the contract would *not* have been re-let. See pp. 12-13, 15, *supra*. Certainly the re-letting of the contract could not cure injury to petitioner if petitioner would have been awarded the

A. The Circuits Are Divided Over Whether A Government-Imposed Choice Between Engaging In Race Discrimination Or Losing A Government Benefit Constitutes Article III Injury-In-Fact.

There is a clear conflict among the courts of appeals regarding the first question presented, as the court below itself recognized in rejecting what it characterized as the "broad view of standing" followed by the Ninth, District of Columbia, and Sixth Circuits, each of which has held that coerced participation in racial discrimination constitutes Article III injury-in-fact.

The plaintiff in *Monterey Mechanical Co.* v. *Wilson*, 125 F.3d 702 (9th Cir. 1997), was a general contractor bidding on a government contract in California, which required by statute that general contractors either subcontract a certain percentage of work to minority, women, and disabled veteran-owned subcontractors or demonstrate a good faith effort to do so. *Id.* at 704.

The Ninth Circuit held that the general contractor had demonstrated standing, without regard to whether it was a victim of the state-mandated discrimination. Because discrimination on the basis of race, sex, and other similar characteristics is "'odious,'" the court explained, a person "required by government to engage in discrimination suffers injury in fact, albeit of a different kind, as does the person suffering the discrimination." *Id.* at 707-08 (quoting *Adarand*, 515 U.S. at 214). Thus, "[e]ven if a general contractor suffers no discrimination itself, it is hurt

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contract had the good faith waiver been granted, and that is the precise factual argument that petitioner advanced below.

by a law requiring it to discriminate, or try to discriminate, against others on the basis of their ethnicity or sex." *Id.* at 707.

The D.C. Circuit agreed with *Monterey Mechanical*'s analysis in *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998). There, a church that operated several radio stations brought a constitutional challenge to FCC regulations requiring radio stations to have affirmative action "equal employment opportunity" ("EEO") programs "targeted to minorities and women." *Id.* at 346. The FCC argued that the church did not have standing to argue that the EEO program requirement violated equal protection, because the church, "as opposed to a hypothetical non-minority employee[,] ha[d] not suffered an equal protection injury." *Id.* at 349.

The court rejected the FCC's standing argument, concluding that "[t]here can be no doubt that the Church has standing." *Id.* at 350. Citing *Monterey Mechanical*, the court noted that "forced discrimination may itself be an injury." *Ibid.* It held that "[w]hen the law makes a litigant an involuntary participant in a discriminatory scheme, the litigant may attack that scheme," by raising the rights of the job candidates discriminated against. *Ibid.*

Finally, in *Safeco Insurance Co. of America* v. *City of White House, Tennessee*, 191 F.3d 675 (6th Cir. 1999), the Sixth Circuit agreed with the view that forced participation in discrimination is a cognizable injury. In *Safeco*, a general contractor in Tennessee submitted the lowest bid for, and won, a municipal contract. An insurance company posted a bond and pledged to be the surety for the agreement between the general contract and the city.

The project in question was partially funded by an EPA grant, whose terms required the contractor to take steps to award subcontracts to small, minority and women's businesses. *Id.* at 678. Shortly after agreeing to the contract, the general contractor withdrew its bid. As a result, the city sought to collect on the surety's bond. In the resulting litigation, both the general contractor and the surety challenged the constitutionality of the EPA regulations. *Id.* at 679.

The court held that both the general contractor and the surety had standing to challenge the regulations. It explained that it did not matter whether the regulations "place[d] one contractor at a competitive disadvantage with other contractors"; the fact that a contractor was "'required by the government to discriminate by ethnicity or sex against others'" was sufficient to confer standing. *Id.* at 689 (quoting *Monterey Mech.*, 125 F.3d at 707) (citing *Lutheran Church*, 141 F.3d at 350-51).

The Seventh Circuit's decision in this case expressly rejected these holdings. It concluded that the "broad view" of standing articulated in *Monterey Mechanical* and the decisions that agreed with it violated "the established principle that 'a plaintiff raising only a generally available grievance about government * * *' does not satisfy Article III's requirement that the injury be concrete and particularized." App., *infra*, 32a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). "[N]ot every contractor," the court explained, "has 'standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws.'" *Id.* at 32a-33a (quoting *Valley Forge Christian Coll.* v. *Ams. United for Sepa-*

ration of Church & State, Inc., 454 U.S. 464, 489 n. 26 (1982)). Only a denial of equal treatment to petitioner itself could create standing.

The Seventh Circuit's holding creates a clear conflict among the circuits. Under the view articulated in *Monterey Mechanical* and followed in other cases, a contractor suffers injury whenever the government forces it to participate in the "odious" business of discrimination against others. See *Monterey Mech.*, 125 F.3d at 705. In the circuits that hold this view, it is irrelevant whether the plaintiff is directly disadvantaged by the discrimination mandate; the mere fact that the mandate is imposed suffices to confer standing.

The court below tried to disguise the square conflict by asserting that the plaintiffs in the three other court of appeals cases had suffered "another direct harm." App., *infra*, 31a. But that harm in *Monterey Mechanical* and *Safeco* was the failure to obtain a contract—the precise harm here. And *Lutheran Church—Missouri Synod* was in the same posture: the harm (adverse administrative action) was based on the failure to comply with the government's race-based hiring requirement.

By contrast, under the decision below, the injury identified in *Monterey Mechanical* is not cognizable. In the Seventh Circuit's view, standing is only available to a party that itself was "denied equal treatment." App., *infra*, 32a. The difference between this position and the view of the other courts of appeals could scarcely be more stark.

B. Forced Participation In Discrimination Is An Injury In Fact Under Article III.

The Seventh Circuit's conclusion that a person forced by the State to discriminate against others on the basis of race has not been injured in fact is unsupportable. This Court's precedents establish beyond doubt that this injury satisfies Article III.

As this Court has repeatedly recognized, "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (brackets and quotation marks omitted); see also, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244, 270 (2003) ("[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting))); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986); *Croson*, 488 U.S. at 493-94.

To be sure, the law permits the use of racial classifications in certain limited circumstances. But whenever such classifications are used and whatever their purpose, "the costs are undeniable." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007). "[R]ace is treated as a forbidden classification [because] it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000). That is why racial classifications are grave and serious measures that this Court has made clear should be undertaken by the government only in compelling circumstances.

A state law requiring a private party to discriminate against others on the basis of race or other such characteristics for that reason inflicts harm on that person. Cf. *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963) (describing a "law compelling persons to discriminate against other persons because of race" as "a palpable violation of the Fourteenth Amendment").

In the Seventh Circuit's view, petitioner's claim that it was injured by being forced to participate in a discriminatory scheme amounted to nothing more than a "generally available grievance about government." App., *infra*, at 32a (quotation marks omitted). Not so. Petitioner did not invoke "a right to a government that does not deny equal protection of the laws." *Id.* at 32a-33a (quotation marks omitted). Rather, petitioner pointed to the fact that general contractors—unlike other persons and entities in Illinois—are conscripted as active participants in the State's DBE program and thus compelled to engage in the sort of racial classification that the law has pronounced "odious." That is anything but a "generally available grievance."

To the extent the Seventh Circuit rule rests on the notion that denial of a government benefit is different in kind from direct government compulsion, it is flatly inconsistent with the unconstitutional conditions doctrine. *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) ("the government may not deny a benefit to a person because he exercises a constitutional right").

In any event, a person compelled to discriminate is also exposed to the risk of liability for the discrimination. *Monterey Mech.*, 125 F.3d at 708 (citing *Adickes* v. *S.H. Kress and Co.,* 398 U.S. 144, 148, 152

(1970)); see also *Lutheran Church*, 141 F.3d at 350. That economic risk constitutes an additional injury in fact within the meaning of Article III, apart from the requirement that the person participate in discrimination. Cf. *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 62 (1976) (holding that a "direct threat of personal detriment" confers Article III standing).

The consequences of the Seventh Circuit's restrictive view of standing are dramatic. Government could condition all manner of government benefits on an express requirement that a private party engage in race-based decisionmaking and the coerced decisionmaker could do nothing about it—the only avenue for relief would be a suit by persons or entities disadvantaged by the quota. That limitation on access to judicial relief has no basis in Article III.

C. The Issue Is Important.

The decision below threatens to constrict significantly the scope of Article III standing, making it harder for private parties to challenge their conscription as participants in unconstitutionally discriminatory government requirements.

The particular context in which this case arises—government-funded highway construction—involves over $40 billion per year in contracts that are subject to DBE requirements. See Fed. Hwy. Admin., *Moving Ahead for Progress in the 21st Century Act (MAP-21)* (July 17, 2012), https://www.fhwa.dot.gov/map21/summaryinfo.cfm (funding level for SAFETEA-LU was $41 billion in FY 2014).

Similar requirements apply to a significant percentage of the other $1 trillion in federally-funded contracts and grants awarded annually, as well as to

the hundreds of billions of dollars in state government contracts. See U.S. Dep't of Treasury, Bureau of Fiscal Serv., *USAspending.gov*, perma.cc/G9KN-GXDP (stating that the federal government disbursed $1.45 trillion in contracts and grants in FY 2015); Cheryl H. Lee *et al.*, U.S. Census Bureau, *State Government Finances Summary: 2013*, at 9, http://www2.census.gov/govs/state/g13-asfin.pdf (total state spending in 2013 on highways alone was $112 billion).

Moreover, federal and state government programs may also require contractors and licensees to engage in DBE-type programs in connection with hiring. See, *e.g.*, *Lutheran Church*, 141 F.3d at 346 (involving FCC mandate requiring radio stations to have affirmative action programs); 41 C.F.R. §§ 60-2.1, 60-2.16 (requiring certain federal contractors to have affirmative action programs that set "placement goals" for minorities or women, if underrepresented in the contractor's workforce).

Absent this Court's intervention, parties conscripted into participating in such race-conscious schemes will be significantly less able to avoid complicity in constitutional violations.

II. The Court Should Consider Whether Facial Compliance With Federal Standards Insulate A State DBE Program From Challenge As An Unconstitutional Quota.

Notwithstanding its conclusion that petitioner lacked standing, the court of appeals went on to address the merits of petitioner's constitutional claim. There too, the court erred significantly, holding that because Illinois' DBE program complied with federal statutory and regulatory requirements, petitioner

was not entitled to demonstrate that Illinois' application of the program here as a matter of fact mandated required race-based decisionmaking and therefore violated the Constitution.

That broad holding conflicts with the approaches of other courts of appeals and, more significantly, would mark a path for government officials seeking to require unlawful race-based decisionmaking. They could create a program that complies with the law, but then apply that program to force contractors to adhere to unwritten racial quotas. That is exactly what the evidence indicates occurred here.

A. The Circuits Are Divided.

A racial classification in a federal or State program must satisfy strict scrutiny to pass constitutional muster. Strict scrutiny requires that the program "serve a compelling governmental interest" and "be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235.

The courts of appeals that have considered *facial* challenges to the federal TEA-21 program have rejected those challenges, finding that TEA-21 is based on "Congress's compelling interest in remedying the effects of discrimination within the transportation contracting industry" and is narrowly tailored. *W. States Paving Co.* v. *Wash. State Dep't of Transp.*, 407 F.3d 983, 992-93 (9th Cir. 2005); accord *N. Contracting, Inc.* v. *Illinois*, 473 F.3d 715, 720-21 (7th Cir. 2007); *Sherbrooke Turf, Inc.* v. *Minn. Dep't of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1176 (10th Cir. 2000).

With respect to *as-applied* challenges to particular States' implementation of their DBE programs,

however, the lower courts part ways. They agree that a State may rely on Congress's nationwide compelling interest in order to justify its State-level DBE program, but they disagree as to whether it is possible to challenge a particular DBE program on narrow tailoring grounds.

The Eighth Circuit has held that as-applied challenges to state DBE programs require a state-specific analysis of narrow tailoring. "[A] *national* program," the court held, "must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny." *Sherbrooke Turf*, 345 F.3d at 971. Thus, the court examined local market conditions in the States whose programs were before it in order to assess the validity of the States' DBE goals.

In *Western States Paving Co.* v. *Washington State Department of Transportation*, the Ninth Circuit similarly held that the State's DBE program could not be "upheld * * * simply because the State complied with the federal program's requirements." 407 F.3d at 997. It therefore permitted a state-specific narrow tailoring challenge to proceed and invalidated Washington's DBE program on narrow tailoring grounds. *Id.* at 996.

The Seventh Circuit's approach to as-applied challenges directly conflicts with the approach of these other courts. In the Seventh Circuit's view, the TEA-21 program makes State governments mere "agent[s] of the federal government" implementing federal goals. App., *infra*, 39a (quoting *Milwaukee Cnty. Pavers Ass'n* v. *Fielder*, 922 F.2d 419, 423 (7th Cir. 1991)). Because the federal-level program has

been held to survive strict scrutiny on its face, as long as the state is "complying with federal law" and "do[ing] exactly what the statute expects it to do," it cannot "be thought to have violated the Constitution." *Ibid.* (quotation marks omitted).

Thus, the court held below that "[a] state is insulated from a constitutional challenge as to whether its [DBE] program is narrowly tailored * * * absent a showing that the state exceeded its federal authority." App., *infra*, 39a (brackets and quotation marks omitted).

The conflict among the circuits is therefore clear. Only in the Seventh Circuit is the narrow-tailoring inquiry constricted to preclude a plaintiff from demonstrating that a State actually implements its DBE program to require discrimination—which often is the most crucial issue in any case involving such a program.

B. Mere Compliance With Federal Regulations Does Not Insulate A State DBE Program From As Applied Scrutiny.

This Court has repeatedly affirmed that the purpose of race-based measures in the context of government contracting is to remedy past discrimination. "Unless [such classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493; see also *Adarand*, 515 U.S. at 225 (overruling *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547 (1990), and criticizing it for assuming that a racial classification was "benign" even though it "did not serve as a remedy for past discrimination").

When the government "fail[s] to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause." *Croson*, 488 U.S. at 511. The government must make "[p]roper findings" that "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Id.* at 510.

In creating the TEA-21 program, Congress did not undertake a jurisdiction-by-jurisdiction analysis to determine whether racial discrimination in contracting had occurred in every State. Nor did it determine what degree of race-conscious measures was warranted in each State to remedy whatever discrimination had occurred. Thus, even if the Seventh Circuit is correct that the *federal* TEA-21 program is narrowly tailored to serve the compelling interest of remedying past discrimination in the construction industry, see App., *infra*, 38a-39a, that does not automatically establish that each *State*'s DBE program is also narrowly tailored as long as it complies with federal requirements.

The court of appeals' approach to strict scrutiny improperly relieved the State of the burden of making *any* showing that its DBE program is applied in a manner consistent with its written standards. The result was that many of petitioner's arguments about the DBE program's lack of narrow tailoring were foreclosed. For example, petitioner sought to argue that the process by which respondents chose the program's DBE participation goal was arbitrary and driven by political considerations. But the court of appeals dismissed that challenge to the program out of hand, stating that it did not appear that "political

motivations matter, provided IDOT did not exceed its federal authority." App., *infra*, 40a.

Under the Equal Protection Clause, motivations *do* matter. The court of appeals' perfunctory reliance on federal regulations cannot be squared with this Court's admonition that racial classifications must be subjected to a "searching judicial inquiry" in order to determine whether they are "motivated by illegitimate notions of * * * racial politics." *Croson*, 488 U.S. at 721. The federal government approves a State's *methodology* for setting DBE goals, but it does not assess whether a State has acted with discriminatory intent in applying that methodology or in administering other elements of the program. Thus, the fact that a State's DBE program and DBE goals have been reviewed by the federal government in no way establishes that they are per se constitutional.

As the court of appeals observed in this case, "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority." App., *infra*, 41a (quotation marks omitted). But IDOT could have exercised its authority in order to impose an impermissible quota in the circumstances of a particular contract. Under the lower court's blinkered view, if a constitutional violation is not also a violation of federal procedures, it is immune from scrutiny.

Finally, the court of appeals engaged in blatant fact-finding—even though it was reviewing a grant of summary judgment *against* petitioner—in undertaking its misplaced inquiry whether IDOT violated federal law. Thus, it held that IDOT did not apply a no-

waiver policy based on resolution of conflicting evidence. See p. 16, *supra*.[10]

In sum, by making compliance with the broad standards of federal law dispositive of the narrow tailoring inquiry, the court of appeals has crafted a "strict scrutiny" analysis for contracting cases that is strict in theory, but exceedingly permissive in fact.

C. The Question Is Important.

TEA-21 is a very large grant program; all 50 States have created DBE programs in order to comply with its requirements and to become eligible for federal highway funds. See U.S. Dep't of Transp., *State DOT and DBE Program Websites*, perma.cc/99FC-E4HZ. Each one of these State DBE programs, moreover, applies to a large number of general contractors. In Illinois alone, for example, nearly 700 contractors are prequalified with the State to bid on contracts. See Ill. Dep't of Transp., List of Prequalified Firms, http://www.idot.illinois.gov/Assets/uploads/files/Doing-

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[10] The court of appeals cited the number of waivers issued in 2009 and in 2010 as evidence that there was not a "no waiver" policy. App., *infra*, 41a-42a. But petitioner's claim was that IDOT maintained that policy during late 2009 and early 2010—the time period proximate to the gubernatorial primary. See pages 7-11, *supra*. Indeed, the "no waiver" policy evidence arose in December 2009, making the annual 2009 number wholly irrelevant. This lawsuit was filed on February 26, 2010 (R. 20) and gave IDOT an incentive to grant waivers after that date (which was also after the primary), including the March 2010 waiver cited by the court below. App., *infra*, 18a. For that reason, the annual 2010 number is also irrelevant. Given these facts, and the repeated statements by government officials, the evidence on this point was sufficiently disputed to preclude a factual finding on summary judgment.

Business/Specialty-Lists/Highways/Construction/Prequal-Lists/Preqlist.xls. The effects of TEA-21 are thus felt broadly across the country.

The Seventh Circuit's decision makes this vast program virtually immune from equal protection review. The *only* legitimate basis for a constitutional challenge to a DBE program, in that court's view. is an allegation that the State "exceeded its federal authority." App., *infra*, 39a.

And the same approach would control assessment of other federal and state DBE programs, of which there are many. See p. 33, *supra*.

This Court has made clear that "*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand*, 515 U.S. at 224 (emphasis added). But the Seventh Circuit's holding significantly undermines that mandate. Such a dramatic restriction in judicial scrutiny warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2016

APPENDICES

APPENDIX A

In the

United States Court of Appeals
For the Seventh Circuit

No. 14-1493
DUNNET BAY CONSTRUCTION COMPANY,
an Illinois Corporation,
Plaintiff-Appellant,
v.

ERICA J. BORGGREN, in her official capacity as
Acting Secretary for the Illinois
Department of Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Central District of Illinois.
No. 3:10-cv-03051-RM-SMJ —
Richard Mills, *Judge.*

ARGUED DECEMBER 12, 2014 — DECIDED
AUGUST 19, 2015

Before ROVNER, WILLIAMS, and TINDER,
Circuit Judges.

TINDER, *Circuit Judge.* Plaintiff-Appellant Dunnet Bay Construction Company sued Defendants-Appellees Illinois Department of Transportation (IDOT) and its then-Secretary of Transportation Gary Hannig in his official capacity, alleging that IDOT's Disadvantaged Business Enterprise (DBE) Program discriminates on the basis of race. The dis-

trict court granted summary judgment to Defendants, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race and that the DBE Program survived the constitutional and other challenges. Dunnet Bay appeals. For the reasons that follow, we affirm.

I. BACKGROUND

Dunnet Bay is a corporation that engages in general highway construction. It is prequalified to bid and work on IDOT projects and competes for federally assisted highway construction contracts awarded by IDOT. Dunnet Bay is owned and controlled by two white males. Between 2007 and 2009, its average annual gross receipts were over $52 million.

IDOT is the agency of the State of Illinois responsible for administering, building, operating, and maintaining the state highway system. It also is responsible for administering federally funded highway construction contracts in accordance with federal and state law, including the regulations promulgated by the U.S. Department of Transportation (USDOT), *see* 49 C.F.R. Part 26. IDOT administers a small business initiative program, which reserves certain work on contracts for small business enterprises. Gary Hannig was the Secretary of IDOT from February 2009 through the end of June 2011.

In order to receive federal-aid funds for highway contracts, IDOT must have a "disadvantaged business enterprise" participation program that complies with federal regulations. The Transportation Equity Act for the 21st Century ("TEA–21"), Pub. L. No. 105–178, 112 Stat. 107 (1998), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 23 U.S.C. § 101 Note,

Pub. L. No. 109–59, 119 Stat. 1144 (2005), and the governing regulations require state recipients of federal-aid funds for highway contracts like IDOT to submit to the United States Department of Transportation (USDOT) a written plan that demonstrates, *inter alia*, that they are not discriminating against minorities and women in the award of contracts. Section 1101(b) of the TEA–21 provides that "not less than 10 percent of the amounts made available for any program under … [TEA–21] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." A DBE is defined as a for-profit small business concern that is at least 51% owned and controlled by one or more socially and economically disadvantaged individuals. 49 C.F.R. § 26.5. There is a rebuttable presumption that women and members of racial minority groups are socially and economically disadvantaged, *id.*, but an individual owner of any race or gender may qualify as "socially and economically disadvantaged." *See id.* Under the applicable regulation, "a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts … over the firm's previous three fiscal years, in excess of $22.41 million." 49 C.F.R. § 26.65(b) (2009).

States must set an overall goal for DBE participation in federally assisted contracts. 49 C.F.R. § 26.45(a). That goal "must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [federal]-assisted contracts" and "must reflect [the state's] determination of the level of DBE participation [one] would expect absent the effects of discrimination." *Id.* § 26.45(b). A state is not permitted to use quotas for DBEs but may use

set-aside contracts for DBEs in limited circumstances. *Id.* § 26.43. A state "must meet the maximum feasible portion of" its overall DBE participation goal through race-neutral means, using contract goals to meet any portion that is not projected to be met with race-neutral means. *Id.* § 26.51(a), (d). In setting specific contract goals, a state should consider such factors as "the type of work involved, the location of the work and the availability of DBEs for the work of the particular contract." *Id.* § 26.51(e)(2).

Under the regulations, a contract may be awarded to a bidder who demonstrates that it has obtained enough DBE participation to meet the DBE contract goal, or demonstrates that it made adequate good faith efforts to meet the goal even if it did not meet the goal, *id.* § 26.53(a), which means that it "took all necessary and reasonable steps to achieve a DBE goal … which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful." 49 C.F.R. Pt. 26, App. A, § I. If a bidder demonstrates that it made adequate good faith efforts, it must not be denied award of the contract on the ground that it failed to meet the goal. *Id.* § 25.53(a)(2). If the apparent successful bidder fails to either meet the DBE contract goal or demonstrate good faith efforts, the state "must, before awarding the contract, provide the [bidder] an opportunity for administrative reconsideration." *Id.* § 26.53(d). If the state determines that the apparent successful bidder failed to show good faith efforts, the state must send the bidder a written explanation of the basis for the finding. *Id.* § 26.53(d)(4).

IDOT administers the DBE program in Illinois. IDOT prepared and submitted to USDOT for approval a DBE program governing federally funded highway construction contracts. IDOT established a statewide aspirational goal for DBE participation of 22.77%. IDOT typically achieved somewhere between 10% and 14% DBE participation. For fiscal year 2009, IDOT attained 11.15% minority participation on all construction projects. For fiscal year 2010, IDOT projected that it would achieve 4.12% DBE participation through race-neutral means, leaving 18.65% DBE participation to be met by using contract goals. The Federal Highway Administration (FHWA) expressed concern about states not reaching their DBE goals and indicated to IDOT that it would like to see the DBE participation opportunities increased.

IDOT has five regions that are subdivided into a total of nine districts. Each district is headed by a district engineer who is responsible for the highways in his or her district. The district engineers report to the regional engineers who report to the Director of Highways/Chief Engineer. A district engineer and equal employment opportunity (EEO) officer review each construction contract to decide whether the contract presents DBE participation opportunities. At all relevant times, Christine Reed was IDOT's Director of Highways/Chief Engineer and was responsible for goal setting. Reed reviewed recommendations for contract goals and small business initiatives. Contracts had been withdrawn from bidding by Secretary Hannig's predecessor to review DBE goals. After the goals were reviewed, the contracts were readvertised with higher DBE goals.

Under IDOT's DBE program, if a bidder fails to meet the DBE contract goal, then it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. These requests for modification are also known as "waivers." Historically, IDOT has granted goal modification requests. In calendar year 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance from IDOT. In calendar year 2008, IDOT granted 50 of 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. And in calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest.

Secretary Hannig became IDOT's Secretary in February 2009. He named William Grunloh his Chief of Staff. From the beginning of his term, Secretary Hannig told Reed that he wanted IDOT to make a "very strong effort" in setting and attempting to achieve DBE goals. As with prior IDOT Secretaries, Secretary Hannig was concerned about increasing DBE participation in federal contracts. Indeed, his first directive to IDOT's entire staff was to increase participation for minority companies. In a March 2009 meeting with Reed, Secretary Hannig made it "very clear that waivers would not be a part of a common practice of his administration." As a result, Reed told the regional engineers that "the Secretary was not interested in entertaining waivers as part of his administration" and told a contracting organization that "request[s] for waivers would be closely scrutinized and would be very difficult to get." In an April meeting about DBE participation for a bridge

project, Secretary Hannig was "very adamant that waivers were not going to be an acceptable part of his administration unless [they were] absolutely positively appropriate."

IDOT's Director of the Office of Business and Workforce Diversity (OBWD) Larry Parrish, who recommended whether waiver requests were granted or denied and sought approval of his recommendation from Secretary Hannig, advised Carol Lyle, IDOT's Deputy Director of OBWD, that he was under pressure not to forward waiver requests.

From time to time, Reed had discussions about DBE goals with Kristi Lafleur, the Deputy Chief of Staff in the Governor's Office who was responsible for oversight of IDOT and Darryl Harris, the Governor's Director of Diversity Enhancement. In September 2009, Lafleur emailed Secretary Hannig that "[w]e need an action plan from [IDOT] on increasing the DBE numbers" and "we need an overhaul for the program and need to announce a new program." Secretary Hannig responded that "an overhaul of this program is in order" but "[t]he federal guidelines make the program goals and not set asides." Beginning with his appointment in November 2009 as Director of Diversity Enhancement, Harris made it clear to Secretary Hannig, Reed, and other IDOT personnel that DBE participation was a top priority and that goal modifications were not favored.

In early December 2009, IDOT sought bids for a highway resurfacing project for a portion of Interstate 290, known as the Eisenhower Expressway. There were four federally funded contracts for construction work on the Eisenhower, one of which was Contract No. 60I57, the contract at issue in this case. Henry Gray, a civil engineer and EEO Officer for

District 1, set the DBE goals for the contracts. He set DBE participation goals of 8% for three of the four contracts, including Contract No. 60I57; the goal for the fourth contract was set at 10%.

In mid-December Secretary Hannig ordered the withdrawal of the invitation for bids for the Eisenhower projects. Before doing so, he had been advised that the Governor's Office wanted a weighted average DBE participation goal of 20% for those projects. Secretary Hannig wrote Reed and Grunloh that "we need to get the [E]isenhower up to 20% minority participation" and back on schedule.[1] Secretary Hannig and Reed were comfortable that the goal could be met within the law. Reed advised Secretary Hannig that the contract goals were "relatively low" and there was opportunity to increase the goals under federal law. IDOT expanded the scope of the projects and items deemed eligible for DBE consideration—by expanding the geographic areas to determine DBE eligibility and by adding pavement patching, landscaping, and other work originally reserved for small business initiatives to the existing DBE goals. These efforts increased the weighted average of the projects to 20%. IDOT issued a revised invitation for bids for a January 2010 letting with a new DBE participation goal on Contract No. 60I57 of 22%.

Earlier in 2009, IDOT had sought approval from USDOT to use "split goals" on a Mississippi River Bridge Project. USDOT rules do not allow "split goals"—separate goals for minorities and women. On December 14, Harris sent the Governor's Chief of Staff and others an email indicating that the Federa-

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[1] There is no "minority participation" goal, and, as noted, DBE status is not limited to any particular minority group.

tion of Women Contractors was "willing[] to drop [its] opposition to split goals" on the project if IDOT implements a "no waiver policy" like that of the Capital Development Board. Harris testified that he never agreed to have IDOT implement a no-waiver policy, but rather agreed to "bring it up for consideration."

On December 23, Secretary Hannig held a mandatory meeting with Grunloh, Reed, Parrish, and IDOT's Chief Counsel Ellen Schanzle-Haskins, as well as with some regional engineers and district EEO officers—the persons responsible for setting contract goals in their respective districts. Secretary Hannig made it clear that the staff needed to be more aggressive in setting DBE goals, that is, they needed to increase the goals. He expressed his concern about waivers and goal modifications, explaining that he did not want to have to decide between goal attainment and waivers and modifications. IDOT's Regional Engineer for the Metra East area, Mary Lamie, testified that the Secretary repeated several times that there would be no DBE waivers. However, she also said that based on the context of the meeting, she was "left with the impression that Secretary Hannig wasn't saying no waivers under any circumstances will ever be issued" but that requests for "waivers were going to be reviewed" at a high level, and "we needed to make sure that the appropriate documentation was provided" in order for a waiver to be issued.

The FHWA approved the methodology IDOT used to establish its statewide overall DBE goal of 22.77%. The FHWA reviewed and approved the individual contract goals for work on the Eisenhower projects for IDOT's January 15, 2010, bid letting. It also approved the IDOT DBE program amendment

that required contractors to submit with their bids their DBE utilization plans and documentation of good faith efforts to meet DBE goals.

On January 6, 2010, IDOT held an informational meeting for general contractors and DBE firms regarding the January 15, 2010 bid letting. IDOT discussed changes in its DBE contracting procedures and requirements. The District 8 (Metra East) EEO Officer Lee Coleman stated that Secretary Hannig had told him that no waivers would be granted with respect to DBE contract goals for the letting. However, IDOT's Director of Highways Reed told Secretary Hannig that a no-waiver policy was not possible because it violated the law. Secretary Hannig told Harris that a no-waiver policy was not allowed under federal law. The Secretary also advised the Governor's Chief Operating Officer Jack Lavin that IDOT was doing its best to follow the law and did not appreciate Harris trying to interject himself into IDOT's business.

IDOT has a "Bidders' List," also known as the "For Bid List of Bidders" and "For Bid List," which identifies all approved, prequalified general contractors for each item on a letting. DBEs rely on the For Bid List so they know to which contractors to submit subcontracting quotes. DBEs typically will not submit subcontracting quotes to general contractors who are not on the For Bid List. On January 14, IDOT issued the final For Bid List, identifying the authorized bidders on each project in the January 15 letting. IDOT inadvertently left Dunnet Bay off the For Bid List.

On January 15, Dunnet Bay submitted to IDOT a bid of $10,548,873.98 for Contract No. 60I57, which was the lowest bid on the contract. Dunnet Bay's bid

was 0.73% under the engineer's estimate but 16% over the program estimate, exceeding the latter estimate by about $1.3 million.[2] Dunnet Bay submitted its DBE utilization plan, noting that it had planned to meet the DBE goal of 22%, but identified only $871,582.55 of subcontracting or 8.26% of its bid for DBE participation.[3] Three other bids were submitted; each of them met the DBE goal. The regional engineer for District 1 advised Director Reed that Dunnet Bay's bid was within the awardable range.

Dunnet Bay requested a goal modification, also known as a waiver, based on its good faith efforts to obtain the DBE goal. In December 2009, Dunnet Bay had attended a symposium where it met some DBEs. Beginning on January 4, 2010, Dunnet Bay faxed DBE subcontractors invitations to submit quotes and followed-up about a week later with telephone calls. Dunnet Bay solicited 796 companies, 453 of which were DBEs. It had contacted DBE networking organizations such as the Black Contractors United, Chi-

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[2] The engineer's estimate is calculated by the relevant district engineer; it is a detailed analysis of the average cost of each work item and the total expenses. The program estimate is set by IDOT and used to allocate available funds for the fiscal year. A bid is compared to the engineer's estimate to determine whether or not it is within the awardable range. The program estimate is used to determine whether there is money in IDOT's budget to pay for the project. Reed stated that bids are measured against both the engineer's estimate (to determine if the bid is reasonable) and against the program estimate (to ensure there is enough money in the budget).

[3] Prior to 2010, a successful low bidder was required to submit its DBE utilization plan within 7 days after the letting. Effective with the January 15, 2010 letting, contractors were required to submit their DBE utilization plans and documentation of good faith efforts with their bids.

cago Minority Business Development Council, and Chicago Urban League, and advertised subcontracting opportunities on its website. In addition, Dunnet Bay's president attended a mandatory pre-bid meeting, which provided DBEs an opportunity to network with prime contractors interested in bidding on the Eisenhower project. Dunnet Bay's efforts were essentially the same that it had made in the past and had proven successful in meeting DBE goals. Dunnet Bay was not among those contractors who often sought goal modification requests. In fact, Dunnet Bay met the goal for 8 of the 9 bids in the January 15, 2010 letting. However, despite utilizing IDOT's supportive services in the past, Dunnet Bay did not contact supportive services in connection with the Eisenhower project. Its president offered the explanation that supportive services were not of "any help."

DBE subcontractors submitted to Dunnet Bay post-bid quotes that would have enabled it to meet the DBE participation goal. At least one of the subcontractors indicated that its quote would have been submitted earlier had it known that Dunnet Bay was bidding on the project, that is, had IDOT not left Dunnet Bay off the For Bid List.

An interview of Darryl Harris was published in the January 2010 issue of *Capital City Courier*. (Governor Quinn was facing a formidable challenger in the Democratic primary election to be held on February 2, 2010.) In the interview, Harris discussed the DBE program on the Eisenhower projects:

> I can tell you one of the greatest successes that we have so far is that we have a project in the Chicago area called the Eisenhower Highway Project, which is a $90 billion dollar project. Traditionally, goals in the past were

> set around 6 or 8 percent. This administration can go on record that our goal is 20 percent, with one stage of that project being 30 percent for minority-owned businesses. Already you can see that the Governor is committed to providing opportunities for minorities and women … .

The Governor remains steadfast on a no-waiver policy. This has been a practice in C.D.B. [Capital Development Board] for several years. So, now we're encouraging the Department of Transportation to also have a no waiver policy.

> [O]ur no-waiver policy is just that. You have to meet it. When we put goals on a project, we strongly encourage that those goal[s] are being met.

The article was not well-received by IDOT. Secretary Hannig was upset that Harris would make such statements that were contrary to federal law. Hannig had advised Harris that a "no waiver" policy was not allowed under federal law and that IDOT would not implement a policy "that was clearly in violation of the federal laws." The article drew objection from the Illinois Road & Builders Association who wrote Governor Quinn, requesting "complete repudiation" of Harris's statements about a "no-waiver policy." Secretary Hannig and IDOT's Chief Counsel responded by indicating that IDOT does not violate federal law and regulations, and that IDOT has granted and does grant waivers where appropriate.

In an email dated January 20, 2010, from Secretary Hannig to Harris and copied to Lafleur in the Governor's Office, Hannig advised of the results of the bidding on Contract No. 60I57:

> The fourth project has 4 bidders. The low bidder is over budget but close in dollar amounts but is the only bidder to miss the DBE goals. Under our rules since the lowest bidder is close to our pre-bid estimate, he would normally be given the award if he could show a good faith effort to meet the DBE goals and was granted a waiver by I.D.O.T. If I.D.O.T. rules he did not make a good faith effort I.D.O.T. could award the contract to the next lowest bidder or rebid the project.

Secretary Hannig testified that the email was mistaken because the low bidder would not normally be awarded the contract because the bid was over IDOT's estimate. He explained, "We would have to take a look at it, and there could be some circumstances where it would be accepted." IDOT Chief Counsel Schanzle-Haskins stated that "[IDOT] would not normally award a contract that was [$1.3 million] over the program estimate"; instead, it "normally would reject the bid."

IDOT held a series of meetings to decide whether to award the Eisenhower contracts. Three of the bids were "way over" the program estimates. It was discussed that Dunnet Bay as the low bidder was over the program estimate, but within the awardable range. Secretary Hannig expressed concern about the race, gender, and ethnicity of the DBEs on the Eisenhower projects. Harris expressed concern that there were not enough African American subcontractors on the DBE list. Reed made recommendations to Secretary Hannig regarding whether to rebid contracts, and he followed her recommendations to rebid contracts for financial concerns. Reed recommended

to Secretary Hannig that Contract No. 60I57 be rebid because the low bidder was 16% over the project estimate and was left off the For Bidders List.

In a letter dated January 22, 2010, IDOT advised Dunnet Bay that it had made a "preliminary determination" that Dunnet Bay had not made good faith efforts to meet the DBE goal. Dunnet Bay's good faith efforts were not considered at that time, however. Rather, where the bidder failed to meet the DBE goal despite documentation of good faith efforts, IDOT initially rejected the bid and all bids as nonresponsive. According to Carol Lyle, IDOT had decided to preliminarily reject any bid that did not meet the DBE goal and allow the contractor to seek a reconsideration hearing. A reconsideration hearing was set for January 25 to allow Dunnet Bay to provide documentation of its good faith efforts.

Secretary Hannig appointed IDOT Chief of Staff Grunloh, a former Democratic State Representative, to serve as reconsideration officer. As noted, Grunloh had participated in the December 23 meeting where Secretary Hannig made it clear he wanted aggressive DBE goal setting and expressed concern about goal modification requests. Dunnet Bay's reconsideration hearing was Grunloh's first as a hearing officer. Before the hearing, Lyle briefed Grunloh on the issues relevant to the reconsideration hearing, provided him with a copy of the applicable federal regulations and standards, including the good faith effort standards in Appendix A to Part 26 of the Code of Federal Regulations, and advised him of the resources that were available to assist contractors in meeting DBE goals.

Grunloh, Lyle, Dunnet Bay's owner and president Tod Faerber, and Dunnet Bay employee Sarah

Rose attended the reconsideration hearing. Dunnet Bay presented evidence of its good faith efforts. However, Faerber admitted that they had not used IDOT's supportive services. Dunnet Bay argued that it would have met the contract's DBE goal but for IDOT's error in leaving it off the For Bid List, which impacted the DBEs' submission of timely subcontracting quotes to Dunnet Bay.

After the reconsideration hearing, Faerber met with Lyle and Grunloh. Lyle initially believed that Dunnet Bay had demonstrated sufficient good faith efforts. She testified, however, that a major reason for this belief was because Dunnet Bay had been left off the For Bid List. Lyle subsequently expressed the opinion that Dunnet Bay could have done more to demonstrate good faith efforts, namely, by contacting supportive services as well as IDOT's Bureau of Small Business Enterprises and the district EEO officer.

Faerber also met with Secretary Hannig to express serious concern about his ability to get a fair hearing given the Darryl Harris article, which "seemed to imply that waivers were not going to be granted." The Secretary responded that he understood, but he was under pressure from Harris not to grant waivers. Faerber candidly testified that Secretary Hannig did not indicate whether or not IDOT would grant waivers.

Grunloh decided that Dunnet Bay's reconsideration request should be denied, having concluded that it had not demonstrated good faith efforts to obtain DBE participation. Although Grunloh prepared no contemporaneous writing of his reasoning, he summarized his reasons as follows: (1) Dunnet Bay did not utilize IDOT's supportive services, and (2) the se-

cond, third, and fourth next lowest bidders were able to meet the 22% goal.

Grunloh also recommended to Secretary Hannig that the contract be rebid instead of awarded to the second lowest bidder because the low bidder (Dunnet Bay) had not been included on the final For Bid List. Similarly, Chief Counsel Schanzle-Haskins advised Secretary Hannig that IDOT "screwed up" by leaving Dunnet Bay off the bidders list, and so, in fairness, IDOT should not award the contract to the second lowest bidder. Because the low bidder was 16% over the project estimate and was left off the Final For Bid List, Secretary Hannig decided not to award the contract to the second lowest bidder and re-let Contract No. 60I57.

On February 2, Secretary Hannig contacted Faerber by telephone and advised that IDOT was not going to grant Dunnet Bay a waiver for the project and its bid was going to be rejected because it did not meet the DBE goal. Hannig explained that IDOT "felt bad" because Dunnet Bay was left off the For Bid List, and IDOT was going to rebid the project rather than award it to the second lowest bidder. Secretary Hannig sent Dunnet Bay a letter dated February 2, 2010, stating that its bid was "considered non-responsive and is hereby rejected." Secretary Hannig testified that Dunnet Bay's bid was rejected because it did not meet the DBA goal, but it "could have been rejected because [it] was too high"; however, IDOT never reached the question of whether or not it should award the contract based on the amount. Secretary Hannig explained that had Dunnet Bay met the DBE goal, the next question would have been whether the bid was appropriate,

and Reed had recommended that IDOT rebid the contract.

Four separate Eisenhower Expressway projects were advertised for bids for the January 15, 2010 bid letting. IDOT granted one of four goal modifications requested from that bid letting. (Reconsideration Hearing Officer Grunloh granted modification of the DBE participation goal on March 4, 2010.) Only one of the four projects was awarded; the other three, including Contract No. 60I57, were unacceptable to IDOT and were rebundled and re-advertised for bids for a February 2010 special letting. The re-bids were "much more competitive." Although Dunnet Bay's bid was lower than its first bid, it was not the lowest bid; it was the third out of five bidders.

On February 26, 2010, Dunnet Bay sued IDOT and Secretary Hannig in his official capacity, asserting race discrimination and equal protection claims under 42 U.S.C. §§ 1981 and 1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and Section 5 of the Illinois Civil Rights Act of 2003, 740 ILCS 23/1–5. Dunnet Bay sought damages as well as a declaratory judgment that the DBE Program is unconstitutional and injunctive relief against its enforcement. Dunnet Bay sought summary judgment as to liability, contending that the Defendants exceeded the authority granted to them in the federal rules regarding DBE programs, so that the DBE Program was not insulated from constitutional attack and could not withstand strict scrutiny. Defendants also sought summary judgment, arguing that the DBE program was not subject to attack, that Dunnet Bay was not subjected to intentional race discrimination, and that Dunnet Bay lacked stand-

ing to raise an equal protection challenge based upon race.

In a comprehensive and well-written opinion, the district court granted the Defendants' motion and denied Dunnet Bay's motion. The court concluded "that Dunnet Bay lacks Article III standing to raise an equal protection challenge because it has not suffered a 'particularized' injury that was caused by IDOT. Dunnet Bay was not deprived of the ability to compete on an equal basis." *Dunnet Bay Constr. Co. v. Hannig*, 3:10-cv-3051, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014). The court also determined that Dunnet Bay, which does not qualify as a small business, lacks prudential "standing to vindicate the rights of a (hypothetical) white-owned small business." *Id.*

Even if Dunnet Bay had standing to bring an equal protection claim, the court concluded that the Defendants were entitled to summary judgment. *Id.* It stated that to establish an equal protection violation, IDOT would have to show that it was treated less favorably than another similarly situated entity. The court found that only speculation could resolve whether Dunnet Bay or any other contractor would have been awarded the Contract but for IDOT's DBE Program. It reasoned that no one could know what the second lowest bidder's bid would have been if it had not met the 22% goal or what Dunnet Bay's bid would have been had it met the 22% goal, or whether Dunnet Bay would have been awarded the contract had it demonstrated adequate good faith efforts because its bid was over the program estimate. And because Dunnet Bay was held to the same standards as every other bidder, the court concluded that Dunnet

Bay could not establish that it was the victim of racial discrimination. *Id.* at *31.

Moreover, the court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE program fails under *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at *26-*29. The court determined that there was no reasonable basis to find that IDOT exceeded its federal authority by (1) setting the 22% DBE goal on the Eisenhower Contract; (2) imposing a "no waiver" policy by refusing to grant waivers of DBE goals, given that a waiver was granted in connection with the January 15, 2010 letting at issue and waivers were granted before and after that letting; (3) denying Dunnet Bay's waiver request initially and on reconsideration upon finding that it did not make adequate good faith efforts; and (4) omitting from its denial letter the reasons why its good faith efforts were inadequate, given that the "technical" violation did not prejudice Dunnet Bay. Furthermore, because IDOT rebid the project, the court concluded that a reconsideration hearing was not required, and because the contract was not awarded to the next lowest bidder, it decided the claim was moot. *Id.* at *29. Dunnet Bay appeals from the district court's judgment.

II. DISCUSSION

Dunnet Bay contends that it was denied a state highway construction contract because of race discrimination in IDOT's DBE Program. We review the district court's ruling on the cross-motions for summary judgment *de novo*, construing all reasonable in-

ferences from the record in favor of the party against whom the motion under consideration is made. *Tompkins v. Cent. Laborers' Pension Fund*, 712 F.3d 995, 999 (7th Cir. 2013).

A. Dunnet Bay's Standing to Raise an Equal Protection Claim

The first issue we address is whether Dunnet Bay has standing to challenge IDOT's DBE Program on the ground that it discriminates on the basis of race in the award of highway construction contracts. In other words, is Dunnet Bay a proper plaintiff to challenge the DBE program on the basis of alleged race discrimination? If Dunnet Bay lacks standing, then we lack jurisdiction to consider the merits of the equal protection claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Standing arises under Article III's "case or controversy" requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing has three elements: (1) an "injury in fact," that is, "an invasion of a legally protected interest which is … concrete and particularized, and … actual or imminent"; (2) a causal connection between the injury and the challenged conduct, meaning that the injury is "fairly traceable" to the challenged conduct; and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (citations and internal quotation marks omitted). These are the constitutional minimum requirements for standing. *See id.* at 560.

There are also prudential limitations on standing. *Lujan*, 504 U.S. at 560; *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). One of these limitations is that "when the asserted harm is a 'generalized griev-

ance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499. Another prudential limitation is that a litigant "generally must assert his own legal rights and interests" and cannot assert "the legal rights or interests of third parties." *Id.* In contrast with constitutional limitations on standing, prudential limitations are not jurisdictional and may be disregarded in certain situations. *Id.* at 500–01 (recognizing that as long as constitutional standing is satisfied, a party "may have standing to seek relief on the basis of the legal rights and interests of others"). In addition, a litigant may forfeit prudential standing arguments by failing to present them in the district court. *See Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Kelly E.*, 207 F.3d 931, 934 (7th Cir. 2000) (stating that "prudential considerations … are forfeited if not presented in a timely fashion").

"The party invoking federal jurisdiction bears the burden of establishing [the standing] elements[,] … [and] each element must be supported … with the manner and degree of evidence required at the successive stages of the litigation." *Edgewood Manor Apart. Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 771 (7th Cir. 2013) (quoting *Lujan*, 504 U.S. at 561 (citations omitted)). "At the summary-judgment stage, 'the plaintiff can no longer rest on … mere allegations, but must set forth by affidavit or other evidence specific facts.'" *Id.* (quoting *Lujan*, 504 U.S. at 561 (internal quotation marks and citations omitted)). Thus, because the district court decided that Dunnet Bay lacked standing at the summary judgment stage, mere allegations of standing are not enough; Dunnet Bay must present evidence to establish the elements of standing.

Dunnet Bay contends that it has standing because it has suffered an injury in fact. First, it asserts that IDOT's race-conscious DBE program prevented it from competing on equal footing with DBE contractors and prevented it from being awarded the contract. Dunnet Bay also claims that it was injured because the DBE program forced it to participate in a discriminatory scheme.

The Supreme Court addressed standing to raise an equal protection challenge to race-conscious government contracting programs in *Northeastern Fla. Chapter, Associated General Contractors of America v. Jacksonville*, 508 U.S. 656 (1993), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In *Northeastern Florida*, an association of contractors challenged a Jacksonville, Florida ordinance setting aside 10% of city contracts for businesses that were minority- or women-owned. Once a project was earmarked for minority business enterprise bidding, it was "deemed reserved for minority business enterprises only" and non-minority business enterprises could not even bid on the project. 508 U.S. at 658. The Court concluded:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 666. The Court held that "in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* Therefore, to establish standing to challenge a set-aside program, a plaintiff "need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.*; *see Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (holding that Caucasian applicant for university admission had standing to seek prospective relief challenging university's use of race in its admissions policy where he was denied admission but a minority applicant with his qualifications would have been admitted and applicant was "able and ready" to apply as a transfer student if the university stopped using race in its admissions policy).

In *Adarand*, the Court addressed whether a subcontractor had standing to raise an equal protection challenge to a law that gave general contractors a direct financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals." 515 U.S. at 204. The plaintiff submitted the low bid but was not awarded the subcontract and submitted evidence that the general contractor would have accepted its bid, but for the subcontractor compensation clause that provided it additional payment for hiring the disadvantaged subcontractor. *Id.* at 205. The plaintiff also established that it often competed for contracts against companies certified as small disadvantaged businesses. *Id.* at 212.

The Court held that the plaintiff had standing to seek forward-looking relief because the "discriminatory classification prevent[s] the plaintiff from competing on equal footing." *Id.* at 211 (citing *Northeast-*

ern Fla., 508 U.S. at 667). In other words, because the subcontractor compensation clause made the plaintiff more expensive to hire, it could not compete on equal footing with subcontractors considered disadvantaged because of their race. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280–81 n.14 (1978) (holding white medical school applicant had standing to challenge school's admissions program which reserved a prescribed number of positions in the class for disadvantaged minorities because the "injury" was the school's "decision not to permit [him] to compete for all 100 places in the class, simply because of his race"); *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920–21 (7th Cir. 2002) (stating that "[a] statute that deprives a firm of an opportunity to compete for business gives standing to sue").

In arguing that it was unable to compete on equal footing with DBE contractors, Dunnet Bay asserts that it "need only show that it was excluded from competition and consideration for a government benefit because of race-based measures." Yet Dunnet Bay has not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. First, in contrast with *Northeastern Florida*, nothing in IDOT's DBE program excluded Dunnet Bay from competition for any contract. IDOT's DBE program is not a "set aside program like Jacksonville's" in which non-minority owned businesses could not even bid on certain contracts. Under IDOT's DBE program, all contractors—minority and non-minority contractors alike—can bid on all contracts, subject to the DBE goals or good faith efforts to satisfy those goals.

Further, Jacksonville's ordinance favored "minority business enterprises," defined as a business

with minority or female ownership. IDOT's DBE program is designed to increase the participation of socially and economically disadvantaged businesses in construction contracts, *see N. Contracting,* 473 F.3d at 720–24 (holding IDOT's DBE program constitutional), and therefore addresses a broader category of disadvantaged businesses than that addressed in Jacksonville's ordinance. The absence of complete exclusion from competition for certain projects with minority- or women-owned businesses also distinguishes some of the other authorities cited by Dunnet Bay and amici: *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 905–06 (11th Cir. 1997) (holding trade associations whose members regularly performed work for county had standing to challenge county's affirmative action program that allowed contracts to be set aside for bidding only among minority and women business enterprise programs); *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 929–30 (9th Cir. 1991) (holding contractor had standing to challenge county's minority- and women-owned business enterprise program where a set aside method applied under which a contractor had to use minority- or women-owned businesses for a certain percentage of work on the contract).

And unlike in *Adarand*, where the challenged law explicitly favored minority-owned subcontractors by providing a direct financial incentive to contractors to hire them, Dunnet Bay has not alleged, let alone produced evidence to show, that it was treated less favorably than any other contractor because of the race of its owners. The lack of an explicit preference for minority-owned businesses distinguishes other authorities cited by Dunnet Bay. *See Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 871 (9th Cir.

1995) (public utility provided a pre-qualification preference to minority- and women-owned businesses and plaintiff lost opportunity to negotiate with utility because race and gender were considered); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1404 (9th Cir. 1991) (ordinance gave 5% bid preference to minority- and women-owned businesses for public contracts); *see also Coral Constr.*, 941 F.2d at 914, 930 (holding contractor had standing to challenge program that gave minority- and women-owned businesses a preference for public contracts if their bid was within 5% of the lowest bid). Under IDOT's DBE program, all contractors are treated alike and subject to the same rules.

Still other authorities cited by Dunnet Bay or amici are inapposite because the contractors' standing was based in part on the fact that they lost an award of a contract for failing to meet the disadvantage business enterprise goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *See Safeco Ins. Co. of Am. v. City of White House, Tenn.*, 191 F.3d 675, 689 (6th Cir. 1999) (holding contractor and its insurer had standing to challenge the constitutionality of EPA regulations imposing a racial preference on minority subcontracts where the alleged failure to comply with the regulations resulted in the loss of a contract which was awarded to the second lowest bidder and the regulations placed white subcontractors at a competitive disadvantage); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 704 (9th Cir. 1997) (noting that plaintiff submitted the lowest bid but did not get the contract since its "bid was disqualified because [it] did not comply with a state statute" and the second lowest bidder won the contract); *Concrete Works*

of Colo., Inc. v. City & Cnty. of Denver, 36 F.3d 1513, 1518 & n.5 (10th Cir. 1994) (holding contractor demonstrated injury in fact where it "submitted bids on three projects and the [o]rdinance prevented it from competing on an equal basis with minority and women-owned prime contractors" and noting that the plaintiff submitted the lowest bid on one project but its bid was not accepted because of its failure to meet the minority- businesses enterprise goals or good faith requirements and the bid was awarded to the second lowest bidder); *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 994–96 (3d Cir. 1993) (concluding that associations of contractors had standing to challenge city ordinance creating contract preferences for businesses owned by minorities, women, and disabled persons where association members presented evidence they were denied contracts for failure to meet the DBE goals despite being low bidders); *but see W.H. Scott Constr. Co. v. City of Jackson, Miss.*, 199 F.3d 206, 214–15 (5th Cir. 1999) (holding that non-minority contractor had standing to bring an equal protection challenge to city's minority participation program because non-minority contractors were at a competitive disadvantage with minority contractors who could satisfy the minority-participation goals with their own work, but relying on *Monterey Mechanical* and *Concrete Works*).

In contrast with these cases where the plaintiffs had standing, Dunnet Bay cannot establish that it would have been awarded the contract on the Eisenhower project but for its failure to meet the DBE goal or demonstrate good faith efforts. The evidence, even when viewed in the light most favorable to Dunnet Bay, demonstrates that although Dunnet Bay's bid was rejected for failing to meet the DBE goal, its bid was 16% or about $1.3 million over the program es-

timate, and Director Reed recommended that IDOT rebid the contract because the low bid was 16% over the project estimate and Dunnet Bay had been left off the For Bidders List. The evidence further establishes that Secretary Hannig always followed Reed's recommendations to rebid contracts for financial concerns. Indeed, the Secretary decided to rebid the contract because the low bidder was 16% over the project estimate and was left off the final For Bid List.

Moreover, even assuming that Dunnet Bay could establish that it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it cannot show that any difference in treatment was because of race. The regulations define a DBE as "a for-profit small business concern" that is owned or controlled "by one or more individuals who are both socially and economically disadvantaged." 49 C.F.R. § 26.5 (2009). "Socially and economically disadvantaged" individuals include women, "Black Americans," "Hispanic Americans," and others. *Id.* And an individual in any racial group or gender may qualify as "socially and economically disadvantaged." *See id.* However, "a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts … over the firm's previous three fiscal years, in excess of $22.41 million." 49 C.F.R. § 26.65(b) (2009). For the three years preceding 2010, the year it bid on the Eisenhower project, Dunnet Bay's average gross receipts were over $52 million. Therefore, Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. Thus, even if a DBE general contractor can count its own work force toward meeting the DBE participation goal without subcontracting any work on the project, whereas a non-DBE general contractor cannot, Dunnet Bay has

not shown that any additional costs or burdens that it would incur are *because of race*. The additional costs and burdens are equally attributable to Dunnet Bay's size.

To put it differently, Dunnet Bay has not established that the denial of equal treatment resulted from the imposition of a racial barrier. Accordingly, this case is unlike those relied on by Dunnet Bay where the plaintiff established that the difference in treatment and any additional costs and burdens imposed on it were because of race (or gender). For example, in *Monterey Mechanical*, the challenged ordinance provided that "contracts awarded by … [the state] for construction … shall have statewide participation goals of not less than 15 percent for minority business enterprises [and] not less than 5 percent for women business enterprises" 125 F.3d at 704 (citing Cal. Pub. Contract Code § 10115(c)). The court concluded that the contractor was at a competitive disadvantage with minority- and women-owned contractors who could use their own work toward the participation goals and be excused from subcontracting the good faith requirements. *Id.* at 706–07. Race (or gender) alone was the barrier to equal competition. *Id.*

As for its second alleged injury, Dunnet Bay argues that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting. In *Monterey Mechanical*, the court held that "[a] person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement, even though the government does not discriminate against him." *Id.* at 707. This holding was followed in *Safeco Insurance Co.*, 191 F.3d at 689, and *Lutheran*

Church-Missouri Synod v. FCC, 141 F.3d 344, 350 (D.C. Cir.) (noting that "forced discrimination may itself be an injury"), *reh'g denied*, 154 F.3d 344 (D.C. Cir. 1998), but the latter court couched the issue in terms of third-party standing. It seems that *Monterey Mechanical* collapsed third-party standing into Article III standing. And in each of these cases—*Monterey Mechanical*, *Safeco Insurance Co.*, and *Lutheran Church-Missouri Synod*—the plaintiffs already had established injury in fact, that is, suffered another direct harm because of the challenged statute or regulation. *See Safeco Ins. Co.*, 191 F.3d at 689 (failure to comply with regulations resulted in the loss of a contract and institution of the lawsuit); *Lutheran Church-Mo. Synod*, 141 F.3d at 348–49 (FCC order found that church violated EEO regulations and imposed a fine and reporting requirements); *Monterey Mech.*, 125 F.3d at 704 (plaintiff submitted the low bid but did not get the job because of its failure to comply with a state statute). As discussed above, where the plaintiff has established injury in fact, it may assert third-party rights.

Neither we nor the Supreme Court has adopted *Monterey Mechanical*'s broad view of standing. We recognize that the Court has held that "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (citing *Adarand* and *Northeastern Fla.*). However, the injuries asserted in Parents Involved were the denial of assignment to a certain public high school based on race and the interest "in not being forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Id.* The plaintiffs' chil-

dren were competing with minorities for assignment to high school, and race was used as a tiebreaker to make assignments to more popular schools. *Parents Involved*, 551 U.S. at 711–12. In other words, race often was the determinative factor in the assignment decisions. Similarly, non-minority contractors were precluded from competing at all for certain projects under the Jacksonville ordinance in *Northeastern Florida*, and in *Adarand*, the government gave general contractors a financial incentive to hire minority-owned businesses. Thus, as in *Parents Involved*, the race of the plaintiffs in *Northeastern Florida* and *Adarand* was the deciding factor. In contrast, the race of Dunnet Bay's owners was not the deciding factor because Dunnet Bay's size created a barrier to its receipt of any advantages given DBEs.

Furthermore, we agree with amicus NAACP Legal Defense & Educational Fund, Inc. that *Monterey Mechanical*'s broad view of standing goes against the established principle that "a plaintiff raising only a generally available grievance about government—claiming only harm to every citizen's interest in proper application of the Constitution and laws" does not satisfy Article III's requirement that the injury be concrete and particularized. *See Lujan*, 504 U.S. at 573–74; *see also Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Allen v. Wright*, 468 U.S. 737, 755 (1984) (stating that racial discrimination "is sufficient in some circumstances to support standing" but only those "who are personally denied equal treatment by the challenged discriminatory conduct" have Article III standing) (quotation omitted). Broadly speaking, not every contractor has "standing to challenge every affirmative-action program on the basis of a personal right to a govern-

ment that does not deny equal protection of the laws." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 n.26 (1982). Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to "a challenge to the state's application of a federally mandated program," which we have determined "must be limited to the question of whether the state exceeded its authority." *N. Contracting*, 473 F.3d at 720–21 (holding that IDOT may rely on federal government's compelling interest in remedying past discrimination in construction projects and that IDOT's DBE program is narrowly tailored to achieve this interest as IDOT did not exceed its authority). Dunnet Bay was not denied equal treatment because of racial discrimination; any difference in treatment is equally attributable to Dunnet Bay's *size*.

Although Dunnet Bay suggests that the second and third standing elements (causation and redressability) are not at issue, as the party invoking federal court jurisdiction, it bears the burden of establishing all three elements of standing. *See Edgewood Manor Apart. Homes*, 733 F.3d at 771. Amicus Pacific Legal Foundation suggests that since Dunnet Bay suffered an injury in fact under the DBE program, which we reiterate Dunnet Bay has not established, it necessarily established causation and redressability. Amicus cites *Northeastern Florida*, where causation and redressability followed from the Court's definition of "injury in fact." 508 U.S. at 666 n.5. Although that was true in the context of the set-aside program where causation and redressability were readily apparent, the Court did not hold that these other elements are always collapsed into an injury in fact.

Dunnet Bay has not established causation or redressability. It failed to demonstrate that the DBE program caused it any injury during the first letting process. Although Dunnet Bay submitted the low bid in the first letting, its bid was 16% over the project estimate. Although IDOT rejected its bid because it did not meet the DBE goal, IDOT never reached the question of whether the bid was appropriate. The evidence establishes that Reed recommended to Secretary Hannig that IDOT rebid Contract No. 60I57 because the low bidder was 16% over the project estimate and was left off the For Bidders List, and that the Secretary always followed her recommendations to rebid contracts for financial concerns. Accordingly, IDOT did not award the contract to anyone under the first letting and re-let the contract. Dunnet Bay suffered no injury because of the DBE program in the first letting. *Cf. Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury.").

Even assuming that Dunnet Bay could establish that the DBE program caused it an injury in the first letting, it cannot establish redressability: IDOT's decision to re-let the contract redressed any injury. As for the second letting, the evidence does not establish that the DBE program caused Dunnet Bay any injury. In the second letting, Dunnet Bay satisfied the DBE goals, but its bid was not the lowest; other contractors submitted lower bids and met the DBE participation goals. Therefore, Dunnet Bay was not awarded the contract.

Moreover, prudential limitations preclude Dunnet Bay from bringing its claim. A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499.[4] Dunnet Bay acknowledges that before a litigant may be permitted to assert another's rights to establish a claim, he must satisfy Article III standing requirements. *See Craig v. Boren*, 429 U.S. 190, 194 (1976) ("[W]e conclude that appellant … has established independently her claim to assert jus tertii standing. The operation of [the challenged statutes] plainly has inflicted 'injury in fact' upon appellant sufficient … to satisfy the constitutionally based standing requirements imposed by Art. III."); *Barrows v. Jackson*, 346 U.S. 249, 255–56 (1953) (stating that "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation" but "this principle has no application to the instant case in which respondent has been sued for damages … and … a judgment against respondent would constitute a direct … injury to her"); *Lutheran Church-Mo. Synod*, 141 F.3d at 349–50 (allowing the plaintiff to raise an equal protection challenge although it had not suffered an equal protection injury where it was harmed by the FCC's order finding it in violation of equal employment opportunity regulations); *Apter v. Richardson*, 510 F.2d 351, 354 (7th Cir. 1975) (stating "[t]he fact that the alleged wrong may also have injured third parties does not deprive plaintiff of standing so long as she

[4] Although IDOT has a good argument that Dunnet Bay forfeited its prudential standing arguments for failing to raise them in the district court in response to its summary judgment motion, we address prudential limitations on standing.

as well is injured in fact."); *see also Warth*, 422 U.S. at 501 (stating that as long as constitutional standing is satisfied, a party "may have standing to seek relief on the basis of the legal rights and interests of others"). In challenging the DBE program, Dunnet Bay is attempting to assert the equal protection rights of a non-minority-owned small business.

City of Chicago v. Morales, 527 U.S. 41 (1999), also cited by Dunnet Bay, is inapposite. In that case, the Supreme Court was asked to review the Illinois Supreme Court's determination that a Chicago gang ordinance was unconstitutionally vague. As the Court explained, "[w]hen a state court has reached the merits of a constitutional claim, invoking prudential limitations on the respondent's assertion of *jus tertii* would serve no functional purpose" and "state courts need not apply prudential notions of standing created by this Court." *Id.* at 55 n.22. Dunnet Bay does not ask us to review a state court's decision as to the constitutionality of the DBE program.

A party is exempt from the prudential limitation on asserting a third party's rights, Dunnet Bay argues, "where the limitation's purpose is outweighed by the need to protect fundamental rights." But *Barrows*, which was cited for this proposition, does not help Dunnet Bay. *Barrows* was a state court action to enforce a racially restrictive covenant, and the defendant was permitted to assert the equal protection rights of others in her defense against enforcement. Dunnet Bay is not defending against a state enforcement proceeding, seeking to raise the rights of others in its own defense. And as noted, the *Barrows* defendant had been sued for damages and thus could establish her own injury. Moreover, the Court con-

cluded that the prudential limitation on standing was outweighed and the defendant should be allowed to assert the rights of others given the "unique situation" and "peculiar circumstances" presented where "the action of the state court … might result in a denial of constitutional rights and … it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257.

But here there is no allegation, let alone evidence, that a non-minority-owned small business could not challenge IDOT's DBE program on equal protection grounds. Because Dunnet Bay has failed to identify an injury in fact that is fairly traceable to the challenged DBE program, it lacks Article III standing. And because Dunnet Bay has not established Article III standing, it cannot raise an equal protection challenge to the DBE program based on the rights of a non-minority small business.

B. Whether Dunnet Bay Has Sufficient Evidence that IDOT's Implementation of the DBE Program Constitutes Unlawful Race Discrimination

In the alternative, even if Dunnet Bay has standing to raise an equal protection claim, IDOT is entitled to summary judgment. The Equal Protection Clause of the Fourteenth Amendment prohibits intentional and arbitrary discrimination. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Thus, to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Franklin v. City of Evanston*, 384 F.3d 838, 846 (7th Cir. 2004).

Racial discrimination by a recipient of federal funds that violates the Equal Protection Clause also violates Title VI and § 1981. *Gratz*, 539 U.S. at 275–76 & n.23. These statutes require proof that the plaintiff was treated differently because of race. 42 U.S.C. § 1981 (providing all persons the same rights to contract and benefit of laws "as is enjoyed by white citizens"); *id.* § 2000d (prohibiting discrimination "on the ground of race" in programs receiving federal assistance). Title VI prohibits only intentional discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001). To establish liability for an equal protection violation, a plaintiff must establish that the defendant acted with a discriminatory purpose and discriminated against him because of his membership in an identifiable group. *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 2002). Section 5 of the Illinois Civil Rights Act of 2003 was not intended to create new rights but merely created a new venue—state court—for discrimination claims under federal law. *Ill. Native Am. Bar Ass'n v. Univ. of Ill.*, 856 N.E.2d 460, 467 (Ill. App. Ct. 2006).

Because IDOT's DBE program employs racial classifications, we apply strict scrutiny in addressing Dunnet Bay's constitutional challenge. *Adarand Constructors*, 515 U.S. at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."); *N. Contracting,* 473 F.3d at 720. Under strict scrutiny, "a government program that uses racial classifications must be narrowly tailored to serve a compelling governmental interest." *N. Contracting*, 473 F.3d at 720. In implementing its DBE program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the

national construction market." *Id.* at 720. "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* at 721; *see also Milwaukee Cnty. Pavers Ass'n v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991) ("Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations … . If the state does exactly what the statute expects it to do … we do not see how the state can be thought to have violated the Constitution."). Thus, the issue is whether IDOT exceeded its authority under federal law.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a predetermined DBE goal and eliminating waivers. If the DBE program were effectively a quota, it would be unconstitutional and violate the regulations. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing."); 49 C.F.R. § 26.43(a) (prohibiting quotas for DBEs). More specifically, Dunnet Bay asserts that IDOT exceeded its authority by: (1) setting the Contract's DBE participation goal at 22% without the required analysis, (2) implementing a "no-waiver" policy, (3) preliminarily denying its goal modification request without assessing its good faith efforts, (4) denying it a meaningful reconsideration hearing, (5) determining that its good faith efforts were inadequate, and (6) providing no written or

other explanation of the basis for its good-faith-efforts determination.

In challenging the DBE contract goal, Dunnet Bay asserts that the issue "is not whether a 20% goal could have been legitimately derived" but instead argues that the DBE contract goal was "arbitrary" and that IDOT "manipulated the process to justify" a preordained goal. Dunnet Bay's real complaint about the contract goal setting is that there were political motivations in resetting the DBE participation goal. But Dunnet Bay has not identified any regulation or other authority that suggests that the political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. More to the point, Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal for the contract. In its reply, Dunnet Bay argues that the factors set forth in the regulation to be used to determine contract goals were not used but were applied to justify a pre-ordained goal. Yet Dunnet Bay points to no evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting, 49 C.F.R. § 26.51(e)(2) (stating that a contract goal "depend[s] on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract").

FHWA approved IDOT's methodology to establish its statewide DBE goal of 22.77% and approved the individual contract goals for the Eisenhower project for the January 15, 2010 bid letting. Dunnet Bay has not identified any part of the regulations that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by

adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. Indeed, as the district court concluded, "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority," *Dunnet Bay Constr. Co.*, 2014 WL 552213, at *26; and this challenge is unavailing.

Next, Dunnet Bay asserts that IDOT had a "no-waiver" policy. Despite statements regarding a no-waiver policy and pressure from the Governor's office, including from Harris, Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. There is evidence that IDOT's District 8 EEO Officer Coleman advised contractors at a pre-letting meeting that Secretary Hannig said that no DBE waivers would be granted for the January 15, 2010 letting. However, IDOT did not have a no-waiver policy; instead, the undisputed evidence shows that it was IDOT's and Secretary Hannig's policy that requests for waivers would be subjected to high-level review and would not be granted unless shown to be appropriate. IDOT's Director of Highways Reed told Secretary Hannig that a no-waiver policy was not possible because it violated the law. The Secretary told Harris that IDOT would follow the law. So, too, IDOT's Regional Engineer for the Metra East area Lamie testified that although Secretary Hannig said that there would be no DBE waivers, in context he was not "saying no waivers under any circumstances will ever be issued" but that waiver requests would be reviewed at a high level and had to be supported by appropriate documenta-

tion. Significantly, even since Secretary Hannig took over, IDOT granted waivers. In 2009, it granted 32 of 58 requested waivers, and the other 26 contractors ultimately met contract goals; in 2010, IDOT granted 21 of 35 requested waivers, that is, 60% of the waiver requests. IDOT even granted a waiver in connection with the January 15 letting—the one at issue here—albeit after this lawsuit was filed. IDOT's unbroken record of granting waivers refutes any suggestion of a no-waiver policy. Dunnet Bay has failed to raise a reasonable inference that IDOT implemented a no-waiver policy.

Dunnet Bay also challenges IDOT's rejection of its bid without determining whether it had made good faith efforts to meet the DBE goal and contests whether IDOT's reconsideration of its bid was meaningful in violation of 49 C.F.R. § 26.53. As an initial matter, the regulation provides that "[i]f the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." *Id.* § 26.53(a)(2). IDOT ultimately determined that Dunnet Bay failed to document adequate good faith efforts; thus this provision was inapplicable and did not prevent IDOT from rejecting Dunnet Bay's bid.

Dunnet Bay asserts that reconsideration hearing officer Grunloh "was not an independent official with no role in the original determination," but it has offered no evidence to establish that Grunloh took any part in the initial determination that Dunnet Bay failed to make the DBE goal or make adequate good faith efforts. *See id.* § 26.53(d)(2). Nor has Dunnet Bay not shown that Grunloh, even if part of the "political leadership" and involved in pre-letting dis-

couragement of waivers, was ineligible to serve as the reconsideration official.

Furthermore, Dunnet Bay argues that it made good faith efforts to meet the DBE goal and that the reasons given for IDOT's decision that it did not make adequate good faith efforts "do not hold up." Dunnet Bay focuses on its efforts in attending a pre-bid meeting, advertising with DBE networking organizations, soliciting DBEs by fax, telephoning DBEs, and posting subcontracting opportunities on its own website. In total, Dunnet Bay solicited 796 companies for subcontracting work, 453 of which were DBEs.

A bidder "must show that it took all necessary and reasonable steps to achieve a DBE goal … which … could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful." 49 C.F.R. Pt. 26, Appendix A, § I. The regulations provide guidance for state recipients in deciding whether a bidder that did not meet a contract goal has demonstrated good faith efforts to meet the goal, instructing recipients to consider "the quality, quantity, and intensity of the different kinds of efforts that the bidder has made." *Id.*, § II. State recipients are provided a non-mandatory, non-exclusive, and non-exhaustive list of actions to be considered in determining whether a bidder made good faith efforts, including the following: (1) "Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract … [and] taking appropriate steps to follow up initial solicitations"; (2) "Selecting portions of the work to be performed by DBEs in order to increase the likeli-

hood that the DBE goals will be achieved"; (3) "Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract"; (4) "Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor"; (5) "Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services"; and (6) "Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs." *Id.*, § IV, A–C and F–H. Further, the regulations instruct that "[i]n determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract." *Id.* § *v.* The regulation gives an example: "[W]hen the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal." *Id.*

Reconsideration officer Grunloh's determination that Dunnet Bay failed to show good faith efforts is well-supported in the record. Grunloh testified that the reasons he determined Dunnet Bay failed to make good faith efforts were because it did not utilize IDOT's supportive services, and because the 2nd, 3rd, and 4th bidders all met the goal, whereas Dunnet Bay did not even come close. Grunloh also explained that Dunnet Bay's efforts were lacking with respect to the following areas included in the Appendix's list: conducting market research and so-

liciting through all reasonable and available means the interest of all certified DBEs; providing interested DBEs with adequate information about the contract; making efforts to assist interested DBEs in obtaining bonding, lines of credit, etc.; making efforts to assist interested DBEs in obtaining necessary equipment, supplies, etc.; and effectively using services of various minority organizations to provide assistance in recruitment and placement of DBEs.

The performance of other bidders in meeting the contract goal is listed in the regulation as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, *see* 49 C.F.R. Pt. 26, App. A, § V, and was a proper consideration. Dunnet Bay argues that this factor should not be considered because IDOT left it off the For Bid List. While it is true that Dunnet Bay was left off the For Bid List, the fact that other bidders met the goal shows that the goal was attainable. Dunnet Bay also argues that IDOT had not previously considered contacting supportive services as necessary to establishing good faith, and that in Dunnet Bay's experience, supportive services were not helpful. However, utilization of supportive services is nonetheless a proper consideration under the regulation.

Dunnet Bay asserts that it employed the same efforts for the Eisenhower project that it successfully employed on other projects. Dunnet Bay is not among those contractors who often seek goal modification. The fact that its efforts failed to secure the DBE participation goal may suggest that it was hindered by its omission from the For Bid List. But the rebidding of the contract remedied that oversight.

Dunnet Bay also points out that Lyle thought it had demonstrated good faith efforts. Given the discretion in determining whether a contractor made good faith efforts, the fact that Lyle disagreed with Grunloh and initially thought Dunnet Bay showed good faith efforts does not raise a genuine issue of fact as to *Grunloh*'s decision. In any event, Lyle subsequently expressed the view that Dunnet Bay could have done more to demonstrate good faith efforts, namely, by contacting supportive services as well as IDOT's Bureau of Small Business Enterprises and the district EEO officer.

Finally, it is true that IDOT failed to provide Dunnet Bay with "a written decision on reconsideration" explaining why it found that Dunnet Bay did not make adequate good faith efforts to meet the DBE contract goal. 49 C.F.R. § 26.53(d)(4). However, this did not harm Dunnet Bay because IDOT did not award the contract based upon the January 15, 2010 bid letting. IDOT decided to re-let the contract instead; and Dunnet Bay's second bid met the DBE goal, but it was not the lowest bid.

III. CONCLUSION

We AFFIRM the district court's judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

August 19, 2015

Before: ILANA DIAMOND ROVNER, Circuit Judge
ANN CLAIRE WILLIAMS, Circuit Judge
JOHN DANIEL TINDER, Circuit Judge

DUNNET BAY CONSTRUCTION COMPANY, an Illinois corporation,
Plaintiff - Appellant

No. 14-1493

v.

ERICA J. BORGGREN, in her official capacity as Acting Secretary for the Illinois Department of Transportation, et al.,

Defendants - Appellees

Originating Case Information

District Court No: 3:10-cv-03051-RM-SMJ
Central District of Illinois
District Judge Richard Mills

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS SPRINGFIELD DIVISION

DUNNET BAY CONSTRUCTION COMPANY,
an Illinois Corporation,
Plaintiff,

v.

GARY HANNIG, in his official capacity as Secretary of Transportation for the Illinois Department of Transportation, and the
ILLINOIS DEPARTMENT OF TRANSPORTATION,
Defendants.

NO. 10-3051

OPINION

RICHARD MILLS, U.S. District Judge:

Pending are Cross-Motions for Summary Judgment.

At the end of the day, Defendants prevail.

Here is the background.

I. INTRODUCTION

In this action, the Plaintiff seeks a declaratory judgment that the Defendant's Disadvantaged Business Enterprise ("DBE") Program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois, is unconstitutional and further seeks injunctive relief against enforcement of the program.

The Plaintiff also seeks damages from the Defendant under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*., on the grounds that it was excluded from participation in, denied the benefits of, and subjected to discrimination by the Defendant through its DBE Program in the award of federal-aid highway construction contracts. Additionally, the Plaintiff seeks damages and injunctive relief under the Illinois Civil Rights Act of 2003, 740 ILCS 23/1 *et seq*.

The Plaintiff has filed a Motion for Summary Judgment, asserting that Defendant has departed from federal regulations and the Defendant's own federally-approved written program to experiment with race-based means to achieve ends it thought were advisable or politically expedient. The Plaintiff alleges that Defendant's program is designed to achieve a desirable racial balance. Because it is not narrowly tailored to further a compelling governmental interest, therefore, the Defendant's actions cannot withstand strict scrutiny. Accordingly, the Plaintiff contends it is entitled to summary judgment on the issue of liability.

The Defendant has also filed a Motion for Summary Judgment, alleging that all applicable guidelines were followed with respect to the DBE program. Because it is federally mandated and the Defendant did not abuse its federal authority, it asserts the program is not subject to attack. Moreover, the Defendant claims neither the rejection of the Plaintiff's bid, nor the decision to rebid the project, was based upon the Plaintiff's race. Because the Plaintiff was not subjected to intentional discrimination based on its race and was not treated less favorably than any

other contractor, the Defendant contends there is no Equal Protection violation.

The Defendant further asserts that, because the Plaintiff is relying on the rights of others and was not denied equal opportunity to compete for government contracts, the Plaintiff lacks standing to bring a claim for racial discrimination. Additionally, it contends the Plaintiff is unable to show that, even if there were a violation, it would have been awarded the contract or that an ongoing violation justifies injunctive relief. For all of these reasons, the Defendant contends it is entitled to summary judgment.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiff Dunnet Bay Construction Company is a corporation organized and existing under the laws of the State of Illinois. Dunnet Bay is engaged in the business of general highway construction. It is a business which is owned by two white males–Tod Faerber and Douglas Stuart. Dunnet Bay has been qualified by the Illinois Department of Transportation ("IDOT" or "the Department") to bid work on IDOT highway construction projects.

From February 2009 through June 30, 2011, Gary Hannig was the Secretary of the IDOT.[1] In October 2011, Hannig became Special Advisor to Illinois Governor Patrick Quinn and, in December 2011, Hannig became the Director of the Governor's Office of Legislative Affairs. At all relevant times, Ellen Schanzle-Haskins was Chief Counsel at IDOT.

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[1] Hannig is sued in his official capacity, which is another way of bringing an action against IDOT. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

IDOT is an agency or department of the State of Illinois and is responsible for administering, building, operating, and maintaining the State highway system, including federal-aid highways, receiving and distributing federal financial assistance for highway construction and maintenance, and administering federally funded highway construction contracts in accordance with the laws of the United States and the State of Illinois, including those regulations promulgated by the United States Department of Transportation found in Part 26 of Title 49 of the Code of Federal Regulations. There are approximately 16,000 miles of highways within the State of Illinois.

For purposes of highway construction and maintenance, the State of Illinois is divided into five regions, which are subdivided into nine districts. In general, the nine district engineers are responsible for the planning, design, construction, and maintenance of highways in their respective districts. In terms of organizational structure, the district engineers report to the regional engineers who in turn report to the Director of Highways, Chief Engineer. At the time of the events described herein, Christine Reed was the Director of Highways, Chief Engineer. Reed was responsible for planning, designing, constructing and maintaining approximately 16,000 miles of highways within the State of Illinois and supporting counties and cities with the maintenance of their streets and roads.

B. Awarding Federally Funded Construction Contracts

IDOT awards highway construction contracts, including federally funded highway construction contracts to the lowest responsible and responsive bid-

der whose bid meets the requirements and criteria set forth in the invitation for bids. A "responsive bidder" is one who has submitted a bid that conforms in all material respects to the invitation for bids.

In general, a procurement for highway construction is initiated by IDOT with the issuance of an invitation for bids and the publication in the Illinois Procurement Bulletin of a public notice of the invitation. Prequalified construction companies interested in competing for a highway construction contract submit sealed bids to the Department. All bids are opened publicly at the designated time and place. IDOT then evaluates the bids based upon the requirements set forth in the invitation for bids and awards the highway construction contract to the lowest responsible and responsive bidder. The general or prime contractor awarded the construction contract completes the project with the use of subcontractors who perform certain phases or aspects of the construction project with the remainder of the construction "self-performed" by the general contractor.

C. The DBE Program

(1) Federal requirements

With respect to federally funded highway construction projects, the Transportation Equity Act for the 21st Century ("TEA-21"), 112 Stat. 107, P.L. 105-178 (1998), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 23 U.S.C. § 101 Note, 119 Stat. 1144, P.L. 109-59 (2005), and the regulations promulgated thereunder, *viz.*, 49 C.F.R. §§ 26.21, 26.45, require State recipients of federal-aid funds for highway contracts, in this case, IDOT, to submit to the United

States Department of Transportation ("USDOT") a written plan that demonstrates, *inter alia*, that they are not discriminating against minorities and women in the award of contracts. Pursuant to Section 1101(b) of TEA-21, a goal of "not less than 10% of the amounts made available for any program under . . . [TEA-21] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Each state recipient is to set an overall goal for DBE participation in accordance with methods prescribed by USDOT. 49 C.F.R. § 26.45.

After an overall goal is established, a State recipient such as IDOT may use contract goals to meet any portion of the overall goal projected not to be met by race-neutral means. 49 C.F.R. § 26.51(e). In setting individual contract jobs, the State recipient is supposed to consider such factors as the type of work involved, the location of the work and the availability of DBE's for the work of the particular contract. 49 C.F.R. § 26.51(e)(2).

In accordance with the federal regulations (49 C.F.R. §§ 26.21 and 45(f)(1)), IDOT[2] has prepared and submitted to the USDOT for approval a DBE program governing federally funded highway construction contracts.

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[2] IDOT's authority to obtain federal funds for highway construction and to follow federal law with respect to those funds comes from Section 3-103 of the Illinois Highway Code, 605 ILCS 5/3-103.

(2) IDOT's Aspirational Goal, DBE Liaison and Unified Directory

The statewide attainment of minority participation was 11.2% while the goal was 22.7%. For fiscal year 2010, the Department established an overall aspirational DBE goal of 22.77% for DBE participation for federally assisted construction contracts and projected that 4.12% of the overall goal could be met through race neutral measures and that the remaining 18.65% would require the use of race-conscious goals IDOT's FFY 2010 overall goal was submitted to the Federal Highway Administration ("FHWA") of USDOT on September 16, 2009. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004. There is often a major difference between the aspirational goal and the goal that can be supported on an individual project.

IDOT prepared and submitted to the FHWA on November 24, 2009, a DBE Program Document for FFY 2010, a copy of which is attached as an exhibit to Dunnet Bay's supporting memorandum. Among other things, the IDOT DBE Program Document provides that IDOT "will not use quotas in the administration of this DBE program."

The Department's DBE Program Document designated its Bureau Chief of the Office of Business and Workforce Diversity, Bureau of Small Business Enterprises, as the DBE Liaison officer. The Bureau's duties included: (1) making recommendations on pre and post-award goal modifications; (2) tracking final payments and approving final goal modifications; (3) approving modifications to approved DBE Utilization Plans; and (4) analyzing race-neutral

program initiatives. Approval of the EEO officer's DBE goal is not a listed duty.

The IDOT DBE Program further provides for the maintenance of an Illinois Unified Certification DBE Directory which lists certified DBE firms with their name, address, and contact information by industry or category. "It is the responsibility of the prime contractor consultant to make his/her own determination regarding the capability of a DBE firm. Only those firms certified as of the letting date/bid opening may be utilized in meeting a DBE contract goal."

(3) Utilization or Contract Goals

Before advertising a construction project, IDOT generally sets goals for individual highway construction projects and estimates the cost of each project. The Program Development Engineer typically develops a general spreadsheet that helps determine the maximum allowable goal based on input from the EEO officer regarding what items could be DBE items.

From 2008 to May 2012, John Fortmann was the Program Development Engineer of the Division of Highways for Region 1 of IDOT. Fortmann wanted to be scientific about setting goals so the goals that are used can be justified.

Each highway construction contract may include a specific DBE utilization goal or contract goal established by the Department for the purpose of meeting its aspirational goal. The utilization goal is incorporated in the invitation for bids for the contract, and "[c]ompliance therewith is deemed a material bidding requirement. The failure of the bidder to comply will render the bid not responsive"

Utilization goals under the IDOT DBE Program Document are determined based upon "an assessment of the type of work, the location of the work, and the availability of DBE companies to do a part of the work." Specifically, the district's estimating engineer and the district's equal employment opportunity officer ("EEO Officer") review each construction project contract in the district to determine whether the project presents opportunities for DBE participation. Henry Gray, a civil engineer who had been with IDOT for 16 years, was the EEO Officer for District 1 from 2008 until approximately January 2010.

Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. For a DBE subcontractor to be "ready," that subcontractor must have all its paperwork submitted, it must be certified, and it must be allowed to bid and perform work on IDOT construction. The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. The analysis requires the exercise of discretionary judgment by an engineer in the highway district and the district's EEO officer, a knowledge of DBE prior experiences and work history, and the unified directory. Based upon the analysis, the district's estimating engineer and EEO Officer established proposed contract goals.

Henry Gray was the IDOT employee who set the DBE goals on the contract, which are then approved by the FHWA, IDOT's Bureau of Small Business Enterprises ("SBE"), the Bureau of Design and Implementation Engineer, the Bureau Chief and the IDOT

District Engineer. Dunnet Bay disputes that occurred in this instance.

Initially, for the January 2010 letting, Gray calculated the DBE goal for the Eisenhower project to be 8%. When goals were first set on the Eisenhower, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower project was 20.3%. Eventually, an overall goal of approximately 22% was set.

General contractors bidding on a highway construction contract are not informed of the individual pay items deemed by the Department to be DBE eligible.

(4) Contractors' Good Faith Efforts

Under the IDOT DBE Program Document, the "obligation of the bidder/offeror is to make good faith efforts" either by meeting the goal or documenting those good faith efforts. When the bid is submitted, the bidder must certify that it met the DBE goal and if it did not meet the DBE goal, the bidder must so state, ask for a modification of the goal, and provide good faith effort documents to show why the goal was not met.

In order to demonstrate good faith efforts, a bidder must show that "all necessary and reasonable" steps were taken to achieve the contract goal. IDOT has identified non-mandatory, non-exhaustive factors for this analysis, including:

a) soliciting DBE companies through attendance at pre-bid meetings, advertising, or providing written notice;

b) selecting economically feasible portions of the work for DBE performance;

c) providing information to DBE companies;

d) negotiating in good faith with interested DBE companies;

e) not rejecting DBE companies as unqualified without sound reasons based upon a thorough investigation;

f) assisting DBE companies in obtaining bonding, lines of credit, or insurance;

g) assisting DBE companies in obtaining necessary equipment, supplies or materials; and

h) using the services of available minority/women organizations.

IDOT maintains a "Bidders' List," also known as a "For Bid List." "Prequalified prime contractors are automatically included in the list." With regard to subcontracting, DBEs typically will not submit quotes to general contractors who are not on the "For Bid List." A Bidder must submit to IDOT with the bid its Disadvantaged Business Utilization Plan indicating that the bidder has sufficient DBE participant commitments or has made good faith efforts to obtain those commitments.

If IDOT determines that a bidder has not met the goal and has not shown good faith efforts, IDOT will notify the bidder that its bid is non-responsive and explain why good faith efforts were not found. A bidder that has not met the contract goal and has

been found to have failed to exert good faith efforts may request administrative reconsideration of the determination by an IDOT official who had no role in the original determination that the bidder did not make good faith efforts. A written decision by the reconsideration officer must be issued, which explains the "basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so." *See* 49 C.F.R. § 26.53(d)(4).

D. Eisenhower Expressway Project, Dunnet Bay's Bid and Rejection

(1) Eisenhower Contract

In 2009, IDOT determined that it would put out a bid for a construction project for a portion of Interstate 290, which is also known as the Eisenhower Parkway, and is located in Cook County, Illinois.

On December 4, 2009, IDOT issued invitations for bids for four federally funded contracts for construction work on the Eisenhower Expressway (also known as I-290) in Cook and DuPage Counties. One of those contracts is identified as Contract No. 60I57 (also identified as Item Letting No. 228). Using the process previously described for the establishment of utilization goals, IDOT initially established a DBE utilization goal of 8% for Contract No. 60I57.

On December 10 or 11, Hannig issued orders to withdraw the invitation for bids for Contract No. 60I57. Prior to issuing that withdrawal order, Hannig was informed that Governor Quinn's office wanted the Eisenhower Expressway construction projects held due to dissatisfaction with the DBE participation numbers.

IDOT increased the DBE utilization goals for the Eisenhower projects to a weighted average of 20%. The specific DBE utilization goal for Contract No. 60I57 was raised from 8% to 22%. The Bureau of Small Business Enterprises did not review the revised Eisenhower DBE goals.

A revised notice of letting/invitation for bids, dated January 5, 2010, was issued by IDOT. The letting date remained January 5, 2010.

(2) IDOT's Failure to Include Dunnet Bay on the For Bid List

As previously noted, IDOT maintains a "Bidders' List" or "For Bid List" identifying all approved, prequalified bidders on every item on a letting. The Department updates the For Bid List as necessary.

With respect to Contract No. 60I57, the final For Bid List was published on IDOT's website on January 14, 2010. Even though Dunnet Bay was an approved, prequalified bidder for Contract No. 60I57, IDOT failed to include Dunnet Bay on the For Bid List.

(3) Project Estimates

The program estimate of project costs is set by IDOT when it establishes its annual program, which is the list of projects that are going to be let during the fiscal year. The program estimate is based on the best information available at the time the program is established. The engineer's estimate is a very detailed analysis of all the work items, the average price of each of the work items and the total of all of those expenses.

The program estimate indicates whether there is money in IDOT's budget to pay for the construction

project. The engineer's estimate should indicate if the contractor made a fair bid. Christine Reed distinguished between the program estimate and engineer's estimate because bid analysis requires a review of both. Bids are measured against the engineer's estimate to see if the contractor gave a reasonable bid. Bids are measured against the program estimate to make sure there is enough money in the budget.

(4) Small Business Initiatives

Small business initiatives are small contracts that are let by themselves to give DBEs an opportunity to submit bids to serve as their own prime contractor instead of always having to be a subcontractor. The small business initiative program is open to non-minority and minority contractors for bidding.

The Division of Highways had reserved $7 million worth of work from the four main Eisenhower contracts to create small business initiative projects and to balance the work in fiscal year 2010. If the work was added back into the prime contracts, it would increase the DBE participation goal. IDOT claims this would serve to get the DBE participation goals close to 20 percent. Dunnet Bay acknowledges it would increase participation though in a race-conscious manner. DBE participation that IDOT receives on small business initiative contracts is not counted towards IDOT's race-neutral DBE participation.

(5) Dunnet Bay's Bid and Alleged Good Faith Efforts

On January 15, 2010, Dunnet Bay submitted to IDOT its bid for Contract No 60I57. Among other

things, Dunnet Bay's bid listed 158 pay items by description, quantity, and price. Dunnet Bay's total bid price for Contract No 60I57 was $10,548,873.198.

Dunnet Bay submitted with its bid its DBE Utilization plan, noting that it planned to meet the 22% DBE utilization goal, but identified $871,582.55 of subcontracting, or 8.26 of its bid, for DBEs.

On January 11, 2010, IDOT convened at a Boys and Girls Club in Chicago a mandatory pre-bid meeting for all prime contractors interested in bidding on one of the Eisenhower projects. On behalf of Dunnet Bay, one of its two owners, Tod Faerber, attended the mandatory meeting. The purpose of the meeting was to give prime contractors an opportunity to discuss with DBEs subcontracting opportunities in light of the increased DBE utilization goals set by IDOT. Faerber spoke with several DBE contractors. At the mandatory meeting, political material supporting State Senator Ricky Herndon was distributed to attendees, including Faerber.

In addition to attending the mandatory meeting, Dunnet Bay undertook other good faith efforts to meet the utilization goal for Contract 60I57. As noted above, Dunnet Bay provided a description and documentation of those efforts to IDOT with its bid. Those efforts included:

a) advertising with DBE networking organizations: Black Contractors United, Chicago Minority Business Development Council, Chicago Urban league, Cosmopolitan Chamber of Commerce, Federation of Women Contractors, Hispanic Contractors, Latin American Chamber of Commerce, Small Contractors Network, the Illinois Hispanic Chamber of Commerce,

and the Women's Business Development Center;

b) delivering faxes on January 4, 2010, to DBE companies;

c) following-up by telephone calls on January 11, 12, and 13, 2010, with DBE companies previously solicited; and

d) posting subcontracting opportunities on Dunnet Bay's website.

Dunnet Bay's outreach efforts included using IDOT's unified directory of certified DBEs to identify possible DBEs for certain pay items. As part of its good faith efforts, Dunnet Bay sent a fax indicating in which areas it was seeking subcontractor prices. In fact, Dunnet Bay had developed its own list of 453 DBE subcontractors from the IDOT unified directory whom Dunnet Bay routinely successfully contracted DBE goals on other objects. The methodology had been successful on past projects as Dunnet Bay was not among the contractors who often sought DBE waivers. Dunnet Bay also used its website to advertise subcontracting opportunities.

With regard to Contract No. 60I57, Dunnet Bay solicited 796 companies, 453 of which were certified DBEs listed in IDOT's unified directory, or 57% of all contacts were to DBEs. Of the 453 DBEs contacted by Dunnet Bay, 12% or 54 of them informed Dunnet Bay that they would provide a quote for Contract No. 60I57; 7% were unsure what they would do; 23% advised that they were not interested; 33% did not answer solicitations or return phone calls; 20% had no contact information or were no longer in business; and 5% asked not to be contacted again.

Although Dunnet Bay from 2007 through 2012 used IDOT's supportive services, it did not do so in preparing its bid for Contract No. 60I57. The goal of IDOT's supportive services program is to provide assistance that fosters opportunities for IDOT's DBE firms, including free services for prime contractors doing business with IDOT.

Although Dunnet Bay occasionally contacted the Bureau of Small Business Enterprises, it did not do so before submitting the bid in this case. The Bureau of Small Business Enterprises will tell a contractor what areas it used for setting the DBE goals if asked. Although it had used the Contractors Marketplace website prior to the January 15, 2010 letting, Dunnet Bay did not use that website in connection with its bid for Contract No. 60I57.

Dunnet Bay's documentation does not indicate that contractors who said they were not interested were called. For example, American Asphalt Company informed Dunnet Bay that it would not quote. In the alphabetical listing of contractors, there is no indication that a call was made to American Asphalt Company, although there are indications other contractors were called.

Tod Faerber testified that if a contractor said it bid but did not send in a quote, then Dunnet Bay might not have followed up with a phone call. Follow-up calls were made on a case-by-case basis.

Dunnet Bay's good faith efforts did not indicate any attempts to assist DBE's in obtaining bonding, lines of credit, or insurance as required by the recipient or contract. Its good faith efforts did not consist of any efforts to assist interested DBEs in obtaining

necessary equipment, supplies, materials, or related assistance or services.

Dunnet Bay received no response from its outreach to minority/women community and contractor organizations, which was the typical response received. There is no indication that Dunnet Bay changed its outreach to minority/women community organizations to receive a more effective response. Dunnet Bay did not provide documents suggesting that it attempted to use the services of local, state, or federal minority/women business assistance offices as part of its documentation of good faith efforts.

Dunnet Bay did not provide documents indicating that it attempted to use any other organization to provide assistance in the recruitment and placement of DBEs as part of its documentation of good faith efforts.

The Department projected that it would be able to achieve a 4.12% DBE participation through race neutral means, leaving 18.65% DBE participation that would be met using contract goals.

Dunnet Bay's outreach to potential subcontractors, including DBEs, *i.e.*, contacting and following-up with the subcontractors, customarily takes three employees, working full time, one week to accomplish. With respect to Contract No. 60I57, Dunnet Bay received ten quotes from DBE subcontractors shortly after 10:00 a.m. bid opening on January 15, 2010, including DBEs. If Dunnet Bay had received those DBE subcontractor quotes earlier, it would have achieved a 22.43% DBE utilization. At least one of the quotes from DBEs to Dunnet Bay arrived late as a direct result of IDOT's failure to include Dunnet Bay on the For Bid List.

Contract No. 60I57 is a federally funded contract. The invitation for bids for the January 15, 2010 letting stated that the letting is subject to and governed by the rules of IDOT adopted at 44 Illinois Administrative Code 650 and 44 Illinois Administrative Code 660, and by the provisions of the invitation. The invitation for the January 15, 2010 letting provided instructions to bidders, which directed as follows: "Read the following instructions carefully. Failure to follow these instructions carefully and the rules may result in the rejection of your bid. The Department reserves the right to reject any and all bids, to waive minor or immaterial irregularities, informalities or technicalities, to advertise for new bids, or to request confirmation or clarification from any bidder regarding a bid."

The FHWA and Ray LaHood, the United States Secretary of Transportation, expressed concern about states not reaching the DBE goals as established by the disparity studies. The FHWA indicated it would like to see participation opportunities increased.

At the bid opening on January 15, 2010, Dunnet Bay's bid was the lowest received by IDOT for Contract No. 60I57. Although its low bid was over IDOT's estimate for the project, it was within an awardable range. However, Gary Hannig testified it was not true that Dunnet Bay would normally be awarded the contract because the bid was over IDOT's estimate.

Dunnet Bay's bid on the Eisenhower was 0.73 percent below the engineer's estimate. It was 16% over the project estimate. Dunnet Bay claims its bid was rejected solely because it did not meet certain arbitrarily set goals. It alleges the amount had nothing to do with the rejection of the bid.

F.H. Paschen/S.N. Nielsen was the second low bidder for Contract No. 60I57 with a bid of $10,634,968.81 and projected DBE participation of 22%. Albin Carlson and Areatha Construction, a joint venture, were the fourth low bidder for Contract 60I57 with a bid of $11,427,873.98 and projected DBE participation of 40%.

Regional Engineer O'Keefe, whose authority included District 1, the district in which the construction was to take place, recommended the award of Contract No. 60I57 to Dunnet Bay.

IDOT alleges that no one in the Governor's office asked that IDOT hold off on advertising the Eisenhower until the Governor's office was satisfied that IDOT maxed the DBE participation numbers. Hannig decided a second look was necessary for the Eisenhower DBE goals and the Governor's office agreed with that decision. Hannig testified he did not mean to say, in an email to Reed and O'Keefe, that the Governor's office had inquired about holding off on advertising the Eisenhower. Rather, he spoke to Lafleur in the Governor's office and told her he would like to take a second look at the project.

IDOT alleges that a decision to have a weighted average of 20% for the DBE goals for the Eisenhower was made after determining that the goals could be raised to that level within the federal law. After the Director of Highways determined that the Eisenhower projects could have goals with a weighted average of 20%, the projects were going to be returned to the letting whether the Governor's office agreed with that decision or not. Hannig did not intend to go with a 20% goal notwithstanding the numbers. IDOT had to be able to support the numbers. Dunnet Bay disputes the foregoing allegations.

E. IDOT's Rejection of Dunnet Bay's Bid and Reconsideration

In a letter dated January 22, 2010, IDOT informed Dunnet Bay that it is IDOT's "preliminary determination that [Dunnet Bay has] not demonstrated a good faith effort to meet the DBE goal as required by DBE Special Provision." SBE did not consider and evaluate a bidder's good faith efforts as submitted with the bid for the January 15, 2010 letting and thereafter. SBE (not IDOT) decided to preliminarily reject as non-responsive all bids where the DBE utilization goals had not been achieved notwithstanding the demonstrated good faith efforts so those efforts could be evaluated in their totality.

Dunnet Bay alleges its bid for Contract No. 60I57 was rejected as non-responsive solely because it did not meet the DBE utilization goal and not because its bid price was over IDOT's price estimate. The Department claims the rejection was because Dunnet Bay did not utilize all good faith efforts to secure DBE participation. Moreover, Christine Reed recommended the project be rebid because it was over the project estimate, and Hannig always followed her recommendation. IDOT contends there is no evidence the recommendation would not have remained the same even if the bid was consistent with the DBE goal.

A reconsideration meeting was convened on January 25, 2010 by IDOT at Dunnet Bay's request. Hannig appointed IDOT Chief of Staff William Grunloh, a former Democratic State Representative, to serve as reconsideration officer. This was the first reconsideration meeting in which Grunloh participated. IDOT alleges that, upon his appointment as reconsideration hearing officer, Grunloh made him-

self aware of what the requirements were and the federal regulations and guidelines that are part of the process. Grunloh reviewed all of the guidance that USDOT published concerning good faith efforts to meet DBE goals prior to the reconsideration hearing. However, Dunnet Bay contends that Grunloh did not act in a manner consistent with federal law.

Dunnet Bay contends its reconsideration was the first to be held after Hannig directed that DBE utilization goals be increased and that waivers or goal modifications would not be granted, or at least, more difficult to obtain. IDOT disputes this allegation on the basis that Grunloh was the final decision-maker for administrative reconsideration and no one from IDOT instructed him to refuse to grant waivers of the DBE participation goals for contractors who have made good faith efforts to secure DBE participation. IDOT acknowledges Hannig did not want for waivers to be a common practice. Moreover, Christine Reed told the regional engineers to do their jobs well because the Secretary was not interested in entertaining waivers as part of his administration. At a meeting with the AGC, Hannig said that waivers were not going to be an acceptable part of his administration unless it was absolutely, positively appropriate.

Carol Lyle, Deputy Director of IDOT's Office of Business and Workforce Diversity, also attended the reconsideration meeting on behalf of IDOT. Lyle had served as the principal technical support employee for IDOT's DBE program since 1993. Lyle has personally reviewed hundreds of IDOT contracts on the issue of a contractor's good faith efforts.

The Department states that to assist Grunloh in preparing for the reconsideration hearing, an employee in Lyle's office would have given him a packet

with the information that Dunnet Bay supplied the utilization plan, any other documentation Dunnet Bay had on the good faith efforts it had provided, and information about other bidders on that particular item. Before his first reconsideration hearing, Grunloh read the section pertaining to reconsideration hearings, made himself aware of what supportive services were available from IDOT, and learned about what some of the pos-sible outreach ideas could be. Dunnet Bay claims this information is immaterial because Grunloh made the decision solely on the basis of the alleged no-waiver policy announced by Hannig.

Tod Faerber attended the reconsideration meeting on behalf of Dunnet Bay. Faerber told Grunloh that Dunnet Bay was not included on the "for bid" or "bidders list." The "for bid" or "bidders list" is a document that is put out by Design and Environment or Division of Highways that shows who is a plan holder and who is anticipated to bid on a project. It is a tool that is put out by IDOT to assist people to know who your competition was going to be and who could bid with you. Grunloh thought it was a possibility that subcontractors did not submit bids to Dunnet Bay because it was not listed on the bidders list. At the reconsideration hearing, Dunnet Bay wanted to show its good faith and that Dunnet Bay would have made the goal if it had not been left off the for bid list.

At the reconsideration meeting, Dunnet Bay did not amend its DBE utilization plan. Rather, Dunnet Bay provided additional documentation and explanation to confirm its pre-bid efforts, as previously described. Dunnet Bay's process of contacting subcon-

tractors by phone and fax to solicit bids occurred before IDOT left Dunnet Bay off the for-bid list.

Dunnet Bay contends that after the reconsideration meeting, Lyle believed Dunnet Bay had exercised good faith efforts as described in the federal regulations and perceived no shortcomings in its efforts. Lyle recommended to Grunloh that Dunnet Bay be awarded Contract No 60I57. IDOT claims these allegations are immaterial because Bill Grunloh was the reconsideration hearing officer. IDOT also disputes the allegation, stating that the major reason Lyle thought Dunnet Bay made good faith efforts was because it was off the bidder's List, which is not listed in the federal regulations as a factor to be considered in assessing good faith efforts. Moreover, Lyle believed Dunnet Bay could have gotten assistance from supportive services and it could have contacted SBE or the EEO officer.

Dunnet Bay alleges that on January 25, 2010, after the reconsideration meeting, Faerber visited Hannig in Springfield. Hannig told Faerber that he was under pressure to not grant any DBE waivers. IDOT claims that whether Hannig said this is immaterial because Grunloh, as reconsideration hearing officer, made the determination without any input from Hannig.

On or about February 2, 2010, Hannig called Faerber and informed him that Dunnet Bay's bid was being rejected because it failed to meet the DBE goal. Hannig told Faerber that IDOT would not grant a waiver of the DBE goal but, because Dunnet Bay was left off the for-bid list, they were going to re-bid rather than award to the second lowest bidder.

Bill Grunloh denied Dunnet Bay's reconsideration of its good faith efforts to secure DBE participation and affirmed the rejection of its bid as nonresponsive. Grunloh stated that, in making this determination, he considered the factors set out in 49 C.F.R. Pt. 26 App. A.

Dunnet Bay asserts Grunloh never provided it with an explanation for the finding that Dunnet Bay did not exercise good faith efforts and never advised what other actions it should have taken to adequately make good faith efforts. IDOT claims the allegation is immaterial because Grunloh did, in fact, determine that Dunnet Bay did not exercise good faith efforts based on the federal criteria. Moreover, IDOT decided to rebid the project, which mooted the reconsideration without any prejudice to Dunnet Bay.

Grunloh concluded that Dunnet Bay failed to exercise good faith efforts because it failed to contact IDOT or IDOT's vendor for supportive services and because other bidders were able to reach the DBE goals. The Department had never advised bidders that a mandatory element for a determination of good faith efforts was contacting IDOT or its supportive services bureau. However, IDOT notes that effectively using the services of state minority/women business assistance offices is within the federal guidelines to be considered when considering good faith efforts. *See* 49 C.F.R. § 26 Appx. A(h).

IDOT alleges that after Grunloh made his decision that Dunnet Bay did not make good faith efforts to achieve the DBE goal and therefore the bid was rejected, he had a conversation with Hannig to tell the Secretary his decision. Grunloh testified that he told Hannig the decision was based on the fact that Grunloh thought Dunnet Bay could have done a bet-

ter job utilizing some of the supportive services offered by IDOT and that the second, third, and fourth bidders were able to reach the goal while Dunnet Bay did not come close to the goal. Dunnet Bay disputes the allegation and alleges Grunloh did not make the decision based upon legitimate factors.

Grunloh and Hannig also discussed the fact that Dunnet Bay's name was left off the for bid list. Grunloh recommended that the project be re-advertised and re-let. After rejecting Dunnet Bay's low bid, IDOT decided to re-let the contract. Even though Dunnet Bay reached the DBE utilization goal on the re-letting, it was not the low bidder.

IDOT alleges that Grunloh never consulted with Hannig concerning what the outcome of a reconsideration hearing should be. Moreover, no one instructed Grunloh to refuse to grant waivers of the DBE participation goals for contractors who have made adequate good faith efforts to secure DBE participation, an allegation that Dunnet Bay disputes.

At the February 18, 2010 re-letting of Contract 60I57, Dunnet Bay submitted a bid of $10,199,793.45, with 23.18% DBE participation, which was the third lowest bid. Dunnet Bay's bid was as aggressive on the re-bid of the Eisenhower as it was on original bid. Dunnet Bay did not do anything differently in the February special letting to secure DBE participation.

At the re-letting of Contract 60I57, Albin Carlson & Co. was the low bidder with a bid of $9,637,998.74 with projected DBE participation of 22.7 percent. Albin Carlson is not a DBE.

On March 4, 2010, Grunloh granted a waiver of the DBE participation goal for K-Five Construction for Contract No. 63335.

F. DBE Program and Administrative Changes on Eisenhower Projects

(1) Decision to raise goals

On December 10, 2009, Gary Hannig sent an email to Reed and O'Keefe stating:

> The Governor's Office has asked that we hold off advertising the Eisenhower until they are satisfied we have maxed our minority participation numbers. So put on hold for now but am interested in what this delay may mean for the project.

IDOT disputes the allegation to the extent it suggests Hannig wanted to maximize the minority participation only, rather than maximizing the DBE goal. According to IDOT, the context suggests that Hannig meant he wanted to maximize the DBE goal. As previously noted, there is no separate minority goal. Goals were to be met through use of DBE contractors, not minority contractors.

Increasing participation goals on State contracts was part of the Governor's mission for more inclusion in State procurement. In fact, Governor Quinn personally emphasized to top IDOT management that DBE participation was a huge priority for him and his administration.

(2) Darryl Harris's interview

As the Director of Diversity Enhancement in the Office of the Governor since November 2009, Darryl Harris was responsible for carrying out the vision of Governor Quinn to include minorities and females in

State procurement practices. In an interview with the Capital City Courier that was published in January 2010, Darryl Harris stated with respect to the Eisenhower Expressway projects:

> I can tell you one of the greatest successes that we have so far is that we have a project in the Chicago area called the Eisenhower Highway Project, which is a $900 billion dollar project. Traditionally, goals in the past were set around 6 or 8 percent. This administration can go on record that our goal is 20 percent, with one stage of that project being 30 percent for minority-owned business. Already you can see that the Governor is committed to providing opportunities for minorities and women . . . .
>
> The general contractor now has to show evidence of who their subcontractor is and the arrangement for that particular subcontractor to do work. The Governor remains steadfast on a no waiver policy. This has been a practice in [the Capital Development Board] for several years. So, now we're encouraging the Department of Transportation to also have a no-waiver policy. . . .
>
> As I said before, I spent a lot of time at the Department of Transportation, and I feel that the fruits of my labor paid off. We have goals now that are higher than any previous administration . . .
>
> I kind of talked about that previously, but our no-waiver policy is just that. You have to meet it.

IDOT disputes the foregoing allegation and claims that, immediately after the article was published, Darryl Harris stated that he did not mean what he said when he said "no waiver policy." Instead, he meant that a waiver could be granted when appropriate. IDOT further contends the fact is immaterial because Harris testified that, at the time the article was published, he had not discussed the alleged "no waiver policy," whatever its meaning, with IDOT.[3] IDOT claims there is no evidence that Harris exercised any actual authority over IDOT's procurement decisions.

Harris was not Christine Reed's supervisor. Reed reminded Hannig that a no waiver policy was not possible. Reed testified that she and Hannig were both concerned about the implications of Harris's statements that the Governor had increased the goals on the Eisenhower contracts to 20% with one project being 30%. The federal rules are very specific in how goals are set.

Harris had a view on how IDOT could set goals for projects funded only with State funds but Hannig informed Harris that IDOT's attorney advised that was not allowed, and if Harris did not like it he could talk to the Governor. Dunnet Bay disputes this allegation and claims that Hannig sought permission from Harris on goals setting waivers and contract awards. Moreover, Dunnet Bay asserts Hannig also sought to have Harris be part of the waiver process.

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[3] Although IDOT also objects to the statement on the basis of hearsay, the Court finds it is admissible under Rule 801(d)(2)(A). The Court further concludes the statement has sufficient guarantees of trustworthiness to consider and notes that IDOT had an opportunity to depose Harris.

(3) Communications regarding diversity issues

Both before and after the January 15, 2010 letting for the Eisenhower Expressway projects and the publication of the Harris interview, Hannig and other senior officials in the Governor's Office frequently spoke and exchanged emails on diversity issues, including the DBE goals on the Eisenhower Expressway projects. On September 14, 2009, Kristi Lafleur, the Deputy Chief of Staff in the Governor's office and also Hannig's principal contact, sent an email to Hannig stating, "We had an action plan from IDOT on increasing the DBE numbers . . . I think we need an overhaul for the program and need to announce a new program."

Hannig responded to Lafleur by email, stating in part, "I do agree an overhaul of this program is in order." IDOT disputes the allegation and states that Hannig testified in the email he may have been referring to the federal government needing to overhaul that program and that he did not recall calling for an overhaul of the program. The Department further claims the allegation is immaterial because the information has no bearing on the issues in this case. On September 17, 2009, Hannig sent an email to Lafleur and Jack Lavin, then Governor Quinn's Chief Operating Officer, providing a description of the goal setting process under the federal rules. He stated, "Obviously we need better results within federal law."

In an email dated November 16, 2009, Harris requested information about IDOT DBE initiatives, stating in part, "Per our conversation, the project of particular interest is the Eisenhower Expressway as we have had inquiries as to the contracting and workforce goals that will be placed on the project." In

an email dated November 20, 2009, Hannig provided Harris information on the expected DBE goals for the four Eisenhower Expressway projects. After praising Harris's knowledge and enthusiasm, Hannig stated, "I think working together we can get a great deal of positive change done here at IDOT."

In an email dated December 11, 2009, Hannig informed Grunloh and Reed of Harris's request for certain information and directed the level of the DBE goals for the Eisenhower projects, stating, "Also we need to get the Eisenhower up to 20% minority participation and back on the schedule next week." IDOT disputes this allegation to the extent it suggests Hannig only wanted to increase minority participation. It is clear he was referencing the DBE goal.

IDOT alleges that on December 11, 2009, there was a meeting with Christine Reed, John Fortmann, Henry Gray, Gary Hannig, Kristi Lafleur and Darryl Harris regarding what DBEs were considered as part of the review process, if there could be additional DBEs considered as part of the review process, and if there could be additional work items included as potential DBE opportunities. Dunnet Bay disputes that IDOT staff had any discretion regarding whether additional work items could be classified as DBE eligible.

At the meeting, the individuals discussed a list of what could potentially be considered DBE eligible and whether or not the Division of Highways needed to go back and take a second look as to whether or not those items could be included for a DBE goal. Division of Highways was asked to return some of the work that had been broken out as small business ini-

tiatives to the prime contracts in order to be able to increase DBE participation opportunities.

Dunnet Bay claims that on December 11, 2009 Hannig directed IDOT staff to raise the minority participation, not DBE participation, on the Eisenhower construction projects to 20%. IDOT contends that the materials cited by Dunnet Bay establish only that minority participation should be raised on the Eisenhower construction projects to 20%. It does not provide that DBE participation should not be increased. IDOT further asserts this is immaterial because the DBE goal was increased to a weighted average of 20% and there was no separate minority goal.

In an email dated December 13, 2009, from Reed to Hannig and other IDOT officials, Reed partially explained the DBE goal setting process:

> The maximum participation for the contracts ranges from 15.5-21.3 percent. . . .
>
> I would be remiss if I did not provide a historical perspective. As with the Eisenhower, there was intense pressure to guarantee minority participation on the reconstruction of the Dan Ryan [Expressway]. . . . At one point, FHWA got very concerned that we were not following the federal process for goal setting and required us to send all of our documentation on goals . . . They wanted to make sure we were not arbitrarily setting DBE goals.

Later that day, Reed sent an email saying that the Division of Highways had separated out $7 million worth of work from the four main contracts to create Small Business Initiative projects and to balance the work in fiscal year 2010 but if the work was

added back into the prime contracts, it would increase the DBE participation goal. Reed knew that adding the Small Business Initiative work back into the prime contracts would not make a 20% goal possible but IDOT would get closer to that.

In December 2009 and January 2010, John Fortmann was acting Bureau Chief of Land Acquisition and the Engineer of Program Development. As Program Development Engineer, Fortmann was involved in the process of setting the maximum goal that the EEO officer would take and make his judgment.

On December 14, 2009 at 10:52 a.m., Fortmann emailed Christine Reed advising her of goals for the four Eisenhower Projects of 16% for 60I57, 9% for 60G51, 10% for 60G52, and 20% for 60G53. The DBE goals reported by Fortmann were based on the EEO officer's determination that there were available DBE contractors. As of December 14, 2009 at 10:52 a.m., the maximum DBE goals were 25.72% for 60I57, 13.08% for 60G51, 18.87% for 60G52, and 26.54% for 60G53. On December 14, 2009 at 1:45 p.m., Henry Gray emailed increased goals as a result of adding pavement patching to the existing DBE goals to Fortmann. Dunnet Bay disputes the foregoing allegations and claims that the goals were first mandated by Hannig and the Governor's office.

In his email, Gray reported the DBE goals as 22% for 60I57; 14% for 60G51; 19% for 60G52; and 31% for 60G53. In a meeting with Hannig, Fortmann was told that the Governor's office wanted them to do their best to meet a 20% DBE goal.

On December 14, 2009, Harris sent an email to Lavin, Lafleur, and other officials in the Governor's

Office. That email included a report of his activities regarding IDOT's DBE program. The report addressed concerns raised by a women's interest group and a black interest group over goals on a Mississippi River bridge project. Harris described the "Resolution" in his report, "The discussion concluded with [a] willingness to drop their opposition to split goals on the . . . project if, IDOT fully implements, enforces and duplicates the Capital Development Board's no waiver policy."

A meeting was held on December 14, 2009 to discuss the Eisenhower and DBE goals on the Eisenhower. Gary Hannig, Bill Grunloh, Christine Reed, Ellen Schanzle-Haskins, Larry Parrish, John Fortmann, Henry Gray, and Bill Frey attended the December 14, 2009 meeting.

At the December 14, 2009 meeting, the following issues were discussed: Darryl Harris's requests in a December 11, 2009 email, the best way to provide the requested information, the DBE goal items for the Eisenhower, the potential DBE goal items for the Eisenhower, and if there were any mechanisms to increase minority participation opportunities on the Eisenhower contracts. Dunnet Bay disputes the issue of whether there were mechanisms to increase minority participation was discussed, claiming that the issue of increasing minority participation was mandated by the Governor's office and Hannig.

Generally, there was a discussion at the meeting about looking at the collar county DBEs to see if they would come into the city to do work and taking another look at the work items to see if there were other opportunities for DBE participation.

In an email dated December 15, 2009, from Reed to Hannig and other senior IDOT officials, Reed advised of the original and revised goals:

> Original Goals
> 60G51 – 8% ($3.2 million)
> 60I57 – 8% ($845,000)
> 60G52 – 8% ($2.26 million)
> 60G53 – 10% ($2.47 million)
>
> These goals were established on *conventional practices* . . . .
>
> Revised Goals
> 60G51 – 14% ($56 million)
> 60I57 – 22% ($2.3 million)
> 60G52 – 19% ($5.4 million)
> 60G53 – 31% ($7.6 million)
>
> The weighted average of these contracts is 20 percent. Originally, we had separated the landscaping work out of these contracts with the intent of advertising them as SBI (Small Business Initiative) Contracts – similar to the Dan Ryan Reconstruction SBI Contracts. We have added that work back into these four main contracts and assigned a goal for those work items. We also contacted the City of Chicago, and they placed a goal on pavement patching. We talked to the FHWA and they concurred that this is a legitimate item for DBE goal credit. Historically, IDOT has not used pavement patching for DBE goal credit because it controls the prime contractor's paving schedule which is key to getting the work done on time. If the prime is not done by the completion date, we assess liquidated damages against them. They will look

> to the subcontractors to recoup their losses if the subcontractors did not meet their deadlines.

Hannig had no understanding what Reed meant in the email when she said, "These goals were established based on conventional practices."

On December 15, 2009, Hannig forwarded to Harris and Lafleur Reed's email of the same date explaining the revised goals and asking, "Is it ok to proceed?" The same day, Harris responded via email to Hannig's question by saying, "This clearly shows Governor Pat Quinn's willingness to provide opportunities to all people of our diverse state." Lafleur responded by email on the same date congratulating Harris, "You did a great job Darryl."

In an email dated December 30, 2009, Harris advised Hannig and other senior IDOT officials, that they all concur with IDOT's determination that the DBE participation goals for two major programs, including High Speed Rail, should be increased to 30%.

With regard to the publication of the Harris interview with the Capital Courier in January 2010, Hannig sent an email, dated January 15, 2010, to Grunloh and other senior IDOT officials stating, "No waivers will be a big change." Hannig testified he was very upset about the article, in that it suggested IDOT would be engaged in conduct not allowed by law. Hannig stated his response was a cross between sarcasm and contempt.

In an email dated January 20, 2010, from Hannig to Harris and Lafleur, Hannig advised of Dunnet Bay's low bid on Contract No. 60I57:

> The fourth project has 4 bidders. The low bidder is over budget but close in dollar amounts but is the only bidder to miss the dbe goals. Under our rules since the lowest bidder is close to our pre bid estimate, he would normally be given the award if he could show a good faith effort to meet the dbe goals and was granted a waiver by idot. If idot rules he did not make a good faith effort idot could award the contract to the next lowest bidder or rebid the project.

Despite the email, Hannig testified it was not true that Dunnet Bay would normally be awarded the contract since the bid was over IDOT's estimate.

In a series of emails dated January 26, 2010 and February 8, 2010, among Hannig, Harris, Lafleur and other officials from IDOT and the Governor's Office, an "IDOT No Waiver Policy" was addressed in light of Harris's interview. In an email dated January 26, 2010, Jack Lavin stated in part, "The information as presented makes it sound absolute." Hannig responded in an email dated January 28, 2010:

> Darryl, this was item 228 [Contract No. 60I57] on this list of Eisenhower projects we shared with you. Your recommendation was to reject and accept the next bid. After speaking with my legal counsel and chief engineer, we decided to rebid.

On February 5, 2010, Hannig explained in an email to Harris, that, with respect to Item 228 after rejecting Dunnet Bay's bid, "We have a special bid opening for this project in a few weeks." Harris responded to Hannig by email dated February 8, 2010 regarding

the special bid opening, "The DBE goals should remain aggressive like the original projects."

In addition to the Governor's Office, Hannig met frequently with members of the General Assembly's Black Caucus, who expressed to him their view that DBEs were not getting sufficient state work. On January 21, 2010, John Webber, IDOT's Director of Communications, prepared a letter for Hannig to send to the members of the Legislative Black Caucus and Legislative Latino Caucus. The letter informed the minority caucuses that: "Governor Quinn recently ordered an increase in DBE goals from 8 percent to 20 percent on upcoming I-290 resurfacing contracts in Chicago, to direct more contracts to DBE firms." Hannig approved that statement.

IDOT asserts that, with respect to goal waivers and modifications, Hannig told Harris that IDOT would follow the federal law, that IDOT would be bound by the federal law and that IDOT was interested in any ideas that were legal. However, it had no interest in going beyond the law. Hannig advised that a no waiver policy was not allowed under the federal rules. He told Harris that federal law provided there must be a waiver process. Hannig further stated that a no waiver policy was not allowed under federal law and that IDOT would not implement a policy that was clearly in violation of federal law. Dunnet Bay disputes these allegations and claims Hannig did not act in accordance with what he told Harris.

On January 26, 2010, Jack Lavin in the Governor's office sent an email to Hannig, Harris, and Schanzle-Haskins in regard to a letter received from the Illinois Road Builders Association complaining

about statements made by Harris in the Capital City Courier about a no-waiver policy.

Ellen Schanzle-Haskins responded, stating that IDOT is not violating federal law. She explained that the DBE program requires the Department to consider and grant waivers of any low bid prime contractor's failure to meet DBE goals based on the good faith efforts of the prime contractor to make the goal. She further stated that IDOT has and does grant waivers when appropriate. Dunnet Bay disputes that IDOT acted in accordance with Schanzle-Haskins' letter.

Harris responded to Schanzle-Haskins and stated that the Road Builders were interpreting the "no waiver" policy as an absolute when it is not. He stated that simply means that a thorough review of the waiver will be pursued and not just granted upon request. Dunnet Bay again asserts that IDOT did not act in accordance with that statement.

(4) December 23, 2009 Phone Conference

At some point, Hannig decided that the DBE utilization goals on the Eisenhower Expressway projects needed to be maximized. Hannig directed the IDOT staff to raise DBE utilization goals to 20%.

A telephone conference call occurred on December 23, 2009 with Hannig, other senior IDOT officials, including Grunloh and Reed, regional engineers and their staff from the district, and district EEO officers to address goal maximization. Participation by the district engineers and district EEO officers in the conference call was made mandatory by Hannig.

During the conference call, Hannig led the conference and did most of the talking. The focus was minority participation in IDOT construction contracts. During the conference call, Hannig directed the IDOT staff to be more aggressive in establishing DBE utilization goals and to set them at the maximum level. Hannig also emphasized the need to have much better communications between the technical staff and the EEO officers and the need to make sure that the goals were set at a maximum. Hannig directed that the Eisenhower Expressway projects DBE utilization goal would be 20%. Moreover, during the conference call, Hannig directed that there should not be any IDOT construction contracts with a zero or low goal.

Hannig was also concerned about waivers and goal modifications and wanted the districts to be well aware of his concerns. Almost immediately after the December 23, 2009 meeting, Hannig announced he would be personally reviewing DBE goals so that everyone in IDOT would understand it is an important decision.

(5) Alleged no-waiver policy

In early March of 2009, Reed met with Hannig to discuss what she should tell her regional engineers at an upcoming meeting. When Reed was asked exactly what Hannig said she testified, "I don't recall his exact words, but his message was very clear that waivers would not be a part of his administration." Reed acknowledged that message was a common theme throughout his administration. In that same conversation, Hannig also gave Reed instructions on what to tell the Illinois Asphalt Pavers Association (IAPA), a major constituent group of IDOT, in an upcoming speech Reed was scheduled to give to IAPA.

Reed's notes state, "IAPA speech, no waivers." IDOT states Reed's notes mean that she was to tell IAPA that waivers would not be the practice of Hannig's administration. In the context, Reed understood Hannig's instructions concerning "waivers" to refer to requests for DBE goal modifications prior to the award of construction contracts.

Reed did not deliver the message using the exact words as instructed by Hannig. Instead, she told the regional engineers the following, "I told them that they had better do their jobs and do them very well because the Secretary was not interested in entertaining waivers as part of his administration." Although she did not recall the exact words used in the IAPA speech, Reed's advice to IAPA was roughly as follows:

> They would have been along the lines of minority participation is very important to the administration. That achieving goals set on highway construction projects was essential. That waivers would be, requests for waivers would be closely scrutinized and would be very difficult to get.

Carol Lyle worked in the Bureau of Small Business Enterprises from 1986 until her retirement in 2011. Not only was Lyle the principal technical support of IDOT since 1993 with respect to interpretation of DBE procedures and requirements, she also is very familiar with the constitutional limitations of the program. One of her responsibilities in the positions she held in 2009 and 2010 was to ensure that the DBE program was administered in accordance with the law. From 2007 to 2010, Lyle was personally involved in reviewing goal waivers or modification requests based upon good faith efforts.

Dunnet Bay had sought and received a modification on September 11, 2008. The DBE goal of 18% was reduced to 16.3%.

In calendar year 2009, there were 58 pre-award modifications requests submitted, 32 of which were approved. The remaining 26 modification requests were resolved by the contractor meeting the goal.

In calendar year 2010, there were 35 modification requests. Twenty-one requests were granted, while 14 were denied. That year, there were 1037 total items with DBE goals and only 35 requests to modify the goals. Dunnet Bay alleges recommendations on goal waivers were sent to Hannig for approval. IDOT disputes the allegation to the extent it suggests that DBE goal waivers are always subject to the approval of the Secretary. IDOT further notes that Bill Grunloh was the final decision maker for the Department on goal waiver requests and he was authorized to reverse contrary decisions by the Secretary.

Dunnet Bay asserts Lyle would make recommendations on goal waivers by giving them to her supervisor, Parrish, who in turn if he agreed, would forward them to Hannig. IDOT contends this fact is immaterial because the cited testimony was describing the process from April 2009 to November 2009. The DBE process would change beginning with the January 15, 2010 letting.

Dunnet Bay further alleges Lyle was concerned in 2009 that her supervisors lacked sufficient respect for the constitutional limitations of the DBE program. She had trouble getting her supervisor, Parrish, to act on DBE waiver requests, or to forward waiver requests to Hannig. Parrish told her he was

under pressure not to approve goal modification requests. IDOT contends the allegation is immaterial because Lyle's testimony was limited to the time prior to Dunnet Bay's bid on the Eisenhower Expressway. Moreover, it is merely an example of one employee who disagreed with aspects of the program.

Dunnet Bay cites another example of when Hannig denied a goal waiver and further stated, "No, we have to do better!" Lyle then responded to her supervisor, "It's not a matter of 'doing better,' it is a matter of being in compliance with the federal regulations, e.g., good faith efforts period." Lyle told one of her employees with respect to Hannig and Parrish, "They are making me crazy." At her deposition, Lyle described what was making her "crazy":

> Not giving consideration to the efforts a contractor made to meet the goal. They were looking at the actual goal itself and what the contractor's participation was. For example, if the goal were 20 percent and a contractor came in at significantly lower than 20 percent, they were looking at the number versus the effort.

IDOT contends the cited testimony is immaterial because it was specifically limited to issues arising prior to the DBE program at issue in this case.

Dunnet Bay alleges that Lyle was frustrated with the lack of respect certain individuals had for the constitutional limitation on the race conscious programs. After a meeting with Hannig and others concerning a new program mandated by state law she wrote an email to Parrish in which she outlined in detail, with case citation, the constitutional limitation on race-based programs. IDOT notes that the

same concerns were shared by its chief legal counsel. Moreover, it claims that the way a constitutional program was ultimately developed was to revise the legislation.

During the conference call on December 23, 2009, Hannig also addressed the subject of DBE waivers. Hannig stated that he did not want to be put in a position where he was forced to decide between goals attained and waivers. Hannig explained his comments on waivers during that telephone conference and his views on waivers in general as follows:

Q. [Mr. Gower] Was there any discussion at the December 23 teleconference meeting about DBE waivers or modifications and your feelings about those?

A. [Mr. Hannig] I think that we talked in terms of we need to do our job right. That we don't need to have a bunch of waivers, in other words.

Q. What did you say to convey that idea?

A. We simply need to do our job, right. You have to do – if the job was done properly and the low bidder was able to meet the goals, because the goals were set high, but within the law could be attained, then the process would work just fine.

Q. If you set DBE goals at the maximum level –

A. Allowed by law.

Q. – allowed by law, would you expect to see more waiver or modification requests as a result?

A. No.

Q. So, when you increased the goals to the maximum percent as you say allowed by law, you would not expect to see any increase in goal modifications or waiver requests?

A. Not necessarily. . . .

Hannig continued:

Q. [Mr. Corrigan] In your meeting of the 23rd when you discussed the fact that you didn't want to see a bunch of waiver requests –

A. Uh-huh.

Q. – what did you think that the staff could do to ensure that there weren't waiver requests?

A. They could get it right. They could find achievable goals within the law that were high. In other words, a waiver is in some ways a – when we grant a waiver, it is, in some ways, in some cases an acknowledgment by the agency that the goals were too high. That they were not achievable, and we grant a waiver.

One of the participants in the conference call, Maruffo, contemporaneously took notes of the statements made during the conference call. One of Maruffo's notes states: "Tony at D-1 – maximized goals, no waivers." The term "D-1" refers to District 1 of IDOT. IDOT disputes the allegation to the extent it is submitted to support the alleged "no waiver" policy. IDOT alleges the comment regarding "maximized goals, no waivers" was made by someone from District 1 at the December 23, 2009 conference call. The individuals stated there was a goal setting that resulted in no waiver requests and the person de-

scribed how they broke out or added in some projects in order to make that work.

During the conference call, Hannig addressed the employment of the district engineers and EEO officer with regard to maximizing DBE goals and waivers. He explained his comment on their job as follows:

> Q. [Mr. Gower] Did you say or do any – did you say anything in the meeting that suggested that if the EEO officers didn't do what you had outlined to be their job, they would no longer have that job?
>
> A. [Mr. Hannig] I suggested that they simply need to do their job, that I was trying to impress upon them that it was important that they do this part of the job. That perhaps, perhaps under previous administrations this was not an important part of the jobs, but under this administration, under my administration at I.D.O.T I considered it to be an important part of the job, and I wished them to simply do their job. That's all I ever expected from my employees.
>
> Q. And what precisely did you say to the EEO officers to convey those concepts to them?
>
> A. That this was a very important part of what we need to do, that you need to do your job.
>
> Q. And did you suggest to anyone – I am going to ask the same question again, it is just a yes or no, did you suggest to anyone that if they didn't do their job, they wouldn't have that job anymore?
>
> * * *

A. I think I made it clear that we all have to do our job.

* * *

Q. Did you say anything at the meeting that was designed to convey to the EEO officers that if they didn't maximize the DBE goals, that they would have their job anymore?

A. The purpose was to make sure that they understood that they needed to do, under the law, what was allowed to set the goals as high as the law allows. That was part of their job. I wanted to make sure that they understood that it was simply part of their job and that we all need to do our job.

Q. Did you tell them they would be fired if they didn't do their job?

A. I am not even sure if I can fire them. They may very well be in the union. I don't know.

Q. Did you tell them that they would be discharged if they didn't do their job?

A. I don't recall that I told people they would be discharged or fired.

On December 28, 2009, Lyle sent an email to Parrish in which she recommended that one of the topics for discussion in a regularly scheduled meeting with Hannig should be "possibly training on Federal Regulations so there is some understanding of regulatory constraint." Lyle described the concern that prompted her to send the email as follows:

Q. [Mr. Gower] Were you concerned as of December 28th, 2009 that Secretary Hannig wasn't

fully appreciative of the constitution limitations on the DBE Program?

A. [Ms. Lyle] I think I had a concern regarding those above me and their knowledge of how the program had been administered previously.

Q. Did you have concerns that some of the actions being taken might be outside the law and cause problems for the program?

A. Yes.

Q. Did one of those concerns relate to maximization of the DBE goals?

A. Yes.

Q. Did another one of those concerns relate to how the goal modification approval process was administered and how those decisions were made?

A. I am trying to recall at this point.

Q. Well, if you look back to Exhibit 7, which was the, I think it is the PT Ferro E-mail, that email was dated December 9, 2009.

A. The answer would be yes.

(6) Review of goals and awarding of contract

Dunnet Bay alleges that at a pre-letting meeting called by IDOT for contractors on January 6, 2010 in District 8 (St. Louis Metro East area), IDOT's District 8 EEO officer, Lee Coleman, reportedly stated to the contractors that no waivers would be granted for the January 15, 2010 letting. IDOT disputes the allegation and notes that Coleman denies making the

statement. Moreover, Coleman would not have had any job duties in considering requests for waivers.

The Department alleges that although Henry Gray heard rumors that Secretary Hannig did not want to approve waivers, the granting of waivers could not be avoided. Dunnet Bay disputes the allegation.

IDOT began to search for ways to justify Hannig's directive to set 20% DBE goals on the Eisenhower projects. The methods reviewed by IDOT include expanding the geographic areas to determine DBE availability, assign pay items as DBE eligible which had previously been reserved for the general contractor, and designate pay items set aside for small businesses as DBE eligible.

The scope of work for Contract No. 60I57 included "4.24 miles of milling, patching, HMA surface, bridge repairs, drainage improvements, striping and other work on I-290." There was discussion about whether pavement patching could be included as a DBE item. Pavement patching involves cutting out deteriorated, faulted concrete and replacing it with steel and new concrete.

Historically, pavement patching and payment marking were not deemed DBE eligible pay items. Pavement patching had been part of the "critical path" work, *i.e.*, work that has to be properly sequenced to complete a project when scheduled. IDOT states that pavement patching would now be used for DBE goals. The fact that IDOT might have risked delays in the project is immaterial because federal regulations do not prohibit this. *See* 49 C.F.R. § 26.1, *et seq*.

Because the majority of work on the Eisenhower Expressway projects was bridge rehabilitation and resurfacing, pavement patching was critical to meeting the completion date. Reed was concerned that designating pavement patching as DBE eligible would interfere with timely completion of the Eisenhower projects and would create public safety considerations. Because pavement marking a Chicago expressway is very specific and difficult and requires special equipment, Reed was concerned whether DBEs could be used for pavement marking. It was a choice made by the Department to not include pavement patching as a DBE-eligible item. It was not a federal rule.

IDOT's small business initiatives program was a program where certain pay items were reserved or set aside for small business enterprises without regard to the racial composition of the small business enterprises. Because DBEs are often small business enterprises, IDOT's small business initiative was designed to give minority enterprises an opportunity to act as prime contractors. In order to set the directed DBE goal on the Eisenhower projects IDOT designated, as DBE eligible, pay items which were previously set aside for small business enterprises, such as landscaping work.

Hannig also decreed in December 2009 that all State funded projects scheduled for the January 15, 2010 letting should be re-reviewed to ensure the DBE goals were maximized and that the review should be completed the next business day. To meet that directive, IDOT EEO officers outside of the Chicago area, among others, added goals to what had been small business initiative projects; assigned goals to projects where the decision had previously

been made to have no goals, and to attach DBE goals because DBEs were likely to be bidders on the projects; or the EEO officers simply revised their prior judgment to justify a DBE goal increase.

Beginning in January 2010, Hannig ordered that all contractor bids that did not meet the goals were to be rejected, notwithstanding any good faith effort. IDOT would convene a reconsideration meeting only for a bidder who had requested a goal modification when it submitted its bid and if it requested reconsideration.

IDOT was advised that its practice of rejecting bids as non-responsive and not offering contractors who failed to meet the goal and did not check the box requesting a modification because, for example, the contractor made a math error, is a violation of 29 C.F.R. § 29.53(d) and contractors who fail to meet the DBE goal must be given an opportunity for reconsideration. The Department contends this allegation is immaterial because Dunnet Bay does not claim this situation happened to it.

IDOT alleges that, when the Eisenhower projects were rebid, it provided more lane closures, which allowed the contractor more time to work unimpeded by traffic and also allowed contractors to make adjustments to their maintenance of traffic, so when the contractor had lane closures the maintenance of traffic requirements were not as tight. By making those two changes, IDOT expected bids to be reduced by a significant amount. Because of the reduced costs of the bids received and the addition of extra work specifications, IDOT saved approximately $1.3 million through acceptance of the lowest responsive bid at the second letting. Dunnet Bay alleges its bid was rejected solely because it did not meet arbitrarily set

goals and these financial considerations are of no consequence.

IDOT asserts that in the original bids for the Eisenhower, one of the reasons that the bids were higher than anticipated was because IDOT was very restrictive on the number of allowed lane closures. Eisenhower Contract 60I57 and three of the four Eisenhower Expressway projects were re-advertised for bids for the February 18, 2010 special letting. Ellen Schanzle-Haskins told Hannig that Dunnet Bay was left off the bidders list; that it was not fair to Dunnet Bay, the other bidders or to the DBEs themselves if Dunnet Bay was left off the bidders list; and that IDOT should absolutely not award the contract to the second low bidder, but should instead rebid the whole thing so that Dunnet Bay got a fair shot at the contract again. Dunnet Bay contends its bid was rejected because it did not meet arbitrarily set goals and these financial considerations are of no consequence.

In March 2010, Hannig was personally reviewing the DBE goals for construction projects before they could be advertised. Within the last eight years, other than its bid on the Eisenhower project on January 15, 2010, Dunnet Bay has never had a bid rejected as non-responsive.

When Dunnet Bay submitted its bid, it did not know it had been left off the for-bid list. The documentation Dunnet Bay received after submitting its first bid for the Eisenhower indicated there were sufficient DBEs in the area to meet the goal. One of the partners of Dunnet Bay admitted that the DBE goal was realistic. On IDOT projects, Dunnet Bay has never failed to submit a bid because it was unable to reach the DBE goal. Dunnet Bay does not claim it

was discriminated against on any construction contracts except the Eisenhower contract.

IDOT alleges Dunnet Bay does not claim that any similarly situated business enterprises were treated more favorably than Dunnet Bay on either the January 15, 2010 letting for the Eisenhower construction project or the February 18, 2010 special letting that the Eisenhower construction project that is at issue in this case. Dunnet Bay disputes the allegation and contends that Albin Carlson, a non-DBE, was awarded the contract because it had adequate DBE participation, and thus was treated differently on the basis of race.

From 2007 to 2012, Dunnet Bay's work with IDOT totaled $202 million, resulting in profits close to $20 million.

III. DISCUSSION

Dunnet Bay contends that IDOT departed from federal regulations and its own federally-approved written program to engage in race-based decision-making, which resulted in harm to Dunnet Bay. Although it was the low bidder for the construction project, Dunnet Bay did not meet what it alleges was the arbitrarily inflated goal for participation of DBEs despite its good faith efforts, thereby denying Dunnet Bay the opportunity to compete for the contract on a level playing field due to race. Because it asserts IDOT's actions cannot survive strict scrutiny, Dunnet Bay claims it is entitled to summary judgment on liability.

IDOT contends it followed all applicable guidelines in handling the DBE program. Because it did not abuse its federal authority in administering the program, IDOT alleges the DBE program is not sub-

ject to attack. Moreover, IDOT asserts that neither the rejection of Dunnet Bay's bid nor the decision to rebid the project was based on its race or that of its owners.

IDOT further contends that because Dunnet Bay is relying on the rights of others (i.e., small businesses operated by white males) and it was not denied an equal opportunity to compete for government contracts, Dunnet Bay lacks standing to bring a claim of racial discrimination. Even assuming there was an Equal Protection violation, IDOT asserts Dunnet Bay cannot show that, but for the violation, it would have been awarded the contract. Additionally, the Department claims Dunnet Bay cannot show there is an ongoing violation which would warrant injunctive relief.

A. Legal standard

Summary judgment is appropriate if the motion is properly supported and "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). The Court construes all inferences in favor of the Plaintiff. *See Siliven v. Indiana Dept. of Child Services*, 635 F.3d 921, 925 (7th Cir. 2011). To create a genuine factual dispute, however, any such inference must be based on something more than "speculation or conjecture." *See Harper v. C.R. England, Inc.*, 687 F.3d 297, 306 (7th Cir. 2012) (citation omitted).

Because summary judgment "is the put up or shut up moment in a lawsuit," a "hunch" about the opposing party's motives is not enough to withstand a properly supported motion. *See Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008). Ulti-

mately, there must be enough evidence in favor of the non-movant to permit a jury to return a verdict in its favor. *See id.*

When a court is considering cross-motions for summary judgment, it must "construe all inferences in favor of the party against whom the motion under consideration is made." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998).

B. Intentional discrimination based on race

Dunnet Bay, a white-owned contractor, alleges IDOT made impermissible, race-based decisions denying it the right to compete for IDOT business on an equal footing, in violation of the Equal Protection Clause, 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 2000d (Title VI of the Civil Rights Act) and Section 5 of the Illinois Civil Rights Act of 2003, 740 ILCS 23/5. Title VI forbids racial discrimination by recipients of federal grants. *See* 42 U.S.C. § 2000d; *Williams v. Wendler*, 530 F.3d 584, 586 (7th Cir. 2008).

Race-based discrimination that violates the Equal Protection Clause also violates § 1981 and Title VI. *See Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003). The same standards generally apply when the plaintiff is alleging intentional discrimination under § 1981 and the Equal Protection Clause. *See Friedel v. City of Madison*, 832 F.2d 965, 971 (7th Cir. 1987); *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661, 669 (7th Cir. 1996).

"Title VI proscribes only those racial classifications that violate the Equal Protection Clause." *Levin v. Madigan*, 692 F.3d 607, 619 (7th Cir. 2012). Title VI prohibits only intentional discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). An equal protection violation involves the

"invidious classification of persons aggrieved by the state's action" and requires a showing of "intentional or purposeful discrimination." *Nabozny v. Podlesny*, 92 F.3d 446, 453-454 (7th Cir. 2002). To establish liability for an equal protection violation, a plaintiff "must show that the defendants acted with a nefarious discriminatory purpose, and discriminated against him based on his membership in a definable class." *Id*. at 453 (internal citation omitted).

Section 5 of the Illinois Civil Rights Act of 2003, which prohibits discrimination against a person in a government program based on race and other classifications, *see* 740 ILCS 23/5, was not intended to create new rights but was instead enacted to establish a state law remedy for discrimination that was covered by Title VI. *See Illinois Native American Bar Association v. University of Illinois*, 368 Ill. App.3d 321, 327 (1st Dist. 2006).

(1)

All entities receiving funds from the FHWA must have a DBE program which meets requirements. *See* 49 C.F.R. § 26.21(a). In order to qualify as a DBE, the company must be 51% owned by persons who are socially and economically disadvantaged. *See* 49 C.F.R. § 26.5. Members of any racial group or gender can qualify as socially and economically disadvantaged for these purposes. *See Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 717-18 (7th Cir. 2007). There is a rebuttable presumption that women, Black Americans and members of certain other groups are socially and economically disadvantaged. *See* 49 C.F.R. § 26.67. However, the ownership interest of an individual must be disregarded if the person has an individual net worth above a certain level (in excess of $750,000 at the time of the con-

tract in question). *See id*. Additionally, a business does not qualify as a DBE if its yearly gross receipts are in excess of $22.41 million. *See* 49 C.F.R. § 26.65.

IDOT was obligated to set an overall goal for DBE participation on federally assisted contracts. *See* 49 C.F.R. § 26.45. One way to comply is to exercise good faith in administering the program and in attempting to meet the goal. *See* 49 C.F.R. § 26.47. One way in which to meet the goal is to place DBE goals on contracts with subcontracting possibilities. *See* 49 C.F.R. § 26.51. If a contract has goals, a general contractor must demonstrate that it has obtained sufficient DBE participation to meet the goal or has made adequate good faith efforts to meet the goal. *See* 49 C.F.R. § 26.53(a). "If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. § 26.53(a)(2). The term "good faith efforts" is expanded upon in Appendix A to the rules:

> This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

49 C.F.R. Appendix A to Part 26, § I ("Appendix A"). The rules require IDOT to review the bid for the purpose of "making a fair and reasonable judgment whether a bidder . . . made good faith efforts" by considering "the quality, quantity and intensity" of the efforts. *See* Appendix A, § II.

The regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. These include:

> A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
>
> B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
>
> C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

See Appendix A, § IV. Other considerations include negotiating in good faith with DBEs while exercising good business judgment; not rejecting DBEs as unqualified without sound reasons following a thorough investigation; and "[e]ffectively using the

services of minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs." *See id*.

The regulations also provide the State may consider the ability of other bidders to meet the goal:

> In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

Appendix A, § V. Given that the factors cited in Appendix A are non-exhaustive, it is also permissible to consider a bidder's track record in evaluating its good faith efforts.

Only after the State entity, in this case IDOT, determines that the apparent successful bidder has failed to meet the requirement of good faith efforts, the bidder must be given the opportunity for administrative reconsideration. *See* 49 C.F.R. § 26.53(d). If the decision on reconsideration is a finding of inadequate efforts, the State recipient must be given a

written explanation regarding the basis for the finding. *See* 49 C.F.R. § 26.53(d)(4).

(2)

"[G]overnment actions to remedy past racial discrimination – actions that are themselves based on race – are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). A government program that uses racial classifications is subject to strict scrutiny. *See Northern Contracting*, 473 F.3d at 720. Therefore, the program must be "narrowly tailored to serve a compelling governmental interest." *Id.*

A state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at 720-21. In these instances, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at 721. Accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 722. Therefore, the Court must determine if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenge is foreclosed by *Northern Contracting*.

IDOT's overall aspirational goal of 22.77% DBE was set in 2005 and was approved in *Northern Contracting*. 473 F.3d at 719, 722-23. Dunnet Bay contends that the contract goals with respect to the Ei-

senhower project were arbitrarily set and were not in compliance with federal regulations. IDOT asserts contemporaneous documents show otherwise. The goal was set at 20% on the four projects, including a 22% DBE goal with respect to Contract No. 60I57.

The undisputed facts show that after initial theoretical DBE goals were set, Henry Gray was the IDOT employee who set the DBE goals on the contract, which were then approved by the FHWA, the Bureau of Design at IDOT, the Implementation Engineer, the Bureau Chief, and the IDOT District Engineer.[4] Bureau of Design estimators put together theoretical or potential goals based on a percentage basis pursuant to the amount of work for individual contracts. Gray would obtain the information from the Bureau and examine the document to determine the county where the work would be performed under the contract and determine what certified DBEs were ready, willing and able in that particular area. Eventually, Gray found that the maximum potential goal for DBE participation for the Eisenhower project was 20.3%. After re-evaluating the goals, a goal of 22.2% was set for the contract.

Although Dunnet Bay contends that IDOT did not employ a reasoned analysis in setting contract goals and instead based the goal on political consid-

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[4] 4Dunnet Bay claims that contrary to IDOT's standard DBE good faith procedures, the Bureau of Small Business Enterprises did not review the revised Eisenhower DBE goals and had no role in their development. IDOT contends this is not contrary to its good faith procedures. Moreover, Small Business Enterprises was not involved in the review of DBE goals for expedited projects. Additionally, because there is no federal or any other requirement that Small Business Enterprises review goals, the Court concludes this would constitute a violation of federal law.

erations, these undisputed facts show that IDOT did in fact employ a thorough process before arriving at the figure. Additionally, because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.

Based on the foregoing, the Court concludes there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor.

(3)

Dunnet Bay also contends that IDOT employed a "no-waiver" policy, by refusing to grant waivers of DBE goals for contractors who made good faith efforts to meet contract goals. Dunnet Bay asserts this amounted to an inflexible quota or set aside, in violation of 26 C.F.R. § 26.43.

The undisputed material facts establish that there was not a "no-waiver" policy at IDOT. Certainly, there is significant evidence that Alex Hannig might not have wanted to approve many waivers. Waivers may well have been discouraged for political reasons. Darryl Harris, the Director of Diversity Enhancement in the Office of the Governor, encouraged a "no-waiver" policy and said that was the Governor's desire as well.

The undisputed facts establish that Christine Reed advised Hannig that a no waiver policy was not possible because it violated the law. Hannig in turn told Harris that IDOT would follow and be bound by federal law, which requires the existence of a waiver process.

It is apparent there was not a no-waiver policy because a waiver was in fact granted in connection with the January 15, 2010 letting–the same letting at issue in this case. It is undisputed that on March 4, 2010, Bill Grunloh granted a waiver of the DBE participation goal for K-Five Construction Corporation on Contract No. 63335. Upon determining that K-Five had made adequate food faith efforts to secure DBE participation, Grunloh granted a modification of the DBE goal from 10% to 7.9%. The record further establishes that a number of modifications were granted before the Eisenhower project and after it.

Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy is unsupported and contrary to the record evidence. Accordingly, despite any political pressure from the Office of the Governor or other entities and regardless of the personal views of the Secretary of Transportation or anyone else, the undisputed facts establish that IDOT did not have a "no-waiver" policy. IDOT did not exceed its federal authority by adopting a "no-waiver" policy. Therefore, any challenge on this factor fails pursuant to *Northern Contracting*.

(4)

Dunnet Bay also contends that, in violation of 49 C.F.R. § 26.53(a), IDOT did not determine whether Dunnet Bay's bid made a showing of good faith efforts. It asserts the Department denied the bid because the DBE goal was not met without reviewing Dunnet Bay's alleged good faith documentation, pursuant to 49 C.F.R. Appendix A to Part 26.

Dunnet Bay contends the reconsideration of its bid was not meaningful. Although Dunnet Bay solic-

ited hundreds of DBEs via faxes and phone calls, attended pre-bid meetings designed to provide outreach to DBEs and contacted appropriate minority and female organizations, it could not meet the DBE goal. However, Dunnet Bay claims this was not due to a lack of good faith efforts. Dunnet Bay alleges the goal was not achieved because of IDOT's own administrative failure in omitting Dunnet Bay from the for bid list. It further notes that Carol Lyle, Deputy Director of IDOT's Office of Business and Workforce Diversity, believed after the reconsideration meeting that Dunnet Bay should be awarded Contract No. 60I57 based upon its good faith efforts to meet the DBE utilization goals.

Dunnet Bay further asserts that IDOT's political appointees decided to manufacture an excuse for its rejection–specifically its failure to utilize the services of IDOT's supportive services vendor. Although this is a factor that may be employed in analyzing good faith efforts, Dunnet Bay claims it is not a mandatory or determinative factor. Moreover, Dunnet Bay contends that this factor has not previously been considered by the Department to be mandatory.

At his deposition, Bill Grunloh was shown the Good Faith Effort Section of the Disadvantaged Business Enterprise Participation special provision. Grunloh was asked to specify the areas in which he found Dunnet Bay's efforts to be lacking. He had criticisms of Dunnet Bay's efforts with respect to paragraph one, which discusses soliciting through all reasonable and available means the interest of all certified DBE companies that have the ability to perform the work of the contract. Grunloh suggests Dunnet Bay was deficient regarding paragraph three, which discusses providing interested DBE companies with

adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in responding to the solicitation. Additionally, Grunloh pointed to paragraph six, which mentions assisting interested DBEs with obtaining bonding lines and credit insurance; paragraph seven, which discusses efforts to assist in obtaining necessary equipment; and paragraph 8, which encourages effectively using services of various groups to provide assistance in recruitment and placement of DBE companies.

The regulations refer to eight non-exhaustive factors which can be considered in assessing good faith. IDOT asserts that Dunnet Bay provided no documentation that it had performed any of the items, except that it sent a large number of faxes to DBEs, minority/women community organizations and minority/women contract groups stating that Dunnet Bay was bidding certain contracts and was looking for subcontractors. Dunnet Bay followed up by phone with a number of the DBEs. Dunnet Bay notes that it also attended pre-bid meetings. Dunnet Bay contends IDOT acted in a manner inconsistent with federal law.

The factors to be considered are non-mandatory, non-exhaustive and non-exclusive. A contractor who does not meet the goals "must show that it took all necessary and reasonable steps to achieve a DBE goal." 49 C.F.R. § Pt. 26 App. A. Based on this standard, a reconsideration officer such as Grunloh has significant discretion and will often be called on to make a "judgment call" regarding the efforts of the bidder. Accordingly, it is not surprising that another IDOT official might disagree with the decision.

The Court is unable to conclude that Bill Grunloh erred in determining Dunnet Bay did not make adequate good faith efforts. Perhaps the strongest evidence that Dunnet Bay did not take "all necessary and reasonable steps to achieve a DBE goal" is that its DBE participation was under 9% while other bidders were able to reach the 22% goal. Accordingly, the Court concludes that IDOT's decision on reconsideration of the rejection of Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under federal law.

Grunloh denied Dunnet Bay's reconsideration of its good faith efforts and affirmed the rejection of its bid as non-responsive. Alex Hannig advised Dunnet Bay of the decision by letter dated February 2, 2010.

To the extent that Dunnet Bay alleges IDOT failed to provide Dunnet Bay with a written explanation of as to why its efforts were not sufficient, as required by 49 C.F.R. § 26.53(d)(4), the Court is unable to conclude that a technical violation such as that would provide any relief to Dunnet Bay. Additionally, because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration.

It is also worth emphasizing that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. The regulations require that the bidder be afforded administrative reconsideration "before awarding the contract." *See* 49 C.F.R. 26.53(d). IDOT states that the project was rebid because the bids were too high and also because it believed it may have tainted the bidding process by leaving Dunnet Bay off the list of bidders for the project. Because the contract was not awarded to the next bidder that did meet the DBE

goal, the Court concludes any claim that Dunnet Bay might have had based on § 26.53(d)(1)–(5) became moot when the project was re-bid.

Because the decision on reconsideration did not exceed IDOT's authority under federal law, Dunnet Bay's claim fails under *Northern Contracting*.

C. Whether Dunnet Bay's equal protection rights were violated

(1)

IDOT contends that Dunnet Bay lacks standing to raise an equal protection claim based on race, contending neither Dunnet Bay nor its owners suffered discrimination on that basis. "Standing exists when the plaintiff suffers an actual or impending injury, no matter how small; when that injury is caused by the defendant's acts; and when a judicial decision in the plaintiff's favor would redress that injury." *Brandt v. Village of Winnetka*, 612 F.3d 647, 649 (7th Cir. 2010).

Citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), Dunnet Bay asserts it is clearly established that a contractor has standing to challenge a DBE program. The Supreme Court held:

> [The Contractor's] claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to [the Contractor]. . . . The injury in cases of this kind is that a discriminatory classification prevent[s] the plaintiff from competing on an equal footing.

Id. at 211 (internal quotation marks and citation omitted). The injury was particularized to Adarand because it submitted the low bid to a contractor to perform work on a project, but did not receive the subcontract because the prime contractor received additional compensation for awarding the subcontract to a small business controlled by "socially and economically disadvantaged individuals." *See id*. at 205. Unlike the subcontractor in *Adarand*, Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business. Neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus.

Dunnet Bay does not point to any other business that was given a competitive advantage because of the DBE goals. "[I]n the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Northeastern Florida Chapter of Associated General Contractors of American v. Jacksonville*, 508 U.S. 656, 666 (1993). That case involved an ordinance which provided that 10% of contracts were to be awarded to minority or female businesses. *See id*. at 658. Certain contracts were reserved for minority businesses. *See id*. The plaintiff was an association consisting mostly of members who could not bid on those contracts. *See id*. at 659. The Court held that in order to establish standing, a company needed only to "demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id*. at 666.

The facts here are not at all similar to those in *Northeastern Florida Chapter*, in which the plaintiffs

were ineligible to compete for 10% of the contracts. While generally alleging it has standing based on *Adarand*, Dunnet Bay does not cite any cases which involve plaintiffs that are similarly situated to it–businesses that are not at a competitive disadvantage against minority-owned companies or DBEs–and have been determined to have standing. Any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. IDOT cites a number of Supreme Court cases, including *Adarand*, which involve claims that a company was at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. That did not occur in this case.

It is true that a hypothetical DBE might not have had to subcontract work on the Eisenhower project, thereby providing it with a competitive advantage over the other bidders. However, there is no evidence that occurred in this case. Dunnet Bay has not pointed to another contractor that did not have to meet the same requirements it did. In any event, it is doubtful that Dunnet Bay could bring a claim on the basis that another contractor was treated more favorably. Because Dunnet Bay's average gross receipts exceeded $22.41 million in the three years prior to 2010, it would be ineligible to be classified as a DBE and not similarly situated to such a company, even if it were owned by a minority or a woman. *See* 49 C.F.R. §26.65(b).

The Court concludes that Dunnet Bay lacks Article III standing to raise an equal protection challenge because it has not suffered a "particularized" injury that was caused by IDOT. Dunnet Bay was not deprived of the ability to compete on an equal basis.

It appears that Dunnet Bay would also be precluded from bringing this claim pursuant to "prudential" standing requirements. A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also G&S Holdings LLC v. Continental Cas. Co.*, 697 F.3d 534, 540 (7th Cir. 2012).

Dunnet Bay is attempting to assert a right that might in certain circumstances be invoked by a white-owned small business–for example, if a white-owned small business lost out on a contract to a minority-owned small business because of the DBE program. Based on its profits, Dunnet Bay does not qualify as small business. Accordingly, it lacks standing to vindicate the rights of a (hypothetical) white-owned small business.

In bidding on the contract, Dunnet Bay was not denied the ability to compete on an equal footing. Accordingly, the Court concludes that Dunnet Bay lacks standing to challenge the DBE program based on the Equal Protection Clause.

(2)

Even if Dunnet Bay has standing to bring an equal protection claim, the Court concludes IDOT is entitled to summary judgment. In its Second Amended Complaint, Dunnet Bay alleges an equal protection violation as follows:

> 68. The IDOT DBE program, with the unwritten no-waiver and the practice of imposing contract goals not narrowly tailored to address discrimination and not determined to be necessary to meet IDOT's overall goal, for DBE utilization as subcontractors by gen-

> eral contractors in Illinois highway construction contracts on which Dunnet Bay bids, invidiously discriminated against Dunnet Bay and is unlawful on its face, in violation of 42 U.S.C. § 1983 and Dunnet Bay's right thereunder to be free from race discrimination in the solicitation and award of IDOT contracts, including the Contract.
>
> 69. Likewise, the IDOT DBE Program, as interpreted, applied, and enforced by IDOT requiring Dunnet Bay to meet DBE goals and to deny Dunnet Bay a waiver of the goals despite its good faith efforts to meet the goal, violates 42 U.S.C. § 1983, and Dunnet Bay's right thereunder to equal protection in the solicitation and award of IDOT construction contracts, including the Contract.

See Doc. No. 19, at 18.

The United States Supreme Court has held that a DBE program can be challenged without a showing that the affected group would have been awarded the contract but for the equal protection violation; the group need not allege it would have been awarded the contract in order to obtain standing. *See Northeastern Florida Chapter*, 508 U.S. at 666. "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id*.

In the Amended Complaint, Dunnet Bay implies that but for the alleged "no waiver" policy and contract goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. As the Court noted earlier, the record

establishes that IDOT did not have a "no waiver" policy.

To establish an equal protection violation, a plaintiff must show that the defendant acted with a "nefarious discriminatory purpose," which was based on its membership in a definable class. *See Indianapolis Minority Contractors Ass'n v. Wiley*, 187 F.3d 743, 752 (7th Cir. 1999) (citation omitted). Because "[t]he gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons," *see id*., it does not appear Dunnet Bay can assert a viable claim. The Court is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE program. "[T]he regulatory requirements focus on what the states must do, in structuring their programs, to maximize the opportunity of minority businesses to participate in contracts financed with federal funds; the regulations do not confer specific entitlements upon any individuals." *Id*. at 751. Therefore, even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation.

In order to support an equal protection claim, a plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *See Harvey v. Town of Merrillville*, 649 F.3d 526, 531 (7th Cir. 2011). "The equal protection clause requires similar treatment of similarly situated persons; it does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id*. (internal quotation marks and citation omitted).

Based on the current record, the Court can only speculate whether Dunnet Bay or another entity would have been awarded the contract without IDOT's DBE program. It is unknown what the bid of the F.H. Paschens/S.N. Nielsen, the second lowest bidder, might have been if it had not met the 22% goal. Similarly, it is not known what Dunnet Bay's bid would have been if it had met the 22% goal.

The Court need not speculate as to whether Dunnet Bay or another company would have been awarded the contract under different circumstances. What is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. Every bidder had to meet the same percentage goal for subcontracting to disadvantaged businesses or make good faith efforts. Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. Because Title VI applies only to violations of the Equal Protection Clause," *Levin* , 692 F.3d at 619, Dunnet Bay's claims under Title VI also fail.[5]

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[5] As IDOT notes, it is also unknown whether the contract would have been awarded if Dunnet Bay was determined to have used good faith to meet the DBE goals. Because Dunnet Bay's bid was over project estimates, it may have been rebid in an effort to lower costs. Additionally, IDOT appears to have carefully considered a number of factors before deciding to rebid the contract. It decided it would not be fair to immediately reject Dunnet Bay's bid after leaving it off the "for bid" list. It also would not have been fair to the other bidders if the bid had been awarded to Dunnet Bay, given the competitive advantage it had by having only 8% DBE participation. If Dunnet Bay had been awarded the contract, the DBEs would also have been denied work because of an error by IDOT. Accordingly, the De-

For the forgoing reasons, IDOT is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and Title VI.

D. Injunctive relief

For the reasons previously discussed, Dunnet Bay is not entitled to injunctive relief because it has not demonstrated a likelihood of future harm. Additionally, contrary to Dunnet Bay's assertion, the record establishes that IDOT did not have a "no waiver" policy.

IV. CONCLUSION

For the reasons stated herein, the Court concludes IDOT is entitled to summary judgment. Dunnet Bay lacks standing to raise an equal protection challenge based on race. Even if Dunnet Bay has standing to pursue such claims, IDOT is entitled to summary judgment because Dunnet Bay is unable to show that it would have been awarded the contract in the absence of any violation. Because Dunnet Bay's equal protection claims fail, IDOT is also entitled to summary judgment on the Title VI claims. Any other federal claims are foreclosed by *Northern Contracting* because there is no evidence IDOT exceeded its authority. Additionally, because Section 5 of the Illinois Civil Rights Act of 2003 simply establishes a state law remedy for Title VI violations, *see Illinois Native American Bar Association*, 368 Ill. App.3d at 327, summary judgment is also warranted on Dunnet Bay's state law claims. Finally, Dunnet Bay has not established a likelihood of future harm and is thus not entitled to injunctive relief.

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partment faced a difficult decision and appears to have acted reasonably.

ERGO, the Plaintiff's Motion for Summary Judgment [d/e 154] is DENIED.

The Defendants' Motion for Summary Judgment [d/e 166] is ALLOWED.

Any future court settings are hereby Canceled.

The Clerk will enter Judgment in favor of the Defendants and against the Plaintiff.

ENTER: February 11, 2014

FOR THE COURT:

s/Richard Mills
Richard Mills
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
for the
Central District of Illinois

Dunnet Bay Construction Co,
Plaintiff

vs.

Gary Hannig and the Illinois Department of Transportation,
Defendant

Case Number: 10-3051

JUDGMENT IN A CIVIL CASE

☐ **JURY VERDICT**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Opinion entered by the Honorable Richard Mills on February 11, 2014. Plaintiff's Motion for Summary Judgment (d/e 154) is denied. The Defendant's Motion for Summary Judgment (d/e 166) is allowed. Judgment is entered in favor of the Defendants and against the Plaintiff. This case is closed.-----

Dated: February 12, 2014

s/ Kenneth A. Wells
Kenneth A. Wells
CLERK, U.S. DISTRICT COURT

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 provides, in relevant part:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000d provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.