Surety Bonding Accessibility Study: OMWBE and HUB Contractors

Prepared by the Center for Economic and Business Research

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Introduction

About the Authors

The Center for Economic and Business Research is an outreach center at Western Washington University located within the College of Business and Economics. In addition to publishing the Puget Sound Economic Forecaster, the Center connects the resources found throughout the University to assist for-profit, non-profit, government agencies, quasi-government entities, and tribal communities in gathering and analyzing data to respond to specific questions. We use a collaborative approach to help inform our clients so that they are better able to hold policy discussions and craft decisions.

The Center employs students, staff, and faculty from across the University as well as outside resources to meet the individual needs of those we work with. Our work is based on academic approaches and rigor that not only provide a neutral analytical perspective but also provide applied learning opportunities. We focus on developing collaborative relationships with our clients and not simply delivering an end product.

The approaches we utilize are insightful, useful, and are all a part of the debate surrounding the topics we explore; however, none are fail-safe. Data, by nature, is challenged by how it is collected and how it is leveraged with other data sources. Following only one approach without deviation is ill-advised. We provide a variety of insights within our work – not only on the topic at hand but also on the resources (data) that inform that topic.

We are always seeking opportunities to bring the strengths of Western Washington University to fruition within our region. If you are looking for analysis work or have comments on this report, we encourage you to contact us at 360-650-3909 or by email at cebr@wwu.edu.

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Glossary

Bid Bond - A bid bond is a guarantee to the obligee that they will be compensated if the bidder fails to honor the terms of a bid and complete a project consistent with those terms. Bid bonds are used to first to discourage frivolous bids, and then to ensure that principals are financially secure enough to finish the project if their bid is selected.

Contractor-License Bond - A contractor-license bond ensures that the principal will complete the terms of the project following ethical business practices, building codes, workmanship standards, and other rules and regulations.

License Bond- A license bond is required by federal, state, and local government agencies to protect consumers against potential damages and unlawful practices. It does so by ensuring that a business will follow the laws and regulations that pertain to the industry of operation for each business.

Obligee - the entity to which a contractor owes a duty to carry out a project, and that requires the bond in connection with that project.

Performance Bond[1] - a guarantee that the principal will complete the project according to the agreed upon terms in a contract.

Principal - an individual or business that purchases a surety bond in order to guarantee future performance.

Surety - an insurance company that backs the bond by offering a line of credit to the obligee in case the principal fails to fulfill its obligations.

Surety Bond - a contract involving three parties – the principal, the surety, and the obligee – in which the surety financially guarantees the performance of the principal to the obligee.

[1]Performance bonds usually go hand-in-hand with payment bonds. Both performance bonds and payment bonds are a type of surety bond acquired by the prime contractor on a construction project. However, a performance bond protects the obligee by ensuring the principal finishes the project. A payment bond protects the project's subcontractors and supplies by guaranteeing that they will be paid for their supplies and labor.

Glossary of Acronyms

BEP – Bonding Education Program

CEBR – Center for Economic and Business Research (at Western Washington University)

DOD – The U.S. Department of Defense

HUB – Historically Under-utilized Businesses: includes women-owned, minority-owned, veteran-owned, and otherwise socially or economically disadvantaged small business.

MBAC – Minority Business Assistance Centers (of ODSA)

MBDD – Minority Business Development Division (of ODSA)

MBDI – Minority Business Development Institute

MCDP – Model Contractor Development Program

M/WBE – Minority or Woman-Owned Business Enterprise

NASBP – National Association of Surety Bond Producers

ODSA – Ohio Development Services Agency

OMWBE – Office of Minority and Women's Business Enterprises

PTAC – Procurement Technical Assistance Center

SAW – Surety Association of Washington

SBA – Small Business Administration

SBDC – Small Business Development Center

SBTRC – Small Business Transportation Resource Center

SFAA – Surety and Fidelity Association of America

WSDOT – Washington State Department of Transportation

Summary

This report was conducted by the Center for Economic and Business Research (CEBR) for the Washington State Department of Transportation. The purpose of this report is to evaluate the current contracting market with regards to surety bond access and availability for underrepresented firms, which we will refer to as historically under-utilized businesses (HUBs) for this report. We define HUBs as women-owned, minority-owned, veteran-owned, and otherwise socially or economically disadvantaged small businesses.

Groups that are presumed to be socially and economically disadvantaged include but are not limited to: African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women, though other individuals can also qualify. There are many state and federal certifications for HUBs, though not all HUB-specific resources or assistance programs require certification as a prerequisite for participation, and as such, our report and findings include both HUBS that are certified and those that are not.

This report aims to present and evaluate the barriers that exist for historically under-utilized businesses (HUB) in the surety bond market, based on relevant literature, market information, available data, and survey responses. While there are many federal assistance programs for HUBs and many other states offer their own support programs, there are very few Washington-specific programs.

Key findings from this study include:

- Literature Review Findings:
    - Many federal programs for assisting HUBs with surety bonding have been found to only offer general information, which may not be useful for those with specific questions about bonds or the process in specific state or states where business operations may occur
    - Recent literature finds that disparities created in the past continue to impact industry participation and key metrics that influence bond eligibility
- Market Analysis Findings:
    - Most available assistance programs fall under one of three categories:
        - Educational and informational websites or other programs
        - Mentor-protégé pairing
        - Business advising – credit building, financial management, and work experience/resume building
    - Many websites are outdated and include broken links or other information that may not be useful to those looking to receive bonds in Washington State
- Data Analysis Findings:
    - Credit is a primary determinant of surety bond approval and rates
        - Minorities and women, on average, have lower credit scores than white men – a product of historic issues – thus putting them at a disadvantage when applying for surety bonds
    - Businesses not owned by women or minority persons dominate the construction market.
        - There are significantly more firms in the market that are not woman or minority-owned

        - This translates to larger aggregate annual sales and employment by non-minority or woman-owned businesses (M/WBE) and therefore more power within this market
    - Historic WSDOT contracts show that minority and women-owned businesses make up a larger share of subcontracting contracts compared to prime contracts
    - Data on surety company's annual premiums and losses shows that since 2013, with the exception of 2019, surety companies in Washington State have positive loss ratios
- Survey Analysis Findings:
    - Underrepresented businesses were much more likely to report experiencing barriers to finding information on surety bonds, applying for surety bonds, and being approved for surety bonds
    - Many respondents referenced credit, finances, experience, and lack of information as barriers
- Legal Analysis – Feasible Approaches to Barrier Reduction
    - Training and outreach programs for both contractors and bond providers are legally permitted under both federal and state constitutions and laws
    - Small and mid-sized contractors (including HUBs) would be assisted by adjusting and rationalizing bonding statutes to ensure consistency and lowering bonding requirements – as a percentage of contract value – for small and mid-sized contractors
    - State-run programs to partially guarantee some bonds are legally feasible in Washington if federally or privately funded

Ultimately, we propose that Washington State consider three proposed methods for reducing barriers for underrepresented businesses.

- First, training and outreach for underrepresented contractors and bond providers will facilitate better communication between the groups and help to dismantle information barriers. These programs can also be used to address the other common barriers including credit, company finances, and experience.
- Second, by ensuring bonding statutes are consistent, the State can help reduce confusion and information barriers while also considering amending current bonding requirements.
- Third, the State can consider implementing a program to guarantee a portion of bonds – using federal or other non-state funding – thus lowering some of the credit, financial, and experience barriers that may come between underrepresented businesses and surety bonds for larger State contracts. We suggest that further research be done to gather data as to the practicability of such a State bonding program.

Report Structure

The purpose of this report is to explore surety bond barriers faced by HUBs in Washington State as well as offer economic and legal context for surety bonds and assistance programs. The report begins with a market analysis focusing on current bond availability and federal, state, and other surety bond support programs being offered to HUBs.

The second section of the report includes information regarding credit scores, bonding rates, and how pairing these factors can impact underrepresented businesses. In addition, we examine WSDOT contract data with respect to HUBs' presence within the state contracting market. This section also includes analyses of general construction market data with regards to business size, annual sales, and the overall share of the market held by woman and minority-owned businesses. This section also has a brief discussion of the importance of data availability for continued research and development of HUB assistance programs.

In the third section, we present a legal analysis that focuses on the statutory framework for bonding requirements, State and Federal laws that constrain certain types of affirmative action, and a look at the Washington State constitution and the restrictions it poses for using public funds to assist private-sector entities. The section concludes with a brief evaluation of possible state-funded programs consistent with the Washington State Constitution and legal precedent.

Components of Report

- Introduction
- Market Analysis
- Data Analysis
- Legal Analysis
- Survey Analysis
- HUB Support Strategy
- Conclusion

The final analysis portion of this report looks at the results of the Center's surety bond barrier survey. This survey was administered to OMWBE-certified firms that work in NAICS codes relevant to WSDOT contracts. The purpose of the survey is to gain a better understanding of the barriers that are faced by HUBs with regards to surety bonding.

As the surety bond market has a multitude of surety brokers, surety companies, contractors, municipalities, and other stakeholders who are operating in the surety market, a multi-faceted approach to HUB surety assistance will be discussed in this section of the report. This section focuses on the necessity and approach to developing a comprehensive assistance strategy.

Literature Review

Historically under-utilized businesses (HUBs) are defined as for-profit small businesses where socially and economically disadvantaged individuals own at least a 51% interest and control management and daily business operations.[2] The classification can include, but is not limited to, business owners who are Black, Hispanic, Native American, Asian-Pacific, subcontinent Asian, or women. To be classified as economically disadvantaged, the owner of a business must have a net worth of less than $1.32 million.

The State's Role in Surety Assistance Programs

While the disparate impacts of current economic institutions are widely known and studied, creating support systems that provide equitable access to business opportunities and resources – without giving preferential treatment to certain groups – is not as well understood. This struggle is made more complicated by the wide variety of needs experienced by HUB firms. As with all firms, minority and women-owned firms are all at different stages of industry knowledge and experience, which further complicates the State's role in creating an assistance program.

As suggested by a 2006 paper[3] by Ann Geter at the Central Ohio Transit Authority, one of the problems HUBs face is an abundance of redundant information. Many states, private companies, and federal programs offer educational resources that cover surety bond information, and many of the assistance programs offered by these entities are "one-size-fits-all" in their approach to assisting HUBs.

This is the same problem that arises in the current surety-assistance landscape – the vast majority of assistance programs are federally-focused and take a broad and general approach to surety bond assistance. Within these federal programs, however, finding information that is state-specific is a challenge. A state-specific assistance program would eliminate some of the informational barriers associated with doing business with the state.

A 2017 disparity study commissioned by WSDOT articulated that "while some progress has been made in integrating their firms into public and private sector transportation contracting activities… significant barriers remain"[4]. The study also presented the opinion of Washington-based HUBs that race- and gender-neutral programs are unlikely to completely address or remove these barriers.

Disparity at a Market Level

HUBs in construction face numerous barriers to building credit, adding to their resumes, establishing business relationships, and securing contracts. While these barriers affect access to surety bonds, the root of the problem is much deeper, as outlined in a 2010 Disparity Study conducted in New York State.

> "Such disparities are symptoms of discrimination in the labor force that, in addition to its direct effect on workers, reduce the future availability of M/WBEs [minority and women-owned business enterprises] by stifling opportunities for minorities and

[2] "Definition of a Disadvantaged Business Enterprise." *U.S. Department of Transportation,* 22 Nov. 2017.
[3] Geter, Ann. *MINORITY BUSINESS DEVELOPMENT – "IS IT A REGULATORY REQUIREMENT?"*. 2006, ippa.org/images/PROCEEDINGS/IPPC2/Article_1_GETER.pdf. Accessed 28 Oct 2020. "Hubzone Program". *Hubzone Program*, 2020, https://www.sba.gov/federal-contracting/contracting-assistance-programs/hubzone-program.
[4] "Washington State Department of Transportation Disparity Study 2017". https://wsdot.wa.gov/sites/default/files/2017/09/11/OEO-DisparityStudy-2017.pdf, 2017

> women to progress through precisely those internal labor markets and occupational hierarchies that are most likely to lead to entrepreneurial opportunities."[5]

These barriers prevent access to entrepreneurial opportunities for HUBs, which shrinks the diversity in the contract-applicant pool for state contracting opportunities. State-sponsored programs could strive to remedy these barriers at an industry-level by working with small business development centers (SBDC), the SBA, and other small-business resources that are not surety-specific, which would increase diversity in the applicant pool. In fact, a 2019 Washington State Disparity study found that market-level biases and discrimination continue to be prevalent and are often not targeted by state-run assistance programs, demonstrating a need for such a program[6].

Surety-specific research and analyses, particularly on the barriers faced by HUBs are numerous – often with a focus on specific minority-groups. While the barriers faced by HUBs are found throughout the surety bonding process, the largest and most visible barrier is the prequalification process. Since surety bonds are offered through a wide variety of private brokers, there is no one threshold for qualification, and determining if an individual firm will qualify is a stressful and difficult process.

Common evaluative criteria include references, work experience, financial strength, and credit history, to name a few.[7] Many studies have noted the challenges that contractors of color face when evaluated based on experience, as the underlying biases that they face affect their references and work history. A 2014 study[8] conducted by the Federal Reserve Bank of Minneapolis lists a lack of work experience to be the largest barrier to surety bond access for American Indian contractors, a factor which likely also affects other minority groups within the construction industry.

While the market-level barriers pose challenges to HUBs in building credit or attaining work history, implicit biases affect HUBs at all levels of business, a 2017 WSDOT disparity study found that many HUBs continue to experience questioning of their competency as a result of their race or gender, less access to business networks and relationships, and job-related sexual or racial harassment or stereotyping[9].

Contracting Barriers

In addition to the underlying biases and barriers that minority and women-owned firms face, there are also problems with the contracting and assistance process that may deter emerging contractors from doing business with the state. A hearing before the Subcommittee on Contracting and Workforce of the

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[5]"Model Contractor Development Program". *Cdn.Ymaws.Com*, 2015, https://cdn.ymaws.com/www.surety.org/resource/resmgr/mcdp/mcdpdesc.pdf.

[6]"State of Washington Disparity Study 2019". https://omwbe.wa.gov/sites/default/files/State%20of%20Washington%20Disparity%20Study%202019.pdf, July 2019

[7]McIntyre, Marla, and Dev Strischek. "Surety Bonding in Today's Construction Market: Changing Times for Contractors, Bankers, and Sureties." *Suretyinfo.org*, The RMA Journal, May 2005, suretyinfo.org/pdf/TodaysMarketMay05.pdf.

[8]Minge, Ahna, and Andrew Twite. "The Impact of Surety Bonding on American Indian and Tribally Owned Contractors." *Https://Www.minneapolisfed.org/*, Jan. 2014.

[9]"Washington State Department of Transportation Disparity Study 2017". https://wsdot.wa.gov/sites/default/files/2017/09/11/OEO-DisparityStudy-2017.pdf, 2017

Committee on Small Business conducted in 2012 described the negative effect of contract bundling on small and emerging contractors[10].

Contract consolidation is a common practice that eliminates many small businesses from competing. Separating large contracts into multiple smaller contracts allows small businesses to amass work experience as a prime or sub-contractor and allows for more competition on behalf of small firms. As surety bond costs are determined by the cost of the contract, unbundling large contracts will also improve the surety bond barrier faced by many HUBs.

Bonding Barriers

Much research has also been done on the subject of surety bonding as a barrier to small businesses. In order to be approved for surety bonds, firms must meet a series of financial and work-history qualifications. These are often harder to meet for small and emerging contractors, though they are necessary for risk-management on behalf of the state.[11] Surety bonds as a challenge for HUBs are well documented and there are several federal assistance programs that target these barriers – these federal assistance programs will be discussed in the following pages.

[10] "Barriers to Small Business Participation: Hearing before the Subcommittee on Subcontracting and Workforce of the Committee on Small Business United States House of Representatives." *Https://Www.govinfo.gov/*, 9 Feb. 2012.

[11] "Barriers to Small Business Participation: Hearing before the Subcommittee on Subcontracting and Workforce of the Committee on Small Business United States House of Representatives." *Https://Www.govinfo.gov/*, 9 Feb. 2012.

Market Analysis

Bond Offerings

Surety Bonds, or contract bonds ensure that the terms of the contract will be met. Bid, Payment, and Performance bonds are all types of surety bonds. **Bid bonds** are a guarantee that if the contractor puts in a bid on a project and is accepted, then they will enter a contract including the terms contained in the request for bids. This ensures that no contractor will apply for a contract and then drop the contract after being selected. **Payment bonds** act as a guarantee that the contractor will pay all subcontractors and suppliers that they work with during the project. **Performance bonds** ensure that the contractor will complete all duties included in the contract. If the contractor does not fulfill their duties as stipulated in the contract, then the client is guaranteed compensation for the monetary losses incurred as a result.

Surety Bond Offering Access Options

Private Surety Bond Availability

Most bonds are offered through private broker companies, which act as the salesperson and liaison between the contractor who is looking to purchase a bond, and the surety company that will issue the bond. This private system allows for competition between firms, but it also allows for a wide variety of surety bond offerings, prices, speed of service, and many other factors.

Alternative Bonding Options

There are some alternatives to surety bonds, though these are often not available to contractors looking to work with the state because state law requires bonds for contracts above a certain threshold. These options are generally a sub-optimal option because they do not offer all of the same benefits as surety bonds. The alternative options, as well as the benefits and drawbacks of each option, are listed below.

Joint check agreements give the general contractor the right to issue checks to third parties, such as suppliers and subcontractors. The suppliers and subcontractors help supply services and materials to the general contractor, which can use joint check agreements as a payment option for these third parties involved in various portions of the project.

Subcontractor default insurance[12] is an insurance policy that covers the general contractor for the costs of subcontractor defaults. This policy can be used in conjunction with surety bonds, but these policies are generally only available to large contractors with ample experience in the field and can demonstrate risk management within their selection of subcontractors. As such, this option is not available to HUBs.

Labor-only contracts are an option that reduces bond exposure when a subcontractor does not have enough capital to provide a bond for the entire project. Rather, the contract only covers the cost of labor, and which lowers the cost of bonding as surety bond costs are calculated as a percent of the contract cost. These types of contracts often insinuate that the subcontractor is of high-risk as they could not bond the entire cost of the project, but this may be a viable option for many HUBs who lack the capital or credit to afford large bonds.

[12] "Surety Bond Alternatives For The Construction Industry." *Higdon Compton Insurance Agency*, www.higdoncomptonagency.com/Bond%20Alternatives.pdf.

Letters of credit[13] are issued by a bank on behalf of a construction firm and serve as a promise that the bank will pay a stated amount at the time that the letter of credit is presented to the bank. This option works if the contractor has enough money deposited in the bank or sufficient other security so that the bank believes it can collect the money from the contractor after paying an amount drawn on the letter of credit. While this does help some companies avoid going through the surety bonding process, it does have some drawbacks because it ties up a company's funds and assets and because a bank may defend itself more vigorously than a surety company, which assumes it will inevitably have to pay for some contractor defaults.

The Assistance Program Landscape[14]

There are numerous assistance programs for HUBs that are specifically created for surety assistance. Most of these are national programs, some of which have local chapters or locations. There are state-specific programs, often created and maintained by a state's surety association. These programs vary in their approach to improving surety bond access, but nearly all offer low-cost educational materials or programs. Another popular assistance program is a mentor-protégé program, which pairs a broker, insurance company, or experienced contractor with a new or emerging contractor. Other programs focus on financial, credit, or experience building, or general business advising.

National Assistance Programs

Education Programs and Resources

Model Contractor Development Program (MCDP)[15] by the Surety & Fidelity Association of America (SFAA) is implemented by local surety associations, state and local governments, and organizations nationally to educate new and emerging contractors. The program also serves to educate contractors on other resources and programs available to them and provides assistance and referrals for meeting bond qualifications as well as networking opportunities.

The **Bonding Education Program (BEP)**[16] as created by the U.S. Department of Transportation and administered and maintained locally through **Small Business Transportation Resource Centers (SBTRCs).** This program is executed through a series of workshops focusing on collaborative efforts with local surety bond producers that volunteer to help small businesses. SFAA also offers educational modules on their website that are targeted specifically at business planning, banking and financials, marketing, estimating, bidding, claims and dispute management, project management and field operations, and case studies of successful and unsuccessful contractor firms.

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[13] "Viable Alternatives To Payment And Performance Bonds". *Constructionexec.Com*, 2020, constructionexec.com/article/viable-alternatives-to-payment-and-performance-bonds.

[14] When searching for data regarding state surety associations, finding accurate information is difficult due to a high number of broken links, blank calendars, and non-responsive information request processes. The Surety Association of Washington website offers 32 "Surety and Insurance" links to other associations or institutes. Of these 32 links, ten were broken, outdated, linked to sites that did not exist, or linked to sites that were blocked for non-members.

[15] "MODEL CONTRACTOR DEVELOPMENT PROGRAM". *Cdn.Ymaws.Com*, 2015, https://cdn.ymaws.com/www.surety.org/resource/resmgr/mcdp/mcdpdesc.pdf.

[16] "Bonding Education Program (BEP) At A Glance | US Department Of Transportation". *Transportation.Gov*, 2019, https://www.transportation.gov/osdbu/financial-assistance/bonding-education/details-bonding-education-program.

The Surety Foundation, a branch of SFAA, offers intern and scholarship programs targeted at underrepresented students who are interested in entering or pursuing fields related to surety and fidelity, such as insurance/risk management, accounting, economics, business, or finance. This program encourages students to consider the surety industry and surety underwriting as a career choice and helps to promote diversity in the field.

The **Surety Information Office** offers free resources and materials on their website. Topics include how to obtain surety bonds, the importance of them in construction, surety companies, bank letters of credit, and a comprehensive surety bond guide for contractors.

The National Association of Surety Bond Producers (NASBP) developed the website **SuretyLearn.org** to assist HUBs in overcoming educational barriers with regards to surety bonding. Not all of these resources are free, but many are offered at low costs and address topics such as fraud, credit building, risk management, and relationship building.

Mentor and Guarantee Programs

The U.S. Small Business Administration (SBA) offers the **SBA Bond Guarantee Program**[17] to small and emerging contractors who do not need educational resources, but rather need practical assistance in obtaining experience and financial strength. The SBA Bond Guarantee Program guarantees access to bid, license, and payment bonds and reimburses a portion of the bond to the issuer in the case of a default.

The Mentor-Protégé program style is a popular assistance program as it allows for senior contractors to assist new and emerging contractors through business plan development, relationship building, and general business and contracting experience. **The 8(a) Mentor protégé program** assists small businesses that participate in the 8(a) program (See: *Other National Assistance Programs*) with obtaining and performing federal contracts. This program allows mentors to form joint ventures with eligible protégés, make equity investments in protégés, lend or subcontract to protégés, and provide technical or managerial assistance. **The SBA's All Small Business Mentor-Protégé program** is another example of this type of program that matches the structure of the 8(a) program.

The Department of Defense (DOD) Mentor-Protégé program differs from the above in that it specifically assists small businesses in obtaining and completing DOD contracts. This program allows mentors to pay their protégés based on their progress that is then reimbursed by the DOD, award non-competitive subcontracts to their protégés, lend money or invest in their protégé firms, and provide or arrange for other assistance.[18]

The WSDOT Capacity Building Mentorship Program[19] works by partnering a mentor with a Protégé so that the Protégé can gain experience with WSDOT projects as well as increase their capacity as a business. In this program, businesses that are eligible to participate as Protégés are considered a diverse

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[17]"SBA Surety Bond Guarantee Program". *Crsreports.Congress.Gov*, 2020, https://crsreports.congress.gov/product/pdf/R/R42037.
[18]*Mentor-Protégé Guidebook For Industry And Acquisition Professionals*. 2015, https://www.public.navy.mil. Accessed 28 Oct 2020.
[19]"Capacity Building Mentorship Program." *WSDOT*

business, which includes any OMWBE-certified companies, or companies registered as small or veteran's businesses. Mentors are required to be prime contractors or consultants with WSDOT.

Other National Assistance Programs

Other programs focus on networking, relationship building, innovation in the surety field, and data availability advocacy. **Surety Resource Connection Inc**. is one such company that focuses primarily on furthering innovation within the construction of infrastructure projects. It has hosted multiple events across the U.S. and in 2012 hosted a contest with the goal of improving access to surety credit for small and emerging companies.

The **8(a) Minority Small Business and Capital Ownership Development Program**[20] provides development assistance to HUBs. 8(a) firms are economically disadvantaged through racial or gender barriers or on a case-by-case basis and must have an annual income of less than $250,000 at the time of application. This program gives authority to the SBA to label contracts as set-aside or on a sole-source basis for HUBs for other agencies within the federal government. In this program, the SBA has the authority to limit competition on these contracts to 8(a) firms.

The **Historically Underutilized Business Zone Program (HUBzones)** create set-asides and sole-source awards for contracts that meet a certain criterion. These programs are geographically determined to target assistance to businesses that are located in areas with low income, high poverty, or high unemployment.[21]

There are many federally sponsored programs for set-aside contracts for certain disadvantaged and minority groups, such as the **Service-Disabled Veteran-Owned Small Business Program** and the **Women-Owned Small Business Program**. There are HUB-contract award goals that create a framework for the improvement of representation in federal contract awarding, and also create a strategy for data collection and analysis.

These programs have been improving HUB access to contracts, though many of these are limited to federal contracts, and finding information on these programs is not always easy. Many of these programs are not advertised or do not have their own webpage, making it difficult to access for HUBs.

Washington State Assistance Programs

The Washington State Surety Bonding Association has created a brand-new mentorship program in Washington specifically focused on surety information. This is the first Washington-based mentorship program for HUBs in the surety field.

The Washington State Office of Minority and Women's Business Enterprises (OMWBE) offers educational resources for surety bonds on their website, and they offer a comprehensive guide on doing business with the state. The Washington Procurement Technical Assistance Center (PTAC) also offers information and assistance with doing business with Federal and State governments, though they do not offer resources specifically for HUBs aside from notifying them that the OMWBE and SBA websites have information and resources.

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[20] *An Overview Of Small Business Contracting*. Congressional Research Service, 2020, https://crsreports.congress.gov/.
[21] For specific criteria, see 15 U.S.C. §632(p)(4); and 13 C.F.R. §126.103.

Other State Offerings

Surety programs that focus on increasing access for HUBs exist in numerous forms across the nation. It is not uncommon for state surety associations to run their own educational programs or mentor-protégé programs, as is the case with the Ohio Surety Association. Colorado State Department of Transportation (CDOT) and New York State Department of Transportation (NYSDOT) also have their own version of state-run surety bond assistance programs in order to aid small businesses developing their contracting and performance records.

These bond assistance programs may be modified and serve as templates to help build a state-run surety bond assistance program in Washington, but there are constitutional barriers that would prevent the use of state funding to benefit specific groups or individuals. Any state-offered bonds would need to be backed by a non-state funding pool, which poses a challenge for Washington state in enacting a similar program. A further analysis of state-sponsored programs that are allowable by the Washington State constitution can be found in the Legal Analysis and Conclusion sections of this report.

The state of Ohio has been an exemplary case both in the availability of resources and in the ease of access to information about these resources. The Ohio Development Services Agency (ODSA) developed the Minority Business Development Division (MBDD) and Minority Business Assistance Centers (MBAC) to support the state's 15% Minority Business Enterprise (MBE) set-aside goal. The Surety Association of Ohio (SAO) offers a bonding program, scholarship program, loan program, collateral enhancement program, and a capital access program.

The Colorado State Department of Transportation (CDOT) has implemented a Partial Bond Guarantee Program in order to invest in emerging small businesses, increase competition of CDOT advertisements, and support new prime contractors through educational programs.[22] Since bonding is a barrier to becoming a CDOT prime contractor due to issues with assets, cash flow, credit, and previous experience, the program addresses that barrier by assuming part of the risk for qualified small businesses, up to $1.5 million on any given contract. Small businesses qualified to participate in the Partial Bond Guarantee program need an active ESB Certification, prequalification approval to bid projects up to $3 million, provision of a 5% bid bond, completion of a financial evaluation, and participating in a bonding education program.[23] Although small businesses may not be able to take on CDOT's large and complex highway projects regardless of bonding barriers, this Partial Bond Guarantee Program helps ensure that emerging small businesses receive the assistance they need in developing their ability to become established CDOT prime contractors.

New York State (NY) runs the NY Surety Bond Assistance Program (NYSBAP) in order to assist contractors receiving surety bonding by providing technical and financial assistance.[24] NYSBAP provides guarantees up to 30% to allow contractors to secure a bid bond, performance bond, or a payment bond for NY State and New York City projects.[25] This program is only applicable to projects up to $2 million. In order to be eligible for this program contractors must be certified small business or Minority/Women-owned Business Enterprise (MWBE), have a minimum average gross revenue of $400,000 for the two most recent fiscal or calendar years, gross revenue that does not exceed $5 million in the most recent fiscal

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[22] "Bond Assistance Program Overview". *Colorado Department Of Transportation*, https://www.codot.gov/business/civilrights/smallbusiness/esb/esb-bap.
[23] Ibid.
[24] Ibid.
[25] "New York State Surety Bond Assistance Program | Empire State Development". *Esd.Ny.Gov*, https://esd.ny.gov/new-york-state-surety-bond-assistance-program.

year, a minimum credit score of 600, and some previous experience.[26] However, if a small business does not receive financial assistance from NYSBAP, they are encouraged to enroll in training and technical support programs offered free of charge.

Non-Government Assistance

The Minority Business Development Institute's mission is to assist the emerging contractor population through education, advocacy, and addressing industry barriers. Their website offers numerous free educational resources as well as one-on-one advisory services and a Bonding Readiness Program. These services are offered across the U.S. but are more often offered in the northeast. This institute also offers capital access through their own fund specifically for contractors and access to its Broker Referral Network[27] that includes brokers who are interested in allocating time and resources to emerging contractors.

Surety Bond Associates offers their own Bonding Assistance program that focuses on education, business advising, bond prequalification, assistance navigating the SBA's Surety Bond guarantee program, and access to capital loans and other funds.[28] They have multiple specific programs that target cash flow, networking, and other barriers that HUBs often face in the surety industry.

Programs Through Bonding Companies

Though it is a rare occurrence and often not HUB-exclusive, some bond brokers or companies do offer their own programs. Suretybonds.com is an information and broker search website that offers their own low-credit program that helps firms with low credit acquire bonds. They also offer financing options which may lower the cash barrier for some HUBs. They do state that the Low-Credit Bonding Program does not have higher rates than their standard bonding options, but broker or company-specific programs may be predatory towards HUBs who are struggling financially, which is a potential topic for further research.

The Center reached out to all firms that offered surety bonds listed on the Washington State Insurance Commissioner's 2019 Insurance Market Report to ask about their awareness of support programs for HUBs struggling with surety access – among other surety inquiries – and the only program that was mentioned was the SBA Surety Guarantee Program. This was also the only support program mentioned by the Surety Association of Washington when asked.

Of the current offerings available for surety bond assistance, the ones that are legally replicable by Washington State include mentor-protégé, educational, financial literacy assistance, network-building, and credit and work-history building programs. While there are very specific restrictions on the awarding of state funds to assist specific groups, there are multiple ways to target the barriers faced by HUBs in attaining surety bonds through addressing the systemic challenges faced by HUBs.

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[26] "New York State Surety Bond Assistance Program | Empire State Development

[27] "Broker Referral Network | Surety Bonding | Surety Agents | MBDI". *Minoritybdi.Org*, 2020, http://www.minoritybdi.org/surety_broker-referral-network.shtml.

[28] "Surety Bond Associates. Most Bond Agents Just Sell Surety Bonds, We Create Them." *Suretybondassociates.Com*, 2020, https://suretybondassociates.com.

Quantitative Data Analysis

Data Availability

The purpose of this project is to analyze surety bonding availability for under-represented businesses in Washington that meet OMWBE criteria. This analysis was to be based on historical and current data that reflects a variety of industry characteristics. The accuracy of this data is essential in determining if and to what extent HUB's experience barriers in accessing surety bonding. In order to determine the presence of these barriers, consistent historical data on surety bonding access covering availability, utilization rates, fees, and interest rates was necessary.

Throughout the research process, access to applicable and consistent data was a difficult barrier to overcome. In some instances, the data was collected but unavailable for use, and in other instances, the data was extremely difficult to find or spread across a large number of sources. A lot of the general data found was helpful, but it is not possible to pinpoint specific disparities when data on approval rates, fees, and interest rates are not available in a longitudinal form. If this data were available and able to be disaggregated by HUB status, many questions regarding the prevalence of barriers to bonding could be better illuminated.

The lack of available and/or consistent data presented a number of challenges during this project. In an industry that is clearly dominated by non-OWMBE certified companies, these challenges only highlight the depth of the barriers HUBs face for surety bonding, including lack of information about various processes, certifications, and assistance. Data availability is crucial for the development of assistance programs for under-represented businesses, particularly on a state level. Therefore, in order to implement an effective assistance program to address the barriers faced by HUBs in surety bonding access, it is also important to have reliable and consistent data necessary for the development of said program.

In the absence of this data, the following pages explore the relationship between credit scores and surety bonds for underrepresented businesses, the construction and surety market, and historical WSDOT contracts. Based on this review, we find that the utilization of credit as a primary requirement for surety bonding can put minorities and women at a disadvantage. In addition, construction market data shows that businesses run by women or minorities have a much smaller share of the market compared to businesses not owned by a woman or minority. Of the 172,690 companies analyzed in this section, only 2,372 of them woman-owned and only 1,904 are minority-owned. The majority of companies that are women or minority-owned have annual sales that fall below $1 million and tend to employ a smaller number of people. Keeping in mind this information, we then turn to historical WSDOT contracts and find that minority and women-owned businesses hold a much larger share of subcontractor contracts than prime contracts.

Credit Scores and Surety Rates

A business owner's credit score plays an important role in approving surety bonds and setting rates. The following section will explore the bonding process in terms of credit, as well as exploring the literature surrounding disparities in average credit score by demographic group.

According to Lance Surety Bond Associates, most license and permit bonds are "based solely on the owner's personal credit score, especially when the bond's required amount is below $50,000."[29] For these bonds, costs will range from 1-10% of the total bond amount.

Table 1: License Bond Costs and Credit Score

Credit Score	Cost of License Bond as a Percent of Total Bond Amount
Excellent Credit (675 or above)	1-3%
Average Credit (600 – 675)	3-5%
Bad Credit (599 or below)	5-10%

Source: Lance Surety Bond Associates. "Surety Bond Cost Guide for 2020." *Lance Surety Bond Associates*, 2020, www.suretybonds.org/surety-bond-cost.

The owner's personal credit score also plays a role in the approval and cost of bid bonds, payment bonds, and performance bonds. Payment bonds are especially weighted toward owner credit and financials because the bond is used to guarantee that all workers will be paid, in the event that the business owner goes bankrupt and is unable to pay employees.[30] Small (<$500,000) performance bonds may still be weighted toward personal credit with average rates around 3 percent; however, as the bonds get larger, project size and type, as well as business financials and industry experience, may carry more weight.[31] For large performance bonds (>$500,000), rates are often lower – 1 percent to 1.5 percent of the total bond amount.[32] Bid bonds generally have a small cost and put weight on credit as well as other measures to ensure that the business is able to complete the project – if an owner has poor credit and/or the company does not have strong financials and a history of similar work, they may not be able to secure and bond and bid on a project.[33]

If the business owner's personal credit score is a major part of approving surety bonds and setting rates, does this impact minority and women-owned businesses in any way? Many studies have been done into questions of race and gender with respect to credit scores; however, results can be interpreted in different ways.

The first study to consider asks the questions, "are income and credit scores highly correlated?"[34] The authors note that, if credit scores and income are highly correlated, rising income inequality "will lead to widening disparities in credit access, which, in turn, may further exacerbate inequality in consumption and welfare." Based on their modeling, and controlling for various metrics of credit history, income

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[29]Lance Surety Bond Associates. "Surety Bond Cost Guide for 2020." *Lance Surety Bond Associates*, 2020, www.suretybonds.org/surety-bond-cost.
[30]SuretyBonds.com. "Your Guide to Payment Bonds." *SuretyBonds.com*, www.suretybonds.com/payment-bonds.html
[31]Lance Surety Bond Associates
[32]Ibid.
[33]SuretyBonds.com. "Your Guide to Payment Bonds." *SuretyBonds.com*, www.suretybonds.com/bid-bonds.html
[34]Beer, Rachel, Felicia Ionescu, and Geng Li. "Are Income and Credit Scores Highly Correlated?" *Federal Reserve*, 13 August 2018, www.federalreserve.gov/econres/notes/feds-notes/are-income-and-credit-scores-highly-correlated-20180813.htm

does not appear to be a good predictor of an individual's credit score. A 2010 Federal Reserve report produced similar findings with respect to race, ethnicity, and gender.[35]

Similarly, a 2018 study by the Federal Reserve Board of Governors finds that, after controlling for credit history, there are no statistically significant differences between the credit scores of men and women.[36] However, without controlling for credit history, there are significant differences between the credit scores of single men and single women below 40 – with women having lower credit scores. The author suggests that the differences in credit history between men and women can potentially be explained by differences in "economic circumstances, labor market experiences, underlying potential gender differentials in attitudes toward borrowing, financial literacy levels, and men and women being potentially treated differently by the credit market and institutions."

Keeping the literature in mind, the following table illustrates average credit scores by demographics based on a variety of studies. Because the table includes data from different years, different studies, and using different credit scores, data is not comparable between studies. On average, we see that women (even after controlling for income) have lower credit scores than men. Additionally, Black and Hispanic individuals have lower credit scores, on average, compared to White or Asian individuals. While these differences in credit score can often be explained by credit history, differences in credit history require much deeper consideration. For instance, research suggests that racial inequality has led to wealth inequality and ultimately credit inequality, with many individuals being "credit invisible" due to a lack of credit history.[37]

Table 2: Credit Score by Demographics (variable date and score type)

	Demographic	Average Credit Score
2018 Federal Reserve Study – Adults 21-40	Men	781
	Women	774
2016 - Credit Scores by Income and Gender (Male / Female)	\$35,000-\$54,999	646 / 634
	\$55,000-\$74,999	651 / 639
	\$75,000-99,999	666 / 652
	\$100,000-\$149,999	683 / 671
	> \$150,000	700 / 690
Federal Reserve	Asian	745
	Black	677
	Hispanic	701
	Other Race	732
	White	734
2017 Vantage Score	Washington State	693
	National Average	675
2019 FICO Score	National Average	706

Source: Elite Personal Finance. "Average Credit Score in America 2020." *Elite Personal Finance*, 3 June 2020, www.elitepersonalfinance.com/average-credit-score/

[35]Avery, Robert, et al. "Does Credit scoring Produce a Disparate Impact?" *Federal Reserve*, 12 October 2010, https://www.federalreserve.gov/pubs/feds/2010/201058/201058pap.pdf.
[36]Li, Geng. "Gender-Related Differences in Credit Use and Credit Scores." *Federal Reserve*, 22 June 2018, www.federalreserve.gov/econres/notes/feds-notes/gender-related-differences-in-credit-use-and-credit-scores-20180622.htm
[37]Streaks, Jennifer. "Black Families have 10 Times Less Wealth than Whites and the Gap is Widening." *CNBC*, 18 May 2018, www.cnbc.com/2018/05/18/credit-inequality-contributes-to-the-racial-wealth-gap.html

The Construction Market

The following summarizes annual sales by businesses in Washington that work in any of the following 11 NAICS sectors: 2361, 2362, 2371, 2373, 2379, 2381, 2382, 2389, 5413, 561990, 561730.

Table 3: NAICS Codes Being Studied and Descriptions

NAICS Code	Description
2361	Residential Building Construction
2362	Nonresidential Building Construction
2371	Utility System Construction
2373	Highway, Street, and Bridge Construction
2379	Other Heavy and Civil Engineering Construction
2381	Foundation, Structure, and Building Exterior Contractors
2382	Building Equipment Contractors
2389	Other Specialty Trade Contractors
5413	Architectural, Engineering, and Related Services
561990	All Other Support Services
561730	Landscaping Services

It should be noted that information is likely limited as to owner race/ethnicity and gender, so the data may miscategorize some companies as not being owned by a woman or minority. Given the data available, a greater share of women and minority-owned businesses have sales over $1 million compared to the control group, which covers businesses not owned by a socially or economically disadvantaged individual.

The majority of construction contractors, women/minority-owned or not, have annual sales of less than $1 million. A higher percentage of businesses not owned by a woman or minority, 97.2%, have annual sales less than $1 million compared to businesses owned by a woman or minority, at distributions of 86.9% and 82.5%, respectively. However, the percentage of women and minority-owned businesses that have sales ranging from $5-10 million are higher at 10.6% and 13.5%, respectively, in comparison to businesses that are not owned by women or minorities at 2.2%. This trend continues for the $5-10 million annual sales range as well, with percentages of 1.8% for women-owned businesses, 2.6% or minority-owned businesses, and 2.2% for businesses not owned by a woman or minority.

At first glance, this may seem like woman and minority-owned businesses have higher annual sales than businesses not owned by a woman or minority. However, it is important to note that these percentages reflect the annual sales distribution for each demographic. For example, the 10.6% of women-owned businesses that have annual sales between $1-5 million do not make up 10.6% of all construction companies that have those annual sales.

Table 4: Distribution of WA Contractors by Annual Sales and Demographics

Annual Sales	Not Owned by A Woman or Minority	Owned by a Woman	Owned by a Minority
<$1M	97.2%	86.9%	82.5%
$1-5M	2.2%	10.6%	13.5%
$5-10M	0.3%	1.8%	2.6%
$10-50M	0.2%	0.6%	1.3%
$50-500M	0.1%	0.2%	0.2%
Total	100%	100%	100%

Source: Mergent Intellect, , https://www.mergentintellect.com/[38]

When broken down into the numbers behind the percentages, it is clear that the construction market is dominated by businesses not owned by a woman or a minority. There are 172,690 businesses in Washington State that are not owned by a woman or minority, compared to 2,372 women-owned businesses and 1,094 minority-owned businesses. Therefore, one of the reasons why the percentage distribution of business by demographic and annual sales might be misleading about the industry is simply because there is a significantly higher number of businesses on the market that are not owned by a woman or a minority. This is further supported by the actual number of firms with higher annual sales for each demographic, as shown in the table below.

For example, while the 13.5% of businesses owned by a minority that have annual sales between $1-5 million is higher than the 2.2% of business not owned by a woman or minority that have the same range of annual sales, the actual number of businesses behind those percentages shows the true disparity in the market. Only 140 businesses owned by a minority have annual sales in the $1-5 million range, compared to 3,954 businesses that have sales in the same range, but who are not owned by a woman or a minority. This same trend holds true for all annual sales ranges as well. Therefore, when analyzing the differences in annual sales distributions by demographics, it is important to look beyond the percentage distribution of firms and compare the actual number of businesses making up each share of annual sales ranges.

Table 5: Number of WA Contractors by Annual Sales and Demographics

Annual Sales	Number of Businesses Not Owned by A Woman or Minority	Number of Businesses Owned by Women	Number of Businesses Owned by Minority
<$1M	167,644	2,068	912
$1-5M	3,954	246	140
$5-10M	579	41	27
$10-50M	420	13	13
$50-500M	90	4	2
$500-$1000M	3	0	0
Total	172,690	2,372	1,094

Source: Mergent Intellect, https://www.mergentintellect.com/

[38]Mergent Intellect uses third-party data that will likely vary from primary data from the Washington State Department of Revenue. The data from the Washington State Department of Revenue was not accessible for this analysis due to data confidentiality and suppression rules.

One barrier that all businesses might face when competing for surety bonding coverage is the size of their business, including the number of people employed at that business. As seen in the table below, the majority of all construction businesses in Washington State, whether they are woman or minority-owned or not, employ less than four people. While this may pose a hurdle to any small business looking to obtain a surety bond, businesses that are not owned by a woman or minority won't necessarily have the additional barriers that woman and minority-owned business will also have.

Table 6: WA Contractors by Number of Employees and Demographic

Number of Employees	Distribution of Businesses Not Owned by A Woman or Minority	Distribution of Businesses Owned by Women	Distribution of Businesses Owned by Minority
< 4	93.3%	76.8%	70.0%
5-10	4.3%	12.8%	14.8%
11-49	2.4%	9.2%	13.6%
50-99	0.3%	0.8%	2.2%
100-499	0.1%	0.3%	0.2%
500-999	0.0%	0.0%	0.0%
1000-4999	0.0%	0.0%	0.1%
More than 5000	0.0%	0.0%	0.0%
Total	100%	100.0%	100.0%

Source: Mergent Intellect, https://www.mergentintellect.com/

Surety Companies

The following table shows a breakdown of direct premiums and losses for surety companies in Washington state from 2013 to 2019. The table shows that surety companies in Washington State tend to have positive loss ratios, meaning they pay less in claims than they receive in premiums.

Table 7: Washington Surety Premiums and Loss Ratio Recapitulation 2013-2019

Year	Line of Business	Direct Premiums Written	Direct Premiums Earned	Direct Losses Incurred	Loss Ratio
2019	Property & Casualty: Surety	$201,899	$184,070	-$3,971	-2.16%
2018	Property & Casualty: Surety	$181,944	$171,175	$2,368	1.38%
2017	Property & Casualty: Surety	$174,026	$156,499	$22,739	14.53%
2016	Property & Casualty: Surety	$149,621	$143,469	$7,204	5.02%
2015	Property & Casualty: Surety	$138,073	$140,599	$2,362	1.68%
2014	Property & Casualty: Surety	$131,446	$134,835	$4,281	3.18%
2013	Property & Casualty: Surety	$126,221	$134,348	$6,100	4.54%

Source: Office of the Insurance Commissioner Washington State

Exploration of WSDOT Contracts

A variety of factors play a role in which business is selected for a contract. Credit scores, company financials, and experience with similar projects can keep contractors from being able to secure the bonds needed to bid on a project or limit them to smaller contracts. If a contractor with a lower credit score submits a bid, their proposed costs may be higher than another bidder with a higher credit score. If the agency is looking to minimize costs, the contractor with a lower credit score may be at a disadvantage.

Table 8 explores WSDOT contracts with start dates between July of 2017 and June of 2020. In looking at the table, it is important to note that some businesses are women-owned, minority-owned, and certified – or any combination of the three – thus the "% of Contracts" column in each year will not sum to 100 percent. Certifications include: WBE, VBE, SSBE, MBE, FSBE, and DBE. The "Control" category is made up of all contracts awarded to businesses without certifications that were non-minority/non-women owned (and contracts for which gender, ethnicity, and certification status were all unknown).

In terms of the number of contracts awarded to each group, the data shows that women, minorities, and certified businesses make up a larger share of subcontractor than prime contractors. Between fiscal year (FY) 2017 and FY 2019, the share of minority, women, and/or certified subcontractors ranged from 42 to 51 percent of all subcontractor contracts. In comparison, this group made up 27 to 28 percent of prime contracts during the same period.

Turning toward contract size, over the sample period women-owned contracting businesses had average prime contracts ranging from 19-33 percent of the value of the average control contract. For minority-owned contracting businesses, this range was 32-96 percent (see table note) and the ratio was 13-30 percent for contractors with one of the listed certifications. While outliers have the ability to skew these averages, the control group consistently had a higher average contract value. Ratios are more variable when looking at contracts for subcontractors, suggesting that the average contract size between groups is more similar than for prime contracts.

Table 8: WSDOT Contract Demographics (FY 2017-2020)

Year	Business Demographics	Prime Contractor			Subcontractor		
		% of Contracts	Average Contract Size	Contract Size Comparison to Control	% of Contracts	Average Contract Size	Contract Size Comparison to Control
FY 2019	Woman Owned	11%	$875,112	19%	21%	$139,662	42%
	Minority Owned	11%	$1,438,628	32%	26%	$213,248	64%
	Certified	18%	$608,703	13%	44%	$146,495	44%
	Control	72%	$4,549,150	100%	49%	$333,892	100%
FY 2018	Woman Owned	5%	$972,795	33%	16%	$154,352	69%
	Minority Owned	11%	$11,445,030*	386%	18%	$239,099	106%
	Certified	24%	$898,198	30%	36%	$110,857	49%
	Control	73%	$2,961,819	100%	58%	$225,274	100%
FY 2017	Woman Owned	8%	$797,831	20%	17%	$135,985	113%
	Minority Owned	8%	$3,864,864	96%	21%	$162,307	135%
	Certified	21%	$888,475	22%	40%	$107,680	89%
	Control	73%	$4,020,349	100%	55%	$120,353	100%

Source: WSDOT internal data

* The second largest contract this year went to a minority owned firm. Omitting this contract, the average contract for a minority-owned business was approximately $2.6 million – 60% of the control group average.

Survey Analysis

The survey developed through Qualtrics was sent to 1,686 companies via emails and postcards, as well as launching focused advertisements on Facebook and Instagram. From those companies, we received 79 responses offering valuable insight into the barriers facing women and minority-owned businesses in obtaining surety bonds. This next section of the report will cover an analysis of the responses from the survey. It should be noted that although the responses from this survey give important data for consideration, however sample sizes on individual questions can be low. The sample of 79 has an 11 percent margin of error at a 95 percent confidence level.[39] In the analysis, the **control group** refers to businesses who are not OMWBE certified or did not answer the relevant question **and/or** not women or minority-owned or didn't answer the question. The **underrepresented group** considers businesses that are minority or women-owned **and/or** have any of the listed certifications including "other."

The purpose of the survey was to learn directly from underrepresented businesses about the different barriers they faced in surety bonding access. Of the 76 respondents who answered the question, 72% said they considered their company a woman or minority-owned business, while 28% said they did not. Within the under-represented group, 57% were certified as a Disadvantaged Business Enterprise[40] (DBE) and 43% were certified as Small Business Enterprise (SBE). For state qualifications, 49% of the underrepresented businesses were classified as a minority business enterprise and 29% were classified as a woman business enterprise. In addition, in the under-represented group, for the businesses who are not OMWBE certified, 8% of respondents are unfamiliar with OMWBE and how it relates to their business, and another 15% have looked into OMWBE certification but have not yet applied. This means that although those businesses do not have an official OMWBE certification, they may still be facing the same barriers to surety bonding discussed below.

For both the control and the under-represented groups, 62% of respondents said performance bonds made up the highest percentage of bonds typically required for the business' industry. In the under-represented group, 49% and 44% of respondents said bid bonds and license bonds, respectively, were also typically required in their industries. In comparison, another 62% of respondents in the control group said that both payment and bid bonds are typically required.

One of the most immediate barriers faced by businesses within the under-represented group is finding information about bonds, including rates, timeframes, restrictions, and where to apply. Depending on the bond type, 22% to 36% of underrepresented respondents noted that they have faced information barriers about bonds. For the control group, respondents reported facing information barriers at significantly lower rate and were more likely to choose "not applicable." This means that under-represented businesses have a harder time simply obtaining information about bonds, which puts them at a greater disadvantage for continuing with the surety bonding application process and eventually obtaining a surety bond.

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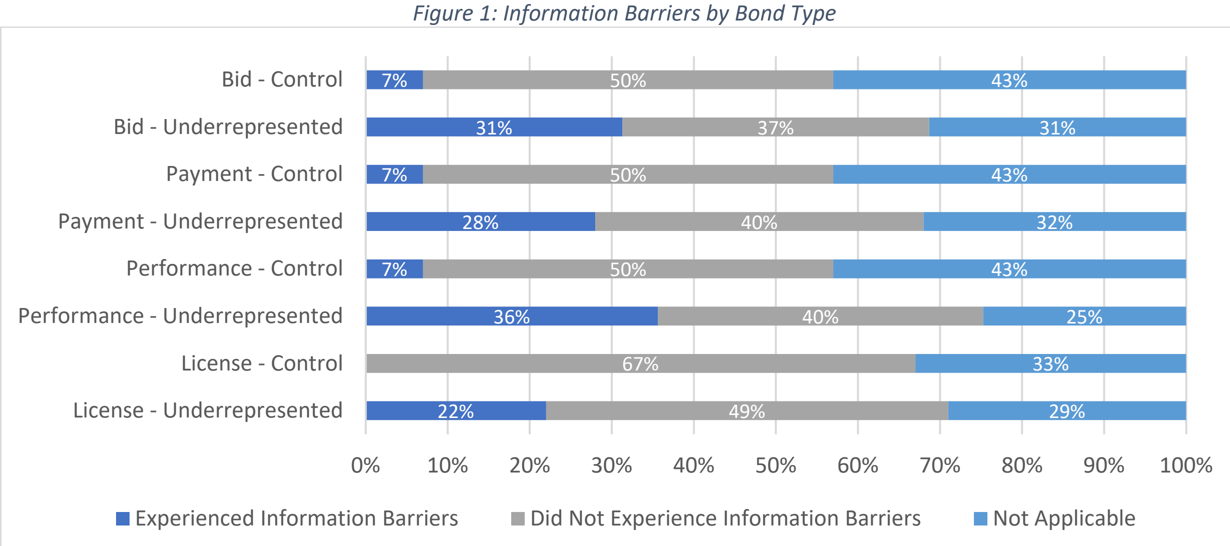
[39] When a sample population is used to make conclusions for a larger population, the margin of error is used to reflect the amount of variation of the statistical conclusion. In this survey, the sample population is the group of companies that completed the survey and the larger population would include every construction company in Washington state. For this survey, an 11 percent margin of error at a 95 percent confidence level means that the true statistics for the larger population lie within 11 percentage points above or below the percentages reflected in the survey response.

[40] Survey participants were asked whether they have a DBE certification or if they self-identify as a DBE. Therefore, in this section of the report when DBE refers to the survey participants who either have a DBE certification or self-identify as a DBE.

Information barriers can occur in different ways throughout the bonding process; however, the most prominent information barrier faced by under-represented businesses across the four bond types was not knowing where to begin looking for information. If under-represented businesses struggle to even find information about surety bonds, it would be expected that they would then apply for those bonds at lower rates compared to the control group who reportedly faced fewer information barriers.

In addition to information barriers, higher percentages of under-represented businesses also faced application and approval barriers. One of the most common application barriers across all four bond types faced by the under-represented group was a confusing application process. However, many of the respondents also reported facing other barriers throughout their bond applications including personal warranties, limited availability due to not having large credit lines, and being told they would not qualify.

Figure 1: Information Barriers by Bond Type



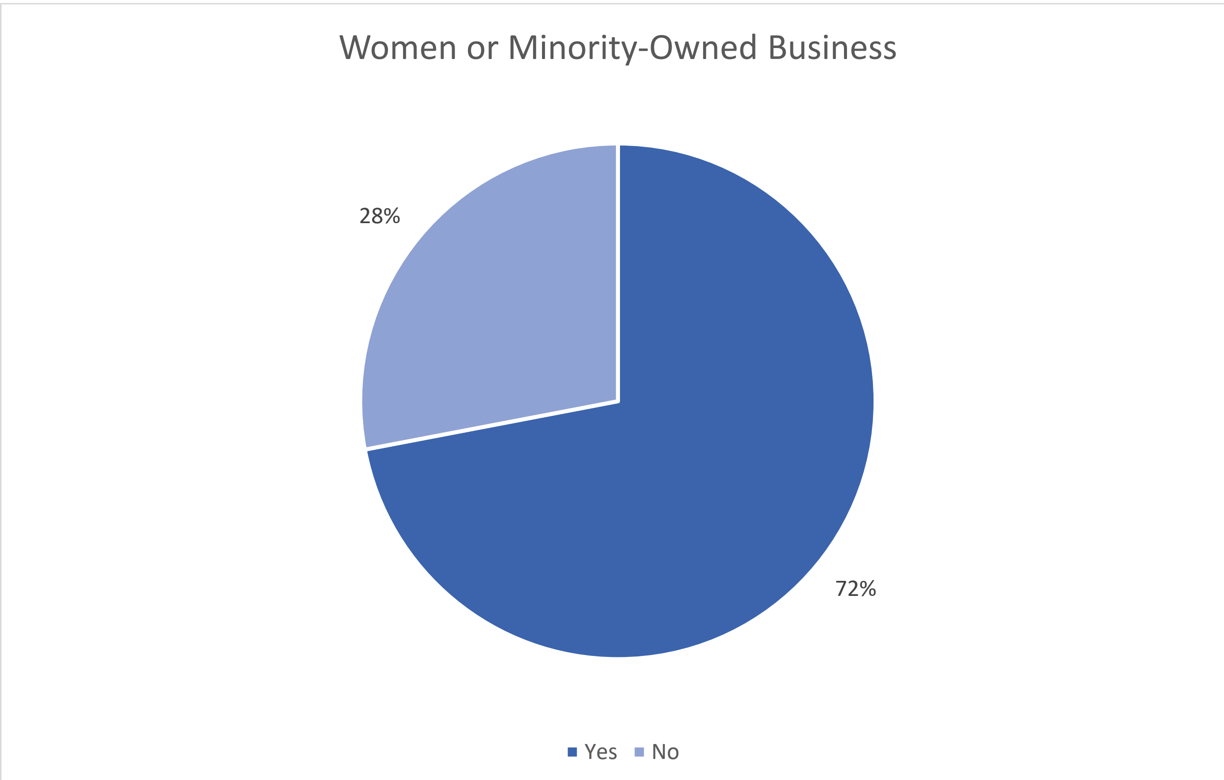
The under-represented group reported facing significant approval barriers for license, performance, payment, and bid bonds. The most commonly reported approval barriers are credit, financial status, and cash availability. In addition, these businesses reported facing other significant approval barriers in comparison to the control group. The control group did report some approval barriers surrounding cash availability, the bonding company not willing to bond, and not thinking their business would qualify. However, the under-represented group reported facing additional barriers that were not mentioned by the control group, including being required to have audited financials (which can be a huge cost for a small business), lack of experience, having to use all personal assets as collateral in order to get bonded, and discriminatory practices. One survey participant even said, “race discrimination is the greatest obstacle to my black-owned business.” This section of the survey highlights the continued barriers under-represented barriers face in the approval process for surety bonds, even once making it past the information and application barriers they already had to overcome.

The majority of businesses surveyed reported applying for a license, performance, payment, or bid bond within the last two years. This is important to note because it shows that the barriers these under-represented businesses are facing are ongoing. The barriers have an obvious influence on the number of under-represented businesses applying, and subsequently, obtaining surety bonds. With the exception of license bonds, the control group had higher percentages of companies applying for performance, payment, and bid bonds. Although not statistically significant, the responses from this survey show that the under-represented group of businesses face barriers to surety bonding at higher rates and higher levels compared to businesses within the control group.

Q1: Do you consider your company a women or minority-owned business?

Respondents were asked to identify as a women or minority-owned business (n=76). Of those who responded, 72 percent identified as such and 28 percent did not. This question was partially used, along with the question on certification, to filter responses into either the underrepresented or control group. Among the underrepresented group, 87 percent indicated they were minority/women-owned, and the remaining 13 percent reported that they were not (however they had a state or federal certification for underrepresented businesses).

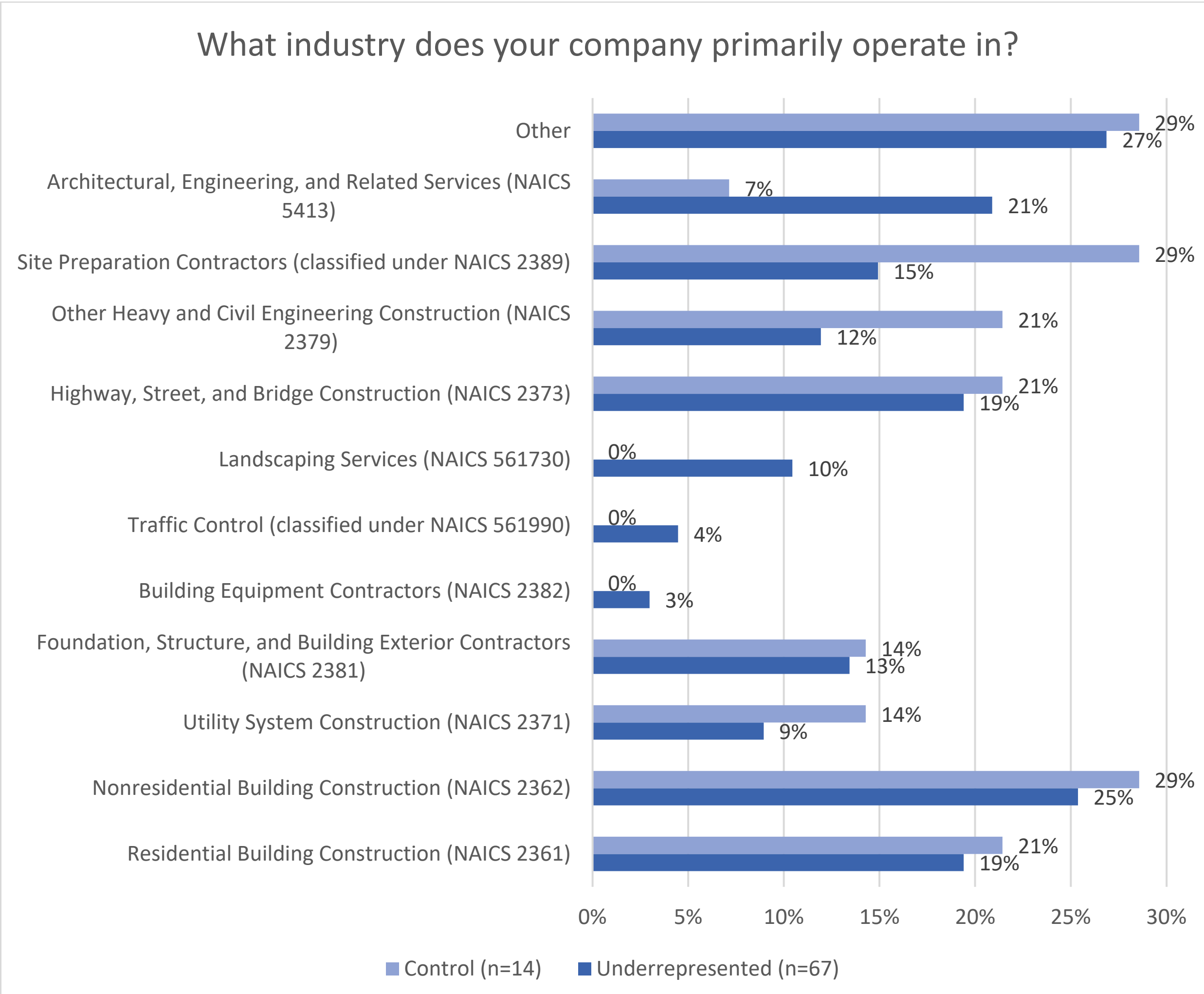
Figure 2: Percentage of Survey Respondents Who Consider Their Business to be Women or Minority-Owned



Q2: What industry does your company primarily operate in?

Respondents to this question were able to select multiple NAICS codes that describe their work. Overall, we see good representation across sectors within both groups. Landscaping services, traffic control, and building equipment contractors were the least represented.

Figure 3: Primary Operation Industries for Survey Participants

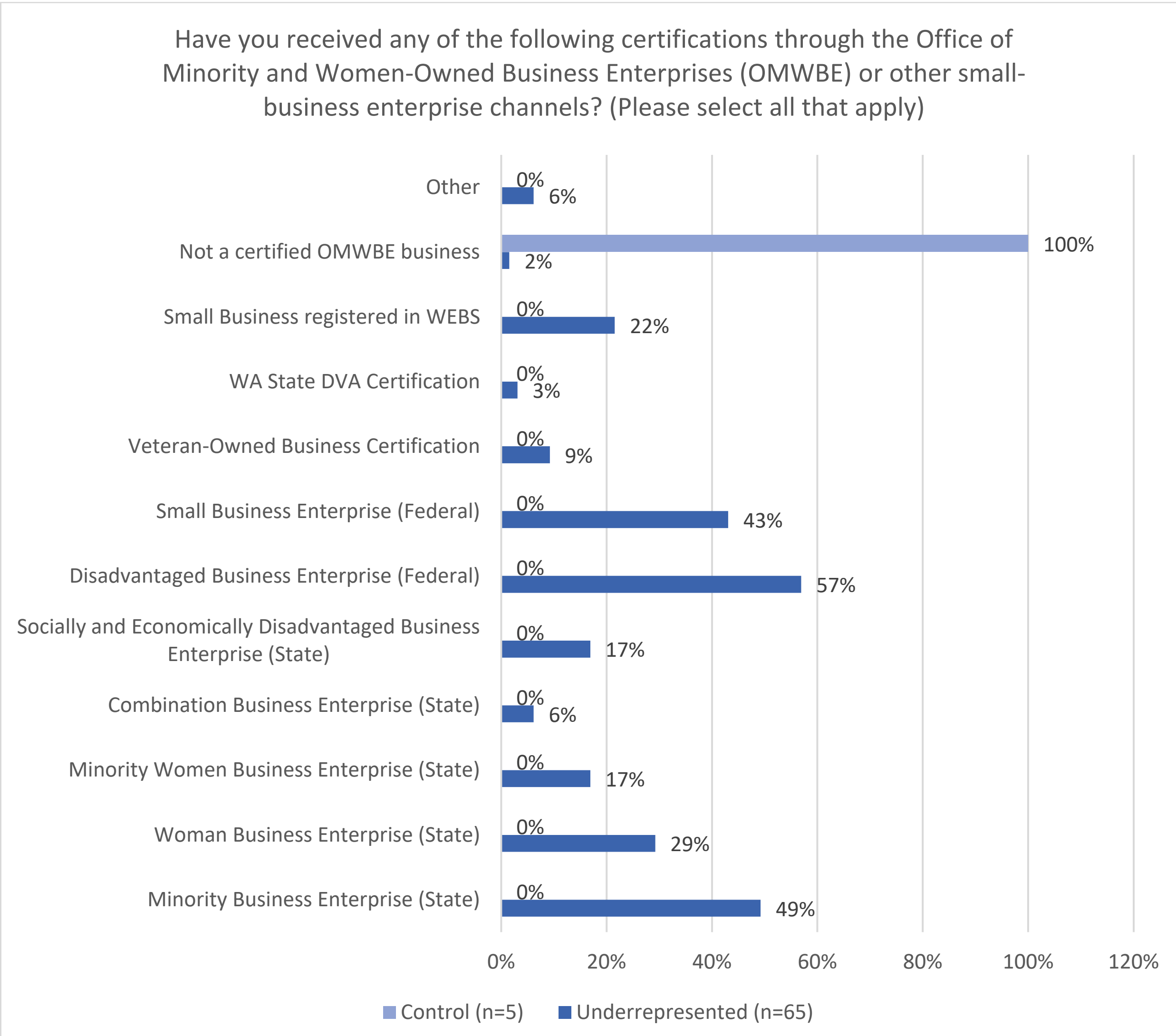


Other Responses	
Consulting (2)	532120
Environmental Consulting	NAICS # 238390 coatings, glazing, sealing
Earth Retention Systems (2)	238320 Painting and wall covering contractors
238210	general construction
Dump Truck and Trailer	NAICS 336611
Excavating & Trucking (2)	532412
parking lots, approaches and drive ways	238160
238290 and 238990	Commercial Cabinetry and Millwork
ASPHALT PAVING	238320

Q3: Have you received any of the following certifications?

The most common certification among underrepresented participants is the Disadvantaged Business Enterprise certification (57 percent) offered through the federal government, followed by the Minority Business Enterprise classification (49 percent) offered through Washington State. The Small Business Enterprise classification is also common, with 43 percent of self-identified DBE respondents having this certification. For this question, respondents were asked to select all certifications that apply.

Figure 4: Comparison of OMWBE Certifications Amongst Survey Participants in Control Group and Under-Represented Group

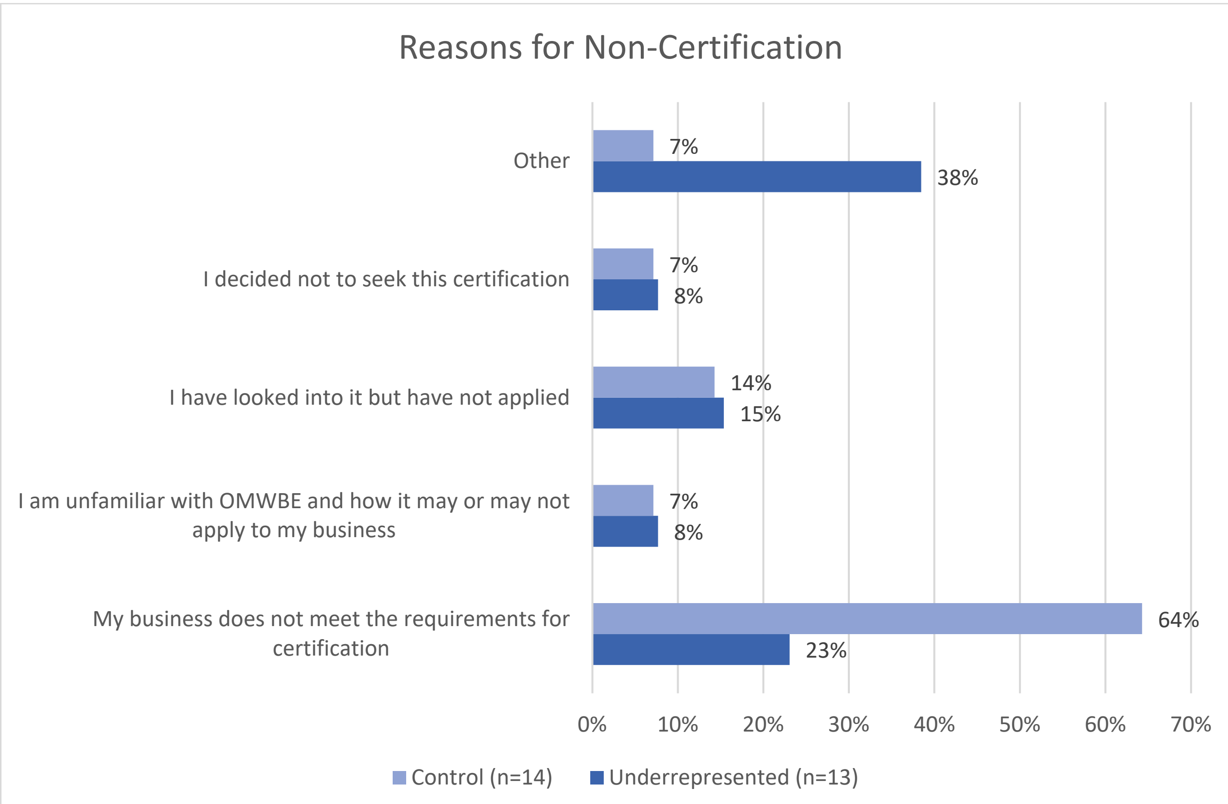


Other Responses	
Section 3, SCS	WOSB (Federal)
Applied for - Have not yet received it	Hubzone

Q3(a): To help us better understand your answers, please tell us why you are not certified by selecting the best answer below:

Of those who answered this question, both groups were most likely to indicate that they did not think they would qualify for the certification. Many also reported that they had looked into the certifications before and did not seek certification. One respondent mentioned that the process for certification seemed too challenging and that the benefits of certification were not worth completing that process.

Figure 5: Reasons for Non-certification amongst Survey Participants in Control Group and Under-Represented Group



Other Responses		
The paperwork requirements seemed onerous and technically challenging without offering me much.	we seek to market on merits of service offered	I am a WBE
I am certified	In process for women owned	

Q3(b): We would like to know if there are any particular barriers preventing you from receiving certification. Please use the text-entry box below to describe any:

All respondents to this question highlighted the time required to complete the certification process as a barrier that has kept them from pursuing certification.

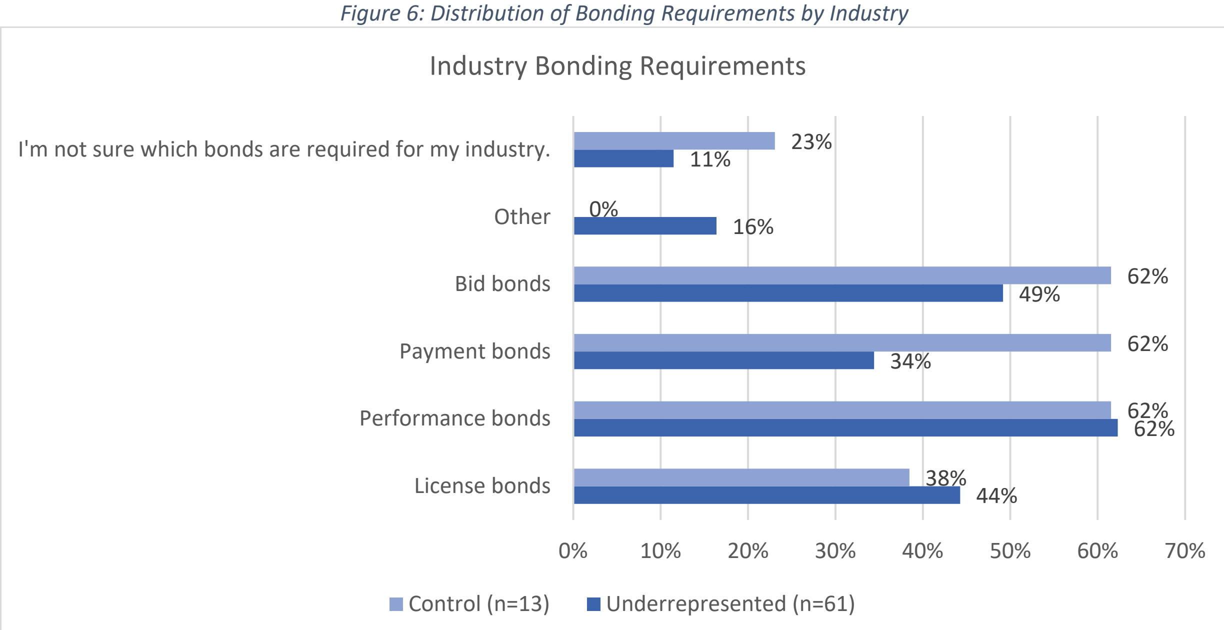
Table 9: Barriers to Certification

Barriers to Certification	
Time to get it done	Time
Received Minority certification then did not apply for others due to the time and effort needed with unknown advantages. no one has ever told me that helped win a contract...seems to price-driven only	Haven't had time to go thru the process

Q4: Which of these bonds are typically required for your industry?

The majority of both groups (62 percent) required performance bonds. For the underrepresented group, 49 percent required bid bonds, 44 percent required license bonds, and 16 percent required bid bonds. The control group was more likely to utilize bid bonds and payment bonds (62 percent) and slightly less likely to use license bonds (38 percent). Underrepresented respondents were over twice as likely to report that they were unsure of what bonds they need compared to the control group. This suggests an information barrier for underrepresented respondents.

Figure 6: Distribution of Bonding Requirements by Industry



Other Responses	
None (I've been in business for 12 years)	Tariff, Retainage
Municipal Bonds for Road or Sewer Work	We act as a Subcontractor and the Prime is the one who gets the bond, most times.
None (5)	Provide engineering services so no surety is required.

Q5: Did you experience any barriers finding information about bonds?

When asked specifically about barriers to finding information about bonds, underrepresented respondents were significantly more likely to report having experienced a barrier. Within the control group, 0-7 percent of respondents had experienced an information barrier. In contrast, 22-36 percent of underrepresented respondents had experienced an information barrier.

Questions 5(a-d) are shown to those who indicated experiencing an information barrier with that specific bond. Question 5(e) was shown to all those who experienced an information barrier to at least one bond.

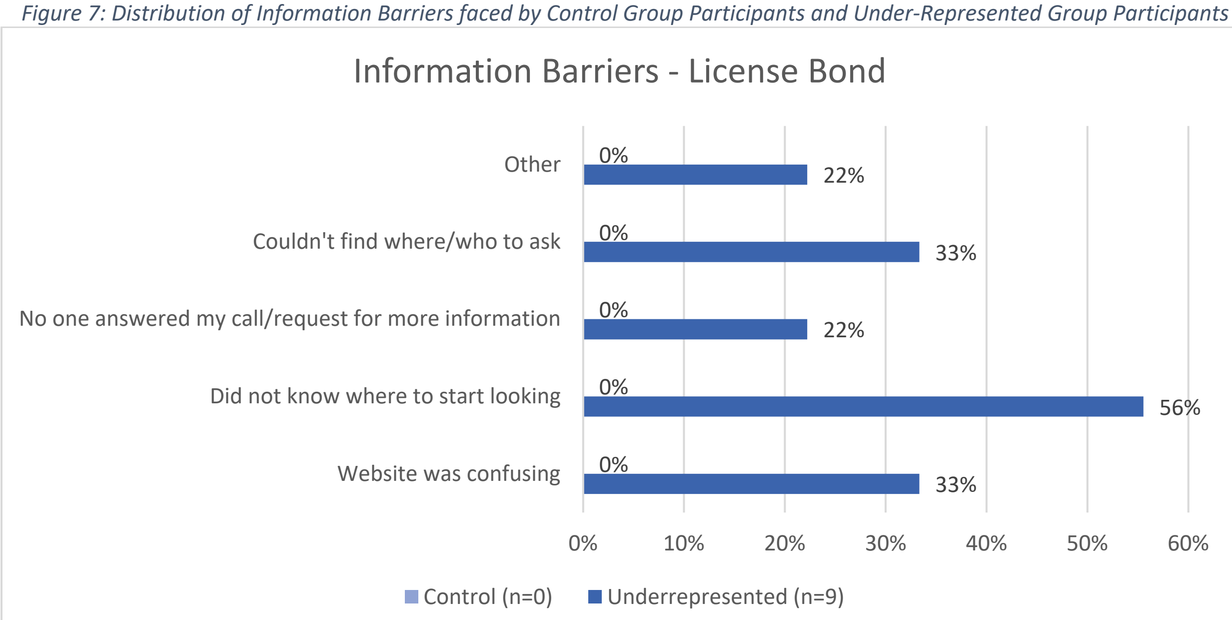
Table 10: Percentage of Respondents Who Experienced Information Barriers

	Yes, I experienced information barriers		No, I did not experience information barriers		Not Applicable	
	Underrepresented	**Control**	**Underrepresented**	**Control**	**Underrepresented**	**Control**
License (n=51|12)	22%	0%	49%	67%	29%	33%
Performance (n=53|14)	36%	7%	40%	50%	25%	43%
Payment (n=50|14)	28%	7%	40%	50%	32%	43%
Bid Bond (n=51|14)	31%	7%	37%	50%	31%	43%

Q5(a): What information barriers did you experience for license bonds?

The most common information barrier for license bonds, among underrepresented respondents, was not knowing where to start looking (56 percent). Confusing websites and uncertainty around who to contact both were barriers to one-third of respondents. Lack of responses to requests for information impacted 22 percent of respondents.

Figure 7: Distribution of Information Barriers faced by Control Group Participants and Under-Represented Group Participants

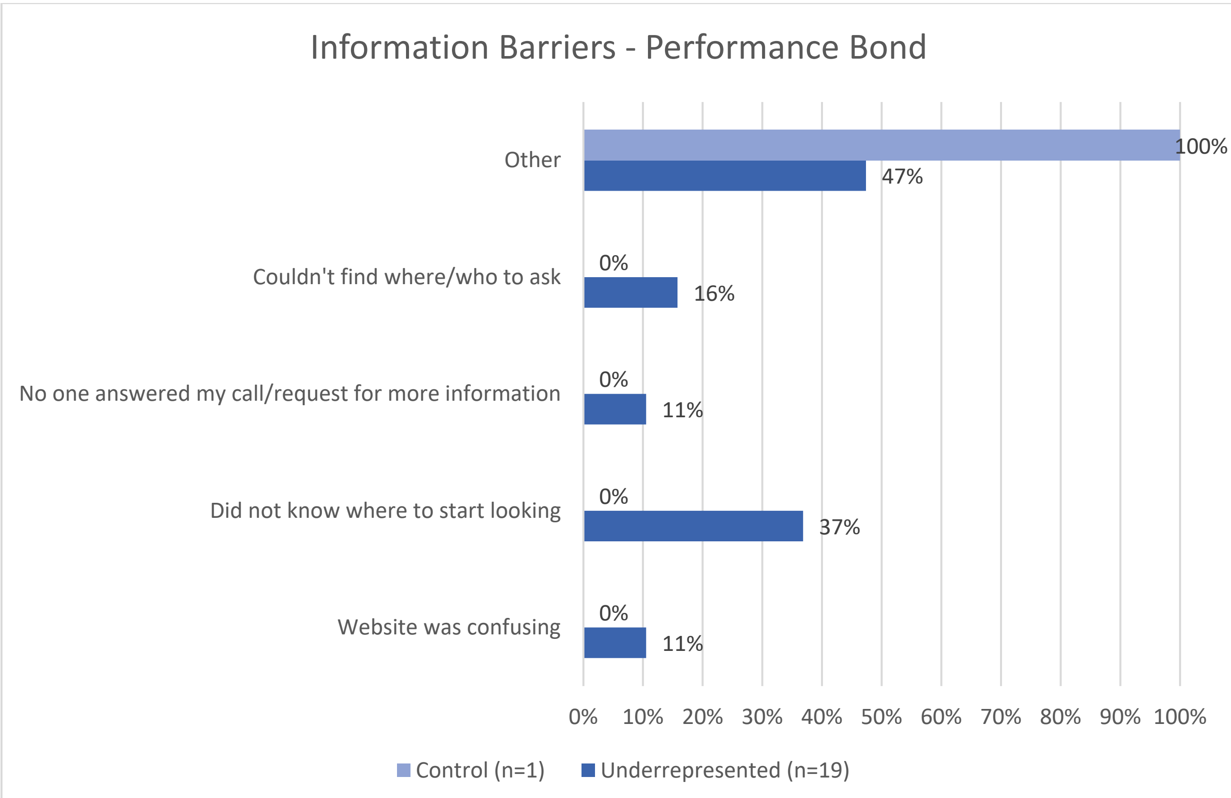


Other Responses	
Credit, companies that provide various writers that apply to public contracting	The website is very confusing

Q5(b): What information barriers did you experience for performance bonds?

The control respondent selected “other” and did not provide any further information. Among the underrepresented group, the most commonly cited barrier was not knowing where to start looking (37 percent). Nearly half of these respondents also indicated experiencing other problems including credit, cost, financials, and relationships.

Figure 8: Information Barriers for Performance Bonds

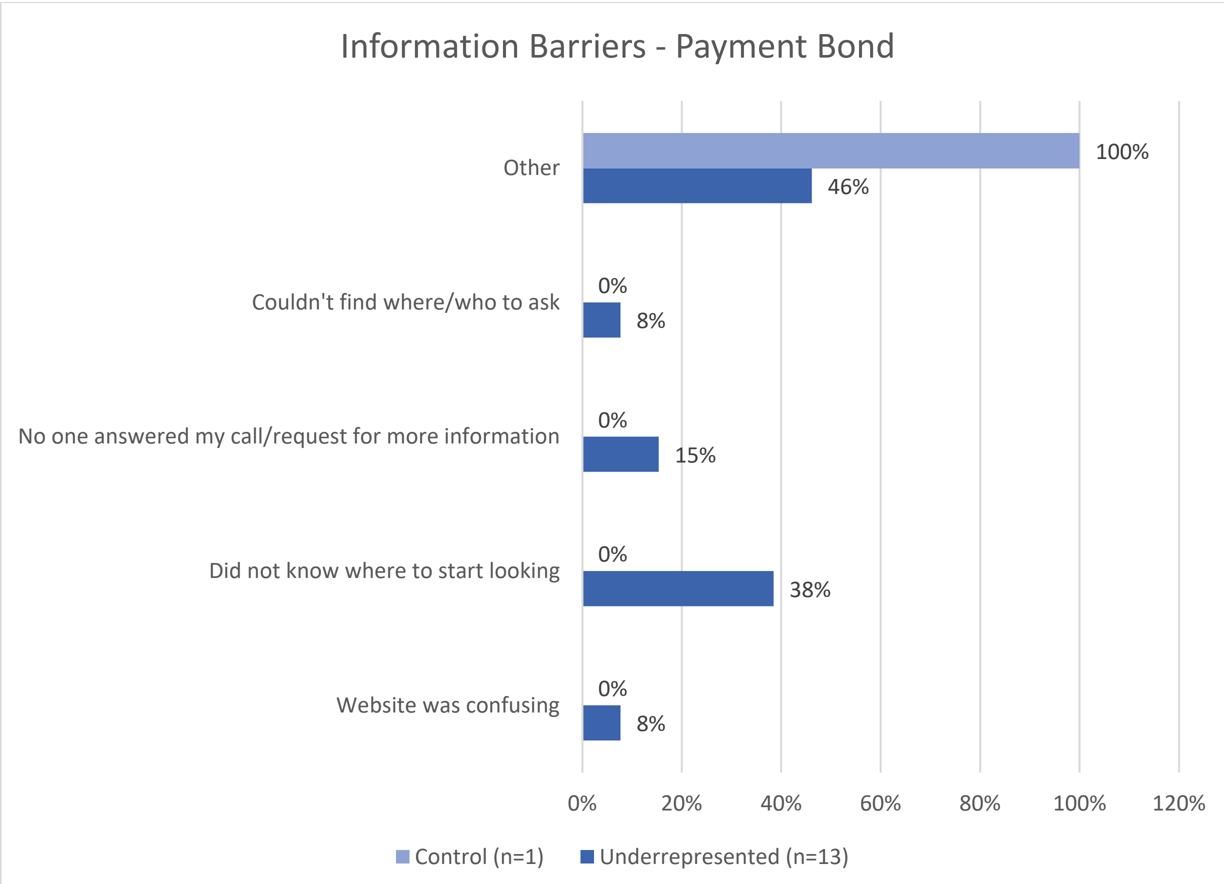


Other Responses	
NOT INTEREST DUE TO LACK OF RELATIONSHIP	Credit, experience
costs	Denied due to assets
Just getting qualified	No problem just difficult to get
No credit	

Q5(c): What information barriers did you experience for payment bonds?

The one control respondent again chose "other" and did not provide additional information. Among underrepresented respondents, figuring out where to start looking (38 percent) was again the most common barrier. In terms of other barriers, respondents mention credit, assets, experience, and relationships.

Figure 9: Information Barriers for Payment Bonds

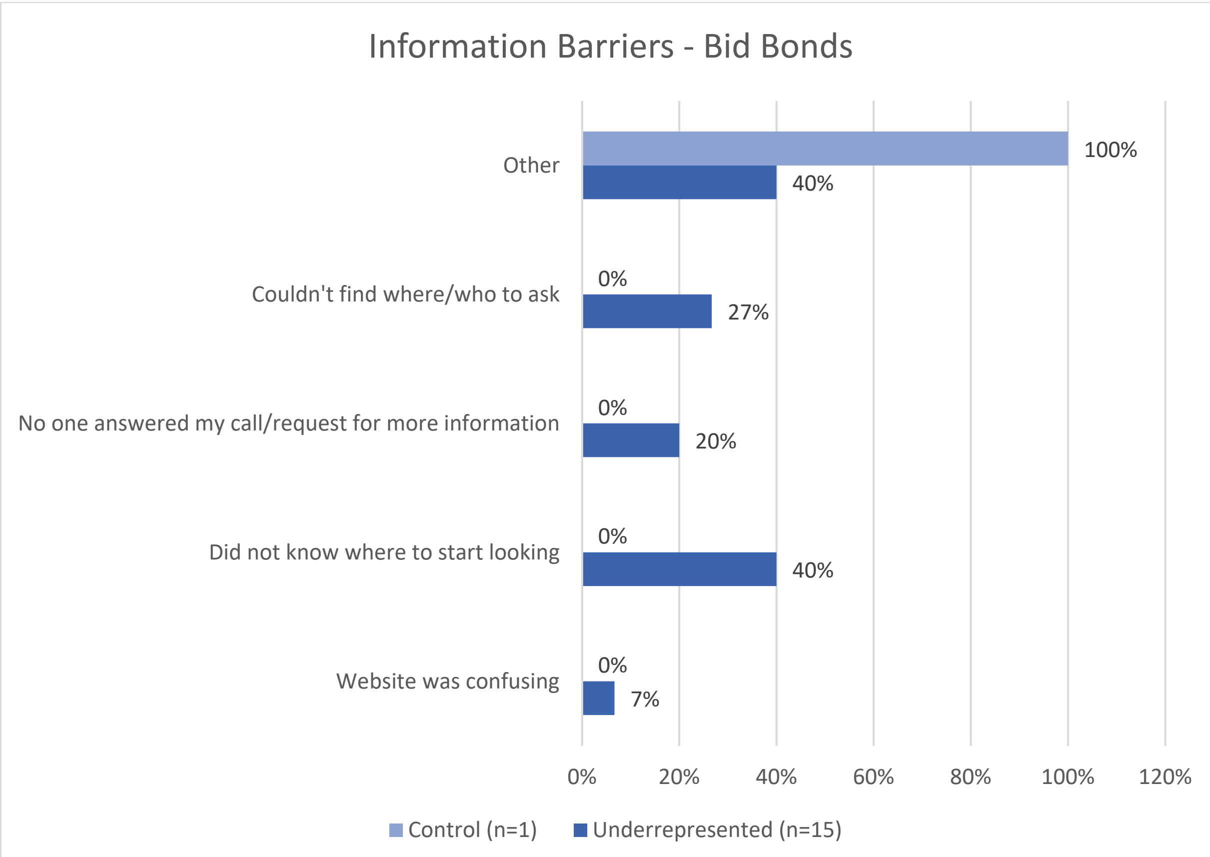


Other Responses	
NOT INTERESTED, DUE TO LACK OF BACKGROUND AND RELATIONSHIP	Credit, experience
No credit	difficult to get
Denied due to assets	

Q5(d): What information barriers did you experience for bid bonds?

Responses regarding information barriers to bid bonds were similar to those observed for other bonds. In addition to being unsure where to start looking for information, 27 percent of underrepresented respondents were not sure where to direct their questions and 20 percent indicated that their requests for information were never responded to.

Figure 10: Information Barriers for Bid Bonds



Other Responses	
NOT INTERESTED, DUE TO LACK OF BACKGROUND AND RELATIONSHIP	Credit, experience
costs	Denied due to assets
No credit	knowing how to get

Q5(e): Do you have any suggestions or recommended solutions to the barriers you experienced in obtaining information about these bonds?

Suggestions include creating a database of bonding firms that are committed to helping underrepresented contractors, creating a state-run bank to specifically help women and minority contractors, and lowering bonding requirements. In addition, many respondents highlighted the need for better and more centralized resources, information, training, and other assistance.

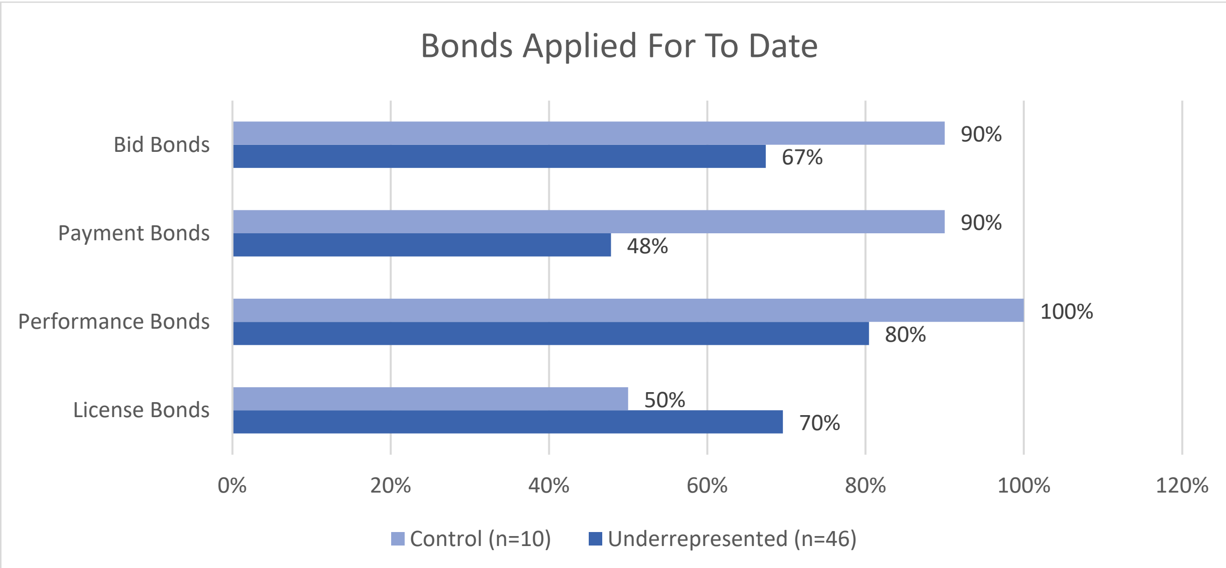
Table 11: Participant Suggestions for Solutions to Information Barriers

Suggested Solutions to Information Barriers	
Yes, eliminate bonding for contacts under $5m, leverage retainage, Insurance, and % completion billing methodology to mitigate risk.	Small companies need to have bonding companies that will allow them to grow their business. I have a lot of opportunities to bid that I cannot bid on due to bonding requirements. As a small business, I do not have the capital to prove I can perform the job. Luckily there is subcontractors that are willing to take on a small company as a liability to allow them to perform the work and work their was to bigger projects.
In the end, I found a fabulous insurance agent that has held my hand through most scenarios	Don't assume we all know how to navigate through this info.
GOVERNMENT PROGRAM FOR ASSISTACNCE AND/OR INTERVENTION	ID bonding firms seeking conduct business with MBE, Veteran owned firms
Needs to be better online resources.	Maybe at the time of taking courses to set up business / also the financial piece
I am limited to very small bonds and only found 1 willing to help me	Performance Bond expenses should be incurred by the Prime or the agency for the minority owned business
Yes the state needs a state ran bank that helps women and minority contractors.	

Q6: Have you ever applied for any of these types of bonds? (select all that apply)

With the exception of license bonds, a greater share of the control group had applied for bonds. Within the underrepresented group, 80 percent had applied for performance bonds, 70 percent had applied for license bonds, 67 percent had applied for bid bonds, and 48 percent had applied for payment bonds.

Figure 11: Percentage of Survey Respondents Who Have Applied for a Bond



Q7: When was the last time you applied for these bonds?

This question was only shown to those who had applied to those who indicated that they had applied for at least one of the four bond types in Question 6. The majority of both groups had applied for all four types of bonds within the last two years. With the exception of license bonds, the control group had applied for the bonds at a slightly higher rate.

Table 12: Distribution of Participants by Date of Most Recent Bond Application

	Within the last 2 years		Between 2 and 5 years ago		Between 5 and 10 years ago		More than 10 years ago		I have not applied for this bond	
	Underrepresented	Control	Underrepresented	Control	Underrepresented	Control	Underrepresented	Control	Underrepresented	Control
License Bonds (n=37|9)	73%	56%	8%	0%	0%	0%	8%	11%	11%	33%
Performance Bonds (n=41|10)	73%	90%	10%	0%	5%	0%	2%	10%	10%	0%
Payment Bonds (n=32|10)	69%	80%	3%	0%	3%	0%	3%	10%	22%	10%
Bid Bonds (n=38|10)	66%	80%	13%	0%	3%	0%	3%	10%	16%	10%

Q8: Did you experience any barriers that stopped you from applying for these bonds?

This question was only shown to those who had never applied for any of the four bonds being studied. Both underrepresented and control respondents reported not experiencing any barriers to starting an application. Most respondents indicated that this question was not applicable to their situation, thus suggesting they have not tried to obtain contracts that require bonding.

Table 13: Distribution of Survey Participants Who Experienced Barriers Stopping Them from Applying for Bonds

	Yes, I experienced application barriers		No, I did not experience application barriers		Not Applicable	
	Underrepresented	**Control**	**Underrepresented**	**Control**	**Underrepresented**	**Control**
License (n=13|3)	0%	0%	15%	33%	85%	67%
Performance (n=13|3)	0%	0%	8%	33%	92%	67%
Payment (n=13|3)	0%	0%	8%	33%	92%	67%
Bid Bond (n=13|3)	0%	0%	8%	33%	92%	67%

Q8(a-e): Application Barriers by Bond Type

No respondents reported experiencing application barriers; therefore, these questions were not shown and did not receive responses.

Q9: Did you experience any challenges in the application process for these bonds?

This question was shown to those who indicated that they had applied for at least one of the four bonds in the past (Question 6). Again, underrepresented respondents reported experiencing barriers at a far higher rate than the control group. Most barriers came from bid bonds (43 percent), performance bonds (37 percent), and payment bonds (31 percent) for underrepresented respondents. The control group reported no barriers within the license bond application process, while 12 percent of underrepresented respondents reported experiencing barriers.

Questions 9(a-d) are shown to those who indicated experiencing an application barrier with a specific bond. Question 5(e) was shown to all those who experienced application barriers.

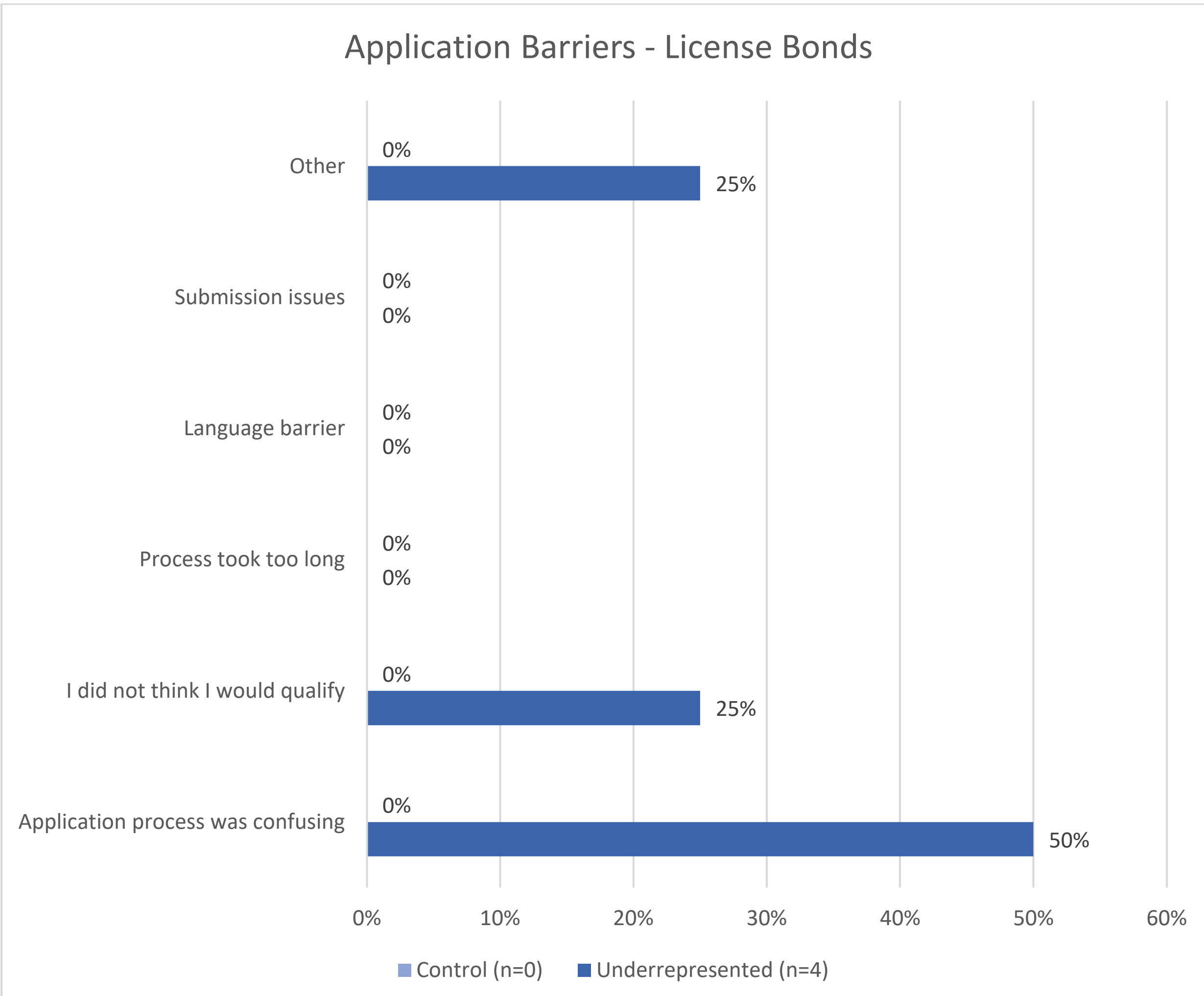
Table 14: Application Barriers Experienced by Survey Participants by Bond Type

	Yes, I experienced barriers within the application process		No, I did not experience application process barriers		Not Applicable	
	Underrepresented	**Control**	**Underrepresented**	**Control**	**Underrepresented**	**Control**
License (n=33|10)	12%	0%	76%	60%	12%	40%
Performance (n=33|10)	37%	20%	58%	80%	5%	0%
Payment (n=33|10)	31%	20%	50%	70%	19%	10%
Bid Bond (n=33|10)	43%	20%	43%	70%	14%	10%

Q9(a): What application barriers did you experience for license bonds?

The sample for this question was small, however, those who responded indicated that the application process was confusing (50 percent) and did not think they would qualify for the bond (25 percent). The respondent who answered "other" listed "The personal warranties for an S Corporation" as their barrier.

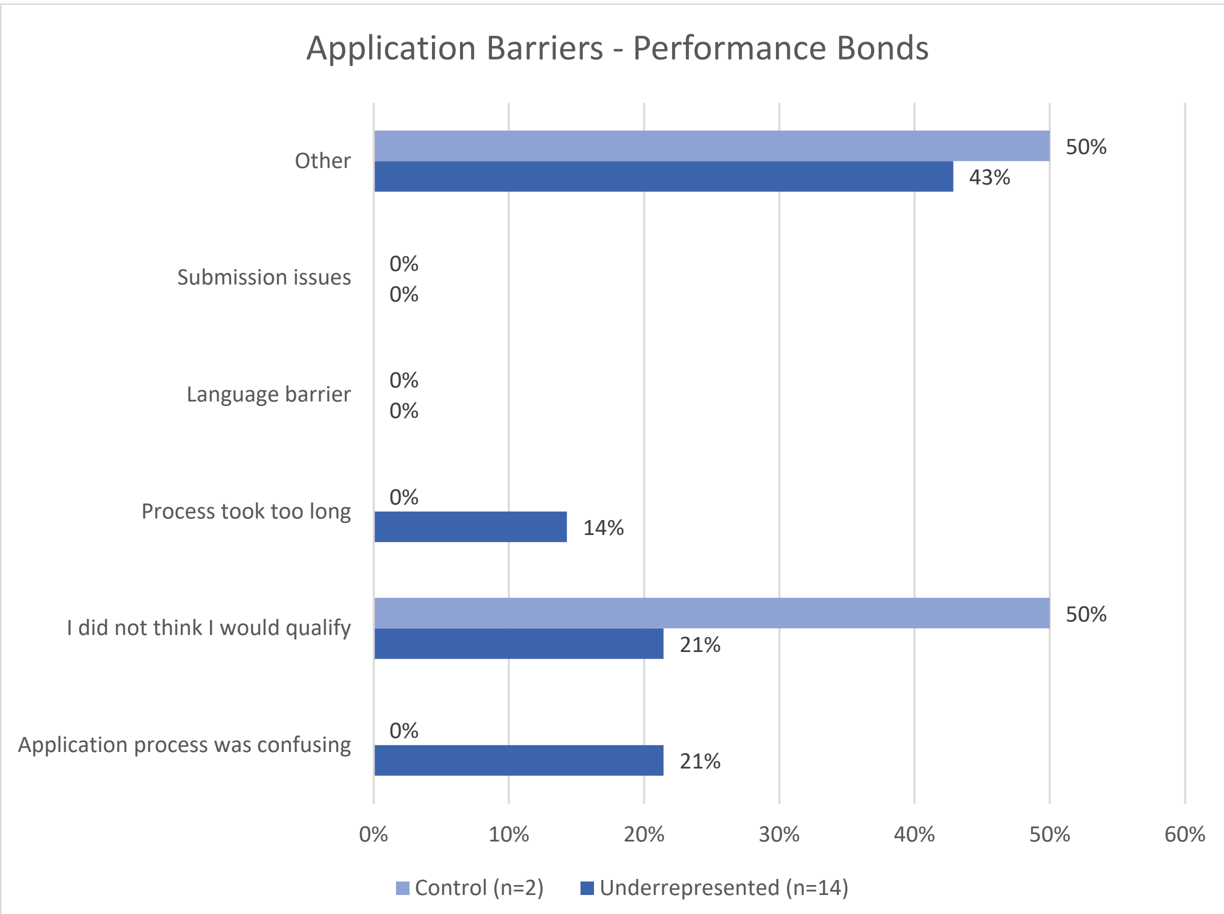
Figure 12: Application Barriers Faced by Survey Participants for License Bonds



Q9(b): What application barriers did you experience for performance bonds?

For the control group, one respondent reported not thinking they would qualify for the performance bond and the other said that the "bonding company [was] not willing to bond." For underrepresented respondents, 21 percent said that the process was confusing, 21 percent said that they did not think they would qualify, and 14 percent said the process took too long. For the 43 percent who responded with other barriers, most of the respondents cited financial barriers to being approved for a performance bond.

Figure 13: Application Barriers Faced by Survey Participants for Performance Bonds

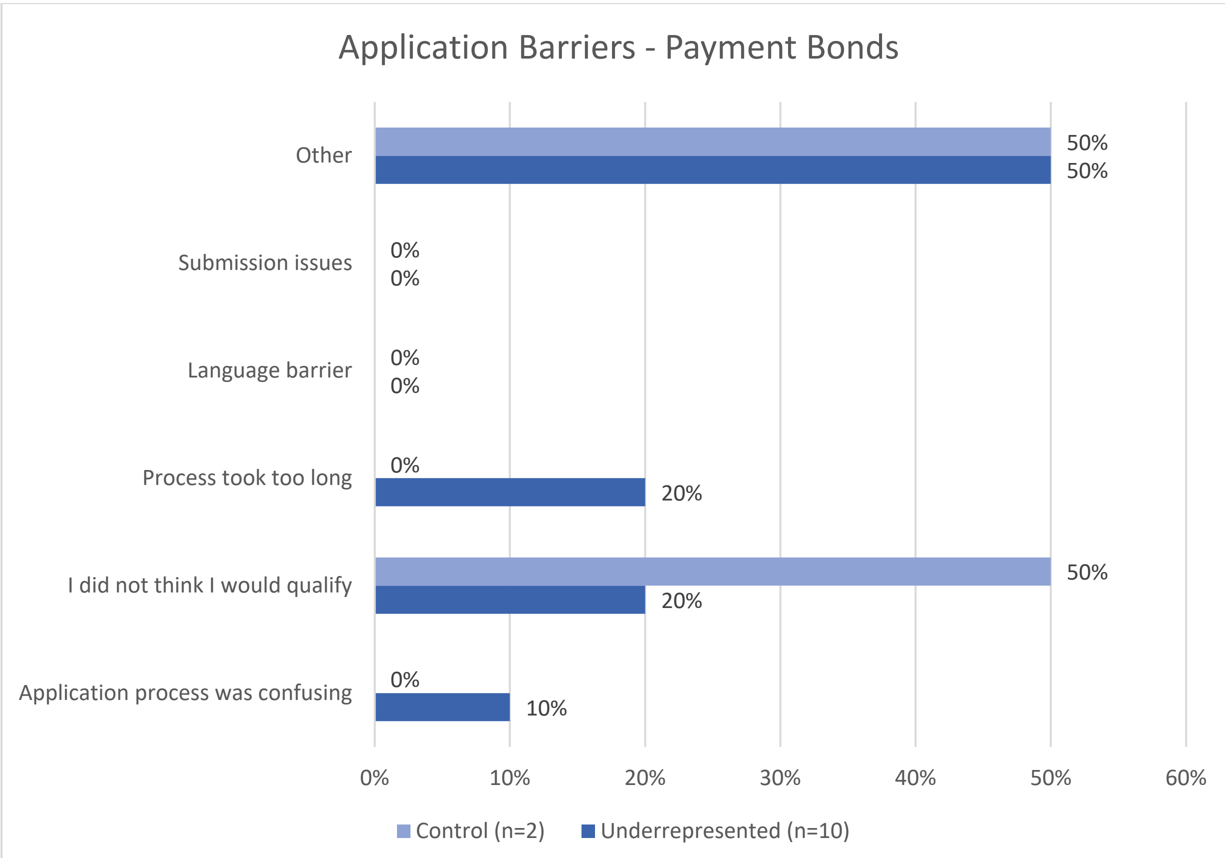


Other Responses	
TOLD I WOULD NOT QUALIFY	The personal warranties
No credit	bonding company not willing to bond
Did not qualify with no capital or assets	qualifications for bonds over 700000
Limited availability due to balance sheet not having big line if credit	

Q9(c): What application barriers did you experience for payment bonds?

Responses from the control group were identical to those noted in Q9(b). In the underrepresented group, 20 percent said the application process for payment bonds took too long, 20 percent said they did not think they would qualify, and 10 percent said that the application process was confusing. Other comments focused on business financials.

Figure 14: Application Barriers Faced by Survey Participants for Payment Bonds

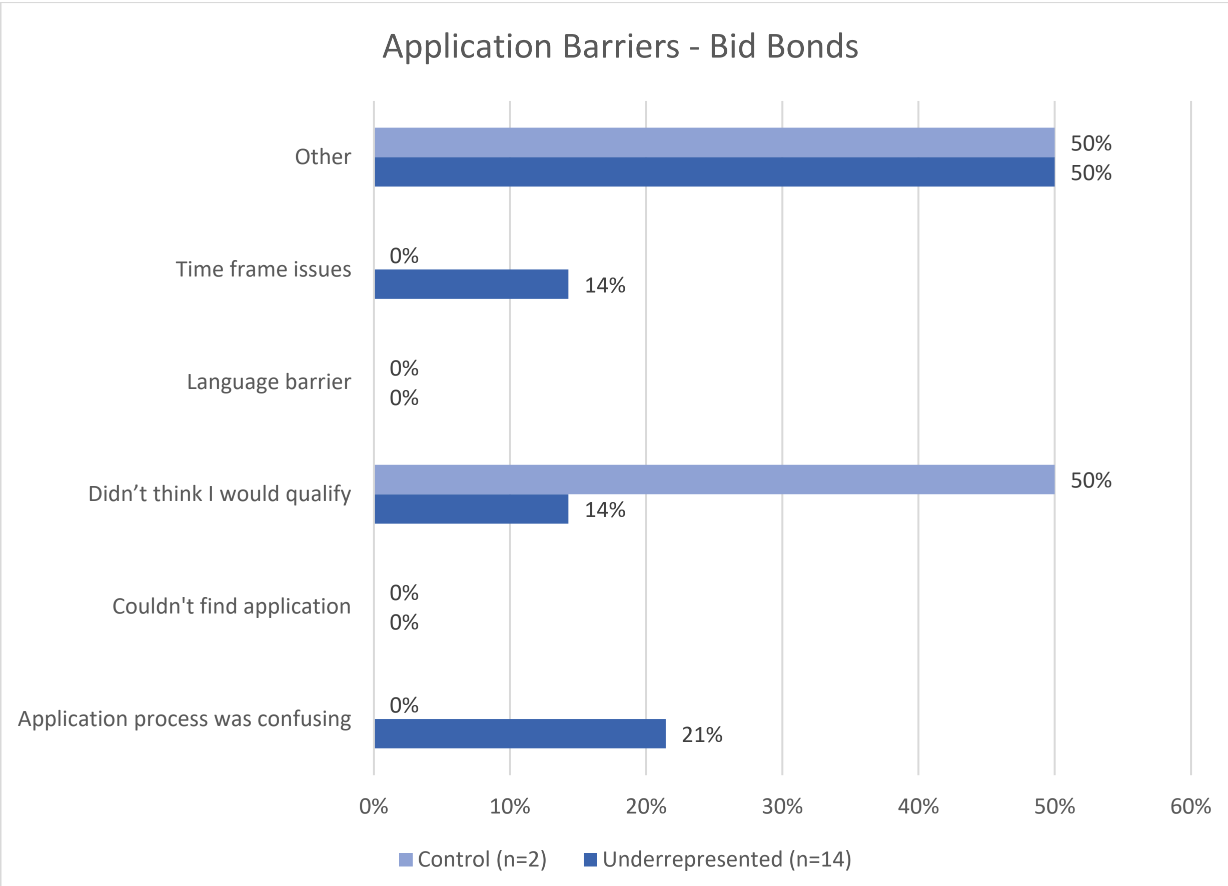


Other Responses	
TOLD I WOULD NOT QUALIFY	personal warranties
Did not qualify with no capital or assets	bonding company not willing to bond
Limited availability due to balance sheet and not having large credit line	qualifications for bonds over 700000

Q9(d): What application barriers did you experience for bid bonds?

Responses from the control group were identical to those noted in Q9(b). Underrepresented respondents reported confusing applications (21 percent), time frame issues (14 percent), and not thinking they would qualify for the bond (14 percent) as application barriers. Other comments largely centered around financial barriers.

Figure 15: Application Barriers Faced by Survey Participants for Bid Bonds



Other Responses	
TOLD I WOULD NOT QUALIFY	personal warranties
costs	bonding company not willing to bond
No credit	Limited availability due to balance sheet and not having larger line of credit
Did not qualify with no capital or assets	funds to purchase the bond

Q9(e): Do you have any suggestions or recommended solutions to the barriers you experienced in the application process for these bonds?

Suggestions included accepting letters of credit in the place of bonds, a state bank, lower bonding requirements, credit repair programs, and government assistance for purchasing bonds. One respondent also suggested that bonding companies had "ignored [them] or deterred [them] from applying."

Table 15: Participant Suggestions for Solutions to Information Barriers

Suggested Solutions to Application Barriers	
ACCEPT BANK LETTER OF CREDIT IN LIEU OF BOND AND/OR GOVERNMENT BONDING ASSISTANCE	I would like to understand why a personal warranty is required when the company is requesting the bonds
State Bank	It is hard to qualify for bonds over 700,000 and the time frame for completion of project. Some projects are two years long.
Most companies I spoke to either ignored me or deterred me from applying	Yes, credit repair and funds availability to purchase bonds when needed
Work with companies with solid histories during low cash flow periods	

Q10: Did you experience any challenges in getting approved for these bonds?

Again, a greater share of underrepresented firms experienced barriers compared to the control. License bonds had the fewest respondents who reported approval barriers (11 percent) and performance bonds posed approval barriers to the most (38 percent) underrepresented respondents.

Questions 10(a-d) are shown to those who indicated experiencing an approval barrier with that specific bond. Question 10(e) was shown to all those who experienced an approvable barrier for at least one bond. It should be noted that, unlike questions 5(a-d), 8(a-d), and 9(a-d), this series of questions was not coded to allow for multiple responses from each survey-taker. The results can be interpreted as the primary barrier faced by the respondent rather than a comprehensive list of all barriers they experienced. We expect that many respondents faced more than one barrier to approval, as financial barriers are often related.

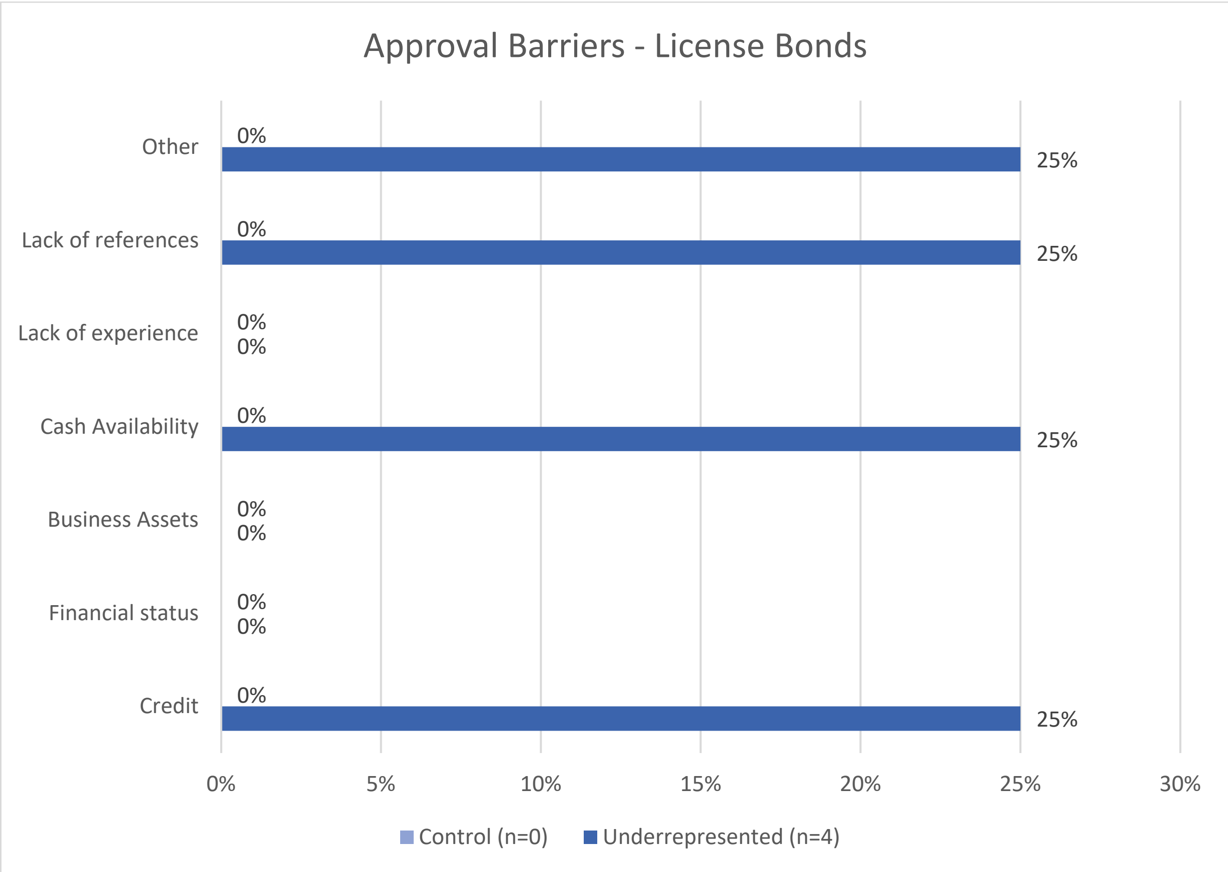
Table 16: Distribution of Survey Participants Who Experienced Barriers in Getting Approved for Bonds by Bond Type

	Yes, I experienced barriers getting approved		No, I did not experience barriers getting approved		Not Applicable	
	Underrepresented	**Control**	**Underrepresented**	**Control**	**Underrepresented**	**Control**
License (n=45|13)	11%	0%	51%	54%	38%	46%
Performance (n=53|13)	38%	15%	30%	69%	32%	15%
Payment (n=45|13)	27%	15%	27%	62%	47%	23%
Bid Bond (n=49|13)	31%	15%	27%	62%	43%	23%

Q10(a): What approval barriers did you experience for license bonds?

Only four underrepresented respondents provided their input to this question. One respondent had credit as an approval barrier, for another cash availability was the issue, and for a third they ran into problems as a result of their lack of references. The one respondent who answered "Other" stated that their primary barrier was "the fact that I have to put all of my personal assets on the line to get the bonds or they will not issue them."

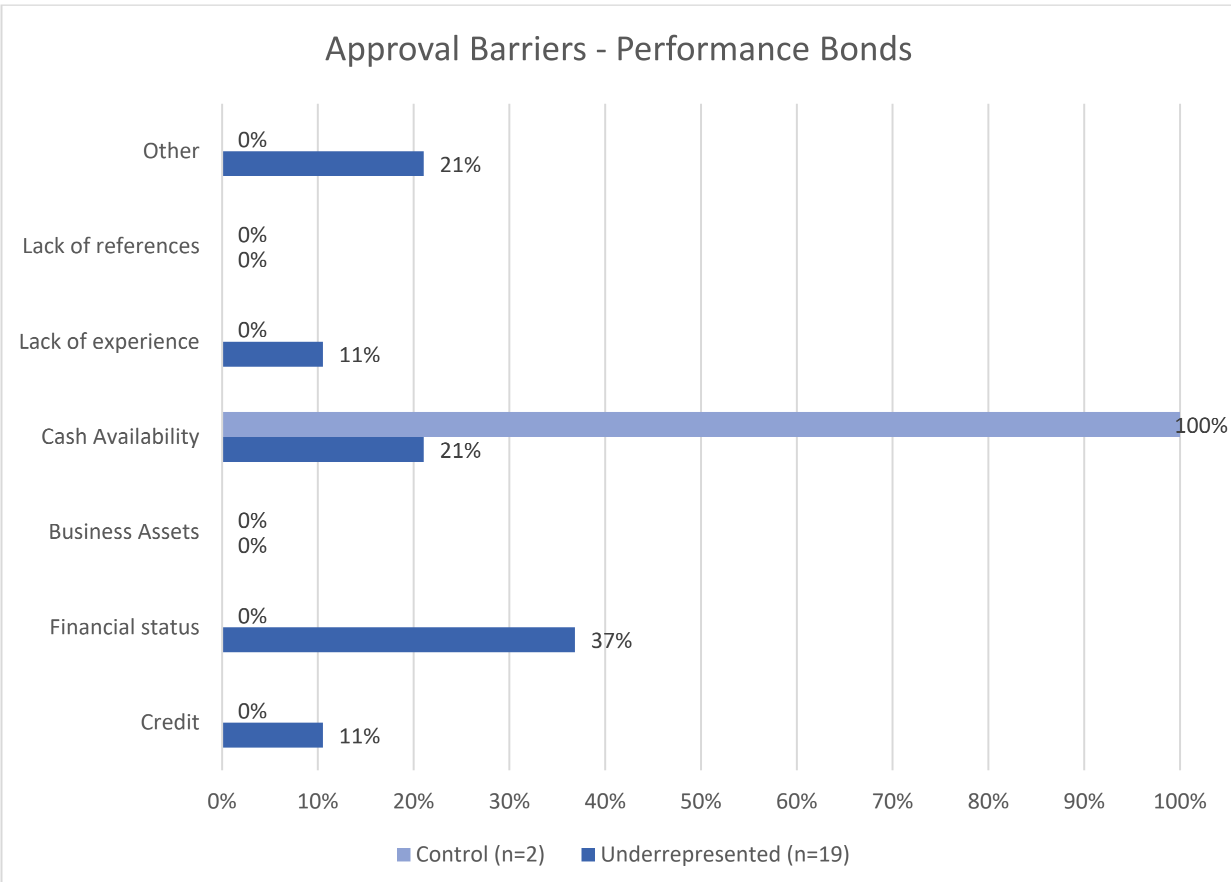
Figure 16: Approval Barriers Faced by Survey Participants for License Bonds



Q10(b): What approval barriers did you experience for performance bonds?

Both respondents from the control group indicated that cash availability was the primary barrier to being approved for performance bonds. For underrepresented respondents, financial status (37 percent), cash availability (21 percent), and credit (11 percent) posed the greatest barriers to being approved for performance bonds. The additional comments primarily focused on financial aspects of being approved for performance bonds.

Figure 17: Approval Barriers Faced by Survey Participants for Performance Bonds

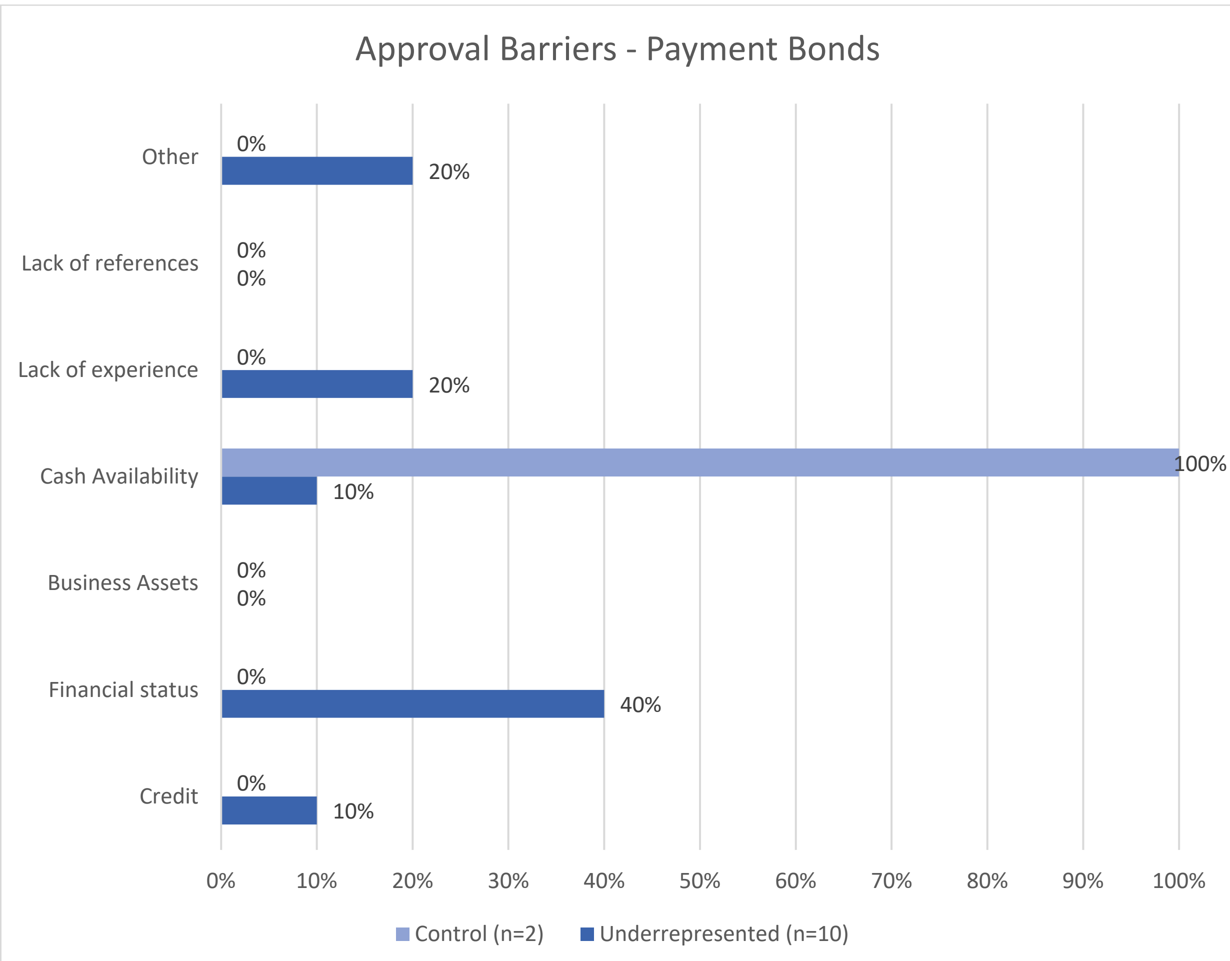


Other Responses	
Credit, Financial Status & Lack of Experience	I have to put all my personal assets a collateral to get bonded
never had to bond in the previous 25 years; short history of bonding	Some of them required audited financials - this is a huge cost to a small business

Q10(c): What approval barriers did you experience for payment bonds?

Cash availability was again the primary issue for the two control groups in terms of being approved for payment bonds. For underrepresented respondents, financial status (40 percent), lack of experience (20 percent), cash availability (10 percent), and credit (10 percent) posed the greatest barriers to being approved for performance bonds. The additional comments included the inclusion of personal assets as collateral for bonds and the "short history of bonding."

Figure 18: Approval Barriers Faced by Survey Participants for Payment Bonds

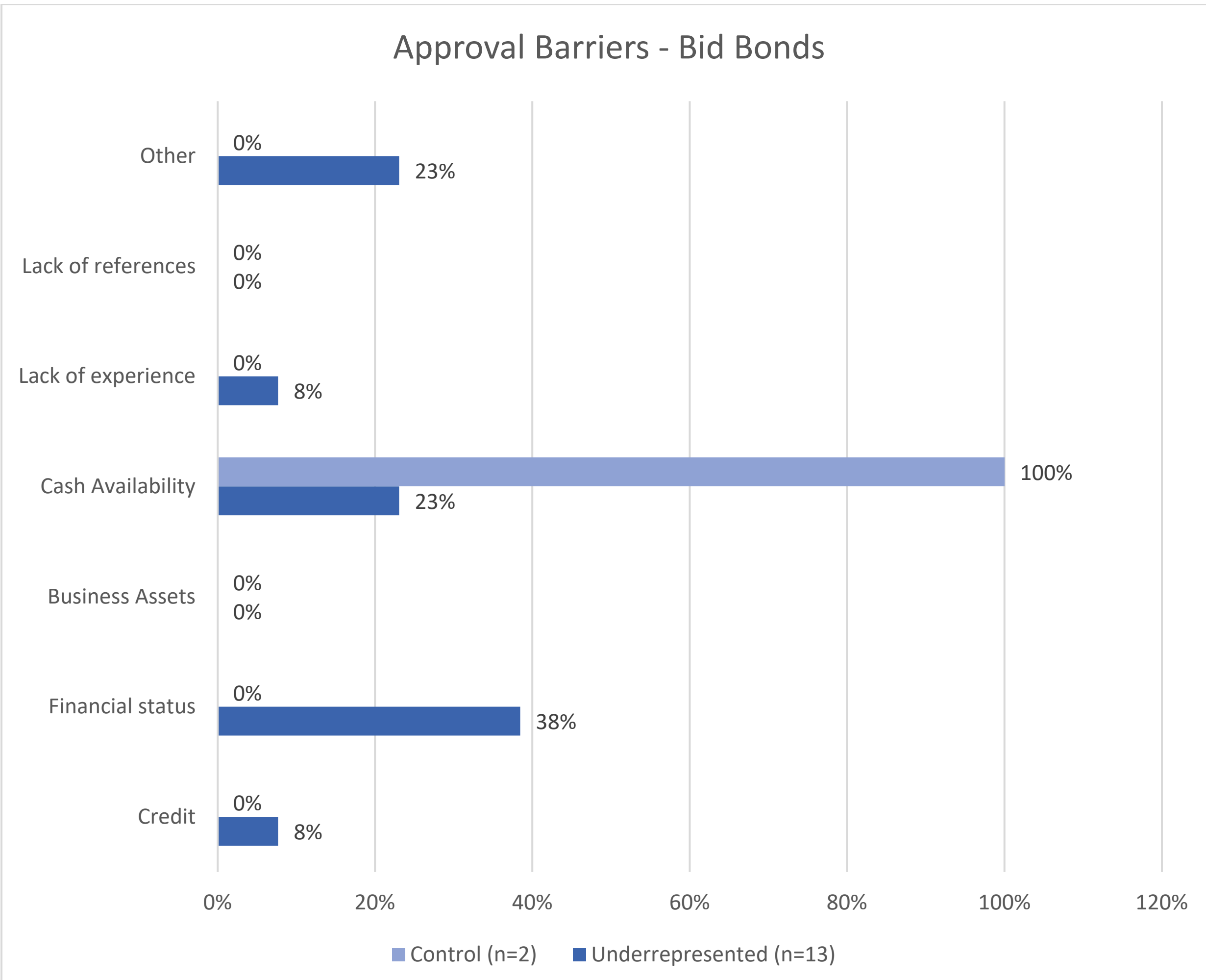


Other Responses	
short history of bonding	My personal assets are part of collateral for the bonding to happen

Q10(d): What approval barriers did you experience for bid bonds?

Cash availability was again the primary issue for the two control groups in terms of being approved for payment bonds. For underrepresented respondents, financial status (38 percent), cash availability (23 percent), lack of experience (8 percent), and credit (8 percent) posed the greatest barriers to being approved for performance bonds. The additional comments included the inclusion of personal assets as collateral for bonds and the "short history of bonding."

Figure 19: Approval Barriers Faced by Survey Participants for Bid Bonds



Other Responses	
Lack of Experience, Credit, Financial Status	They required my personal as part of payment for any liability which may occur
short history of bonding	

Q10(e): Do you have any suggestions or recommended solutions to the barriers you experienced with getting approved for these bonds?

Multiple respondents cited revising, offering assistance with, or lowering requirements for bonding, especially on larger scale projects. Others suggested a state bank or mentor/protégé program.

Table 17: Participant Suggestions for Solutions to Approval Barriers

Suggested Solutions to Approval Barriers	
REVISE STATE LAW REQUIRING BONDS RELATED TO MWDBE PARTICIPATION	Bonding should be available for projects over 700,000
Someone has to do something for the first time at some point.	funds to acquire the bond.
I had great references and got a million dollar contract and nobody would bond me and I had to lower my contract to 500k...Even though I had references and was fully capable.	I don't think that if a company is buying the bonds the surety needs to ask for personal warranties. That creates that the owners risk all they have work for during the
State Bank	mentor/protege program
Create a checklist of all requirements for bidding a particular project. Work closely with the Bonding Agent and Insurance Agency early in the bid & proposal phase, don't wait till the last minute to submit a request for bonding.	The agency needs to provide support when it comes performance bonds as this is barrier to getting projects from large prime contractors
More individual review less industry standard. If you don't fit into their little box it's a no go	

Q11: Please use the space below to communicate any additional barriers you have experienced that have not been addressed by this survey:

This question was only shown to those who had applied for at least one bond in the past. Two respondents mentioned race as a barrier for their business and bonding. Other comments centered around business finances.

Table 18: Addition Barriers Faced by Survey Participants

Additional Barriers	
the discrimination and demands for personal warranties is a barrier to get bonds for a small women minority business	the barriers to entry in the bond market are usually do to the person applying rather than the industry. You have to have enough capital and capacity to get the bond you are requesting. People who can't get bonds usually don't have one or both of these things. Would you loan money to someone who doesn't have the means to pay it back?
Financing for my business	None (2)
RACE DISCRIMINATION IS THE GREATEST OBSTACLE TO MY BLACK OWNED BUSINESS	Surety companies sometimes won't bond certain new types of jobs or newer type jobs that require longer maintenance.

Legal Analysis

A number of legal parameters should be taken into account when considering adjustments to Washington State requirements for bid bonds and performance and payment bonds that are required on public works and procurement contracts. This section of the report discusses:

- Washington's statutory framework for bonding requirements;
- State and federal laws and cases that constrain certain types of affirmative action programs; and
- The Washington State Constitution's restrictions on using public funds and credit support for private-sector entities.

This section then describes how these legal issues would affect potential programs for helping historically under-utilized businesses ("HUBs") to comply with bonding requirements for public works and procurement contracts.

Statutory Framework

Washington State has a complex and inconsistent array of statutes governing public works bonding requirements. A few statutes provide basic statutory guidelines for state agencies and local governments, but more than two dozen other statutes then set different parameters for specific political subdivisions or types of government contracting. Adjustments to bonding requirements to assist HUBs and other small contractors will require careful detailed review of multiple statutes to determine which ones should be amended. Consideration might be given to reducing the number of overlapping statutes and simplifying bonding requirements generally.

General Statutes

Statutes of general applicability to state and local agencies include:

- **RCW 39.08.010** requires that "the state or any county or municipality or any public body" obtain from each contractor "a good and sufficient bond, with a surety company as surety," guaranteeing that the contractor will "faithfully perform all the provisions of such contract," pay all laborers, mechanics, subcontractors and material suppliers, and pay all taxes. That statute provides that for contracts of $150,000 or less, the contracting agency may accept a payment and performance bond from an individual surety or sureties rather than from a surety company, or alternatively may retain ten percent of the contract amount as a "bond" for a period of 30 days after the final acceptance date. Chapter 39.08 RCW provides additional provisions that detail governments' use and enforcement of performance bonds.
- **RCW 39.04.155(3)** provides that for local government projects estimated to cost less than $50,000, those governments may use small works rosters in lieu of bidding and may waive the payment and performance bond requirements of Chapter 39.08 RCW.
- **RCW 39.19.170** provides that state agencies must not require performance bonds for public works projects not exceeding $25,000 that are awarded to prequalified and certified minority or woman-owned businesses.
- **Chap. 39.10 RCW** provides special performance bond requirements when qualifying state agencies and local governments use the alternative public works processes provided by that statute. Alternative public works include design-build mechanisms and the use of general contractor-construction managers (GCCMs). See, *e.g.*, RCW

39.10.380 and RCW 39.10.330. RCW 39.10.380(3) also requires bid bonds on alternative public works contracts over $300,000.

Corresponding rules in the Washington Administrative Code (WAC) provide additional detail for some of the state requirements.

Entity-Specific Statutes

At least two dozen statutes provide governmental entity-specific rules governing contractor bonding requirements at both the state agency and local government level. There is a considerable lack of consistency among those requirements. While each affected state or local agency may become familiar and proficient with its unique statutory framework, the variation from entity to entity can be confusing to contractors. A few examples from among these diverse statutes include the following:

Bid Bond Statutes

- RCW 39.04.220 mandates that on GCCM projects for state correctional facilities, bidders on subcontracts over $200,000 must post bid bonds.
- RCW 35.23.352, RCW 35.61.135, RCW 54.04.080, and RCW 57.08.050 require that bidders post 5% bid bonds for public works projects of second-class cities, metropolitan park districts, public utility districts, and water-sewer districts, respectively.
- Under RCW 43.52.570, joint operating agencies (*i.e.*, Energy Northwest) may waive bid bonds on bids for supplier contracts under $75,000.
- RCW 47.01.210 permits the Washington State Department of Transportation (WSDOT) to contract with public utilities and municipalities without bid bonds.
- RCW 54.04.082 allows public utility districts to waive bid bonds on purchasing contracts between $30,000 and $120,000.
- RCW 70.44.140 requires 25% bid bonds for public hospital district projects.
- RCW 47.28.170 states that on emergency highway repair projects, contracts must be prequalified and *may* (not *must*) be required to furnish a bid deposit or performance bond.

Payment and Performance Bond Statutes

- RCW 39.04.220 provides that on GCCM projects for state correctional facilities, the Department of Enterprise Services will establish the performance and payment bond requirements.
- RCW 35.95A.050(3)(g) states that a city transportation authority must require “a project performance bond or bonds or other security by the vendor” but that statute does not set a specific bond level.
- RCW 36.58.090(7) and RCW 35.21.156(7) provide that for solid waste handling, plants and facilities contracts, counties and cities can require project performance bonds or other security “that in the judgment of the legislative authority of the city or town is sufficient to secure adequate performance by the vendor.”
- RCW 47.01.210 permits the Washington State Department of Transportation (WSDOT) to contract with public utilities and municipalities without performance bonds.
- RCW 53.08.140 permits port districts to enter into contracts and leases with other governments without requiring performance bonds.

- RCW 69.50.508(3)(c) allows the pharmacy quality assurance commission to enter into contracts for educational and research activities without performance bonds.
- In connection with the recycling of hazardous electronics, under RCW 70A.500.290 the Washington Materials Management and Financing Authority is permitted to require financial assurances or performance bonds from manufacturers participating in the Authority's recycling program. The Authority is able to set the performance bond levels.
- RCW 78.60.130 provides that in connection with geothermal drilling, the Department of Natural Resources can require an operator engaged in well drilling to file "a reasonable bond or bonds with good and sufficient surety, or the equivalent thereof, acceptable to the department."

The multiplicity of statutes governing bid bonds and payment and performance bonds at the state and local level has several implications for a process or program seeking to assist HUBs in this area:

1. There is already significant variance in the statutory bonding requirements for public works contractors and suppliers. There are different levels of bonding for different public entities and for different kinds of public works or procurement projects. There are occasional commonalities such as 5% bid bonds for several types of municipalities, but there is no across-the-board consistency. There are also a number of entities that are permitted to determine for themselves what kind and amount of bid bonds and performance bonds will be required. Finally, several varieties of state and local agencies are permitted to waive some bonding requirements altogether for smaller projects. This means that there is no generally accepted standard level of bonding required across the board, Therefore, adjustments in the statutory requirements—particularly for smaller contracts—will not necessarily be seen as a departure from standard prudent practices.

2. The multiple requirements for different types of governments and agencies may be confusing to contractors. Without addressing any proposed standard level of bonding requirements or waiver practices, the concept of increased standardization is likely to be met with favor among contractors generally.

3. Any program of statutory standardization will require a careful review of *all* statutes and WAC provisions to ensure that the amendatory legislation addresses every state and local bonding requirement intended to be adjusted.

Constitutional and Statutory Overlays Relating to Affirmative Action

Consideration should be given to provisions of state and federal constitutional provisions and statutes that might affect a program to assist HUBs in the area of contractor bonds.

Article I, §12 of the Washington State Constitution

No Washington State constitutional provision would likely present material issues for statutory changes in statutes or programs aimed and simplifying or reducing bonding requirements for small contractors in general or disadvantaged, minority, and women-owned businesses in particular. Art. I, §12 of Washington's constitution provides:

> No law shall be passed granting to any citizen, or class of citizens, or corporation…privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

The basic concept of Art. I, §12 is that people in like circumstances should be treated equally under state law. The caselaw under Art. I, §12 currently is in a state of flux. Recently, members of the State Supreme Court have applied distinctly different approaches to interpreting and applying that language. In recent cases, a majority of our court has applied the federal Equal Protection doctrine to cases involving discrimination against minorities, and a separate Washington State approach when cases grant special privileges to small groups of people or private entities. *See generally Andersen v. King County*, 158 Wn.2d 1 (2006)(result overruled by *Obergefell v. Hodges,* 576 U.S. 644); *Schroeder v. Weighall*, 179 Wn.2d 566 (2014); *Ockletree v. Franciscan Health System*, 179 Wn.2d 769 (2014). Under federal Equal Protection (14th Amendment) doctrine, a statute is typically upheld if that law is rationally related to achieving a legitimate state interest and the differential treatment of classes of persons under the statute are not based on grounds that are wholly irrelevant to achieving the state interest. *State v. McKague*, 159 Wn.App. 489 (2011). When the state's separate approach is applied, the court uses a somewhat different "reasonable ground" test. Under that analysis, distinctions between different groups must rest on "real and substantial differences bearing a natural, reasonable, and just relation to the subject matter" of a statute." *Ockletree*, 179 Wn.2d at 783. Under the reasonable ground approach, the court must find that the legislature had an adequate factual basis for statutory actions that favor one particular group of another. *Schroeder,* 179 Wn.2d at 574-75.

These concepts and doctrines are complicated, difficult to apply, and at least two cases currently before the Washington State Supreme Court could affect how Art. I, §12 is understood and applied. However, it is unlikely that the provision of Washington's constitution would adversely affect adjustments to the state's construction bonding statutes so long as the legislature made it clear why certain groups of contractors were being treated differently than others. This can be done through carefully designed legislative findings, and historically there are no Washington cases that have adversely affected affirmative action programs based on Art. I, §12. In any event, classifications in requirements based primarily on *size* of contracting firms and *size* of contracts would very likely be sustained if challenged.

The Fourteenth Amendment's Equal Protection Clause

The U. S. Supreme Court has determined that the use of race- and sex-conscious subcontract set-asides to address contracting disparities violates the Fourteenth Amendment's Equal Protection clause. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). At the same time, actions to encourage and assist HUBs in qualifying for contracts are permitted so long as those actions do not discriminate against non-HUB contractors or lead to qualified non-HUB contractors being rejected when their bids are lower, or their qualifications are clearly higher. A government program that makes racial distinctions is subject to "strict scrutiny" by the courts. This means that the program must be necessary to fulfill a compelling state interest, must be narrowly tailored to achieving that compelling purpose, and must use the least restrictive means to achieve the purpose. In hundreds of cases nationally, courts have examined various government programs and determined whether specific programs to assist racial minorities did or did not meet these stringent tests. In one case arising from Washington State, the federal Ninth Circuit Court of Appeals upheld a U.S. Department of Transportation HUB program as being "narrowly tailored" because Congress had identified a compelling remedial interest when it enacted the specific program involved, and because that program appeared "narrowly tailored" to achieve the program's objectives.

Western States Paving Co., Inc. v. Washington State Dept. of Transportation, 407 F.3d 983 (2005). But in the same case, the court held that "claims of general societal discrimination—and even generalized assertions about discrimination in an entire industry—cannot be used to justify race-conscious remedial measures." 407 F.3d at 1002.

The key point is that evaluation of affirmative action programs under Equal Protection standards is very fact-specific, and each program must be carefully designed to assist traditionally underrepresented groups while not establishing conditions that discriminate against other groups. The key is to focus on supportive activities to give HUBs better access to opportunities for success in obtaining contracts, and to take actions that are neutral in terms of race and sex. For example, increasing the size of contracts that do not require bid bonds or performance and payment bonds is neutral because it applies equally to all small contractors. Similarly, giving state and local agencies more flexibility in waiving bonding requirements can provide access to all contractors within a class without involving any favoritism.

Washington's I-200 (RCW 49.60.400)

In Washington State, the most immediate legal impediment to certain types of government affirmative action is not posed by the federal Equal Protection clause, but rather by RCW 49.60.400, enacted in 1998 by Initiative 200 ("I-200"). RCW 49.60.400(1) provides:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The Washington State Supreme Court has held that his law "prohibits reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant." *Parents Involved in Community Schools v. Seattle School District*, 149 Wn.2d 660, 689-90 (2003). I-200's impact on race-conscious or sex-conscious measures to address discrimination in State contracting was carefully examined in a thoughtful opinion issued by Attorney General Bob Ferguson in 2017. *Use of Race- or Sex-Conscious Measures or Preferences to Remedy Discrimination in State Contracting*, AGO 2017 No. 2 (March 20, 2017). The Attorney General concluded that I-200 permits the State (and presumably local governments) to take race and gender into account in contracting under limited, "narrowly tailored" circumstances. The opinion concluded that race- and sex-conscious measures are allowable when those measures "do not actually elevate less qualified potential contractors over more qualified potential contractors," and "do not discriminate against, or grant preferential treatment to, any person or group." Allowable programs might include:

- Aspirational goals for minorities or women;
- Solicitation of women and minority businesses for participation in public contracting;
- Targeted training and outreach; and
- Other measures "designed to increase participation in public contracting by underrepresented groups."

AGO 2017 No. 2 at p. 6. The Attorney General's Opinion also noted that I-200 expressly allows preferences under narrow circumstances, including when necessary to prevent the loss of federal funding. Preferences may also be used if they are the only available means to avoid discriminating against protected groups. However, before any such preference may be used, there must be a strong basis in evidence to show that an unlawful disparate impact would exist without the preference. Such evidence should include statistical evidence of disparity caused by the state's contracting processes, but also evidence that the disparity is caused solely by factors that are consistent with business necessity and manifestly related to the performance of the contract. The bottom line is that any type of preferential treatment for some groups that might discriminate against other groups must be based on careful findings and the ultimate program must still be "narrowly tailored" as the "only means available to remedy discrimination in [the] contracting process." The Attorney General observed: "In practice these circumstances could be narrow indeed, because an agency finding that its own policies cause a disparate impact must also exhaust available alternatives to the use of preferences." AGO 2017 No. 2 at p. 11.

The bottom line is that State and local actions to assist HUBs in state bonding programs will be readily defensible from legal challenges when those actions focus on positive, non-discriminatory assistance like those listed in the bullet points immediately above, and when changes in state law improve the situation for *all* small and medium sized contractors, regardless of whether they belong to underrepresented groups.

Constitutionally-Prohibited Gifts, Loans or Credit Support to the Private Sector

The Washington State Constitution includes two provisions prohibiting State and local funds from being applied to gifts, loans, or credit support for private persons or entities "except for the necessary support of the poor and infirm." Wash. Const. Art. VIII, §§ 5 & 7. Although written somewhat differently, the two sections are interpreted as applying in identical ways to both State and local governments. The local government provision, Art. VIII, §7, provides the more comprehensive statement of the principle involved:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

This provision applies to government loans, grants or credit support to private-sector entities whether those entities are for-profit or non-profit, and whether or not there might be some general public benefit from those government actions. *See, e.g. Lassila v. Wenatchee,* 89 Wn.2d 804 (1978) (city lending of credit to assist development of private community auditorium prohibited); *Johns v. Wadsworth,* 80 Wash. 352 (1914) (county barred from giving free use of county fairground to non-profit fair association). At the same time, government agency actions that directly serve recognized public functions are allowed when there is sufficient agency control over the use of the state's assets and the extent of its liability. *See*: *In re Marriage of Johnson*, 96 Wash.2d 255, 267-68 (1981) (prosecuting attorney's enforcement of child support law served a recognized public function even when one parent was incidentally benefitted, hence no violation of Art. VIII, §7). *See also City of Tacoma v. Taxpayers*, 108 Wn.2d 679 (1987) (no unconstitutional gift of public funds in an energy conservation program where there was sufficient consideration and not donative intent). Further, Article VIII, §§ 5 & 7 are not implicated when non-state or local government funds are used for programs involving transfers or loans to private persons or entities. *See Wash. Higher Education Facilities Auth. v. Gardner*, 103 Wash.2d 838, 847-48 (1985); AGO 1970 No. 24.

The main impact of these state constitutional provisions here is that direct grant, subsidy, or credit support programs for private contractors could readily be found to violate the prohibitions in Art. VIII, §§ 5 & 7. The potential implications are discussed below.

Application of Legal Constraints on Potential State and Local Programs

This section discusses the practical implications of the legal parameters discussed above and evaluates some plausible programs in light of those constitutional and statutory constraints. Potential programs might include, for example, targeted training and outreach, rationalizing state bonding requirements, and state financial or credit support for construction-related bonds. The discussion looks at each of these in turn.

Potential Program: Targeted Training and Outreach*.* In this hypothetical program, the State would provide workshops and consulting assistance for HUBs, including training on effectively presenting each contractor's background and experience to bond providers, and assisting HUB contractors in locating reasonably priced bonds. Such a program could also advise small contractors on how they might improve their credit scores. The State could also work with bond providers to educate them on how their implicit biases in underwriting might cause them to charge HUB contractors higher premiums. The State could also work with bond providers to encourage them to take "equivalent experience" into account when underwriting, Finally, such a program could help match HUBs contractors with bond providers who have committed to work collaboratively with the program. *This type of program would be lawful under both the United States and Washington Constitutions and I-200.* Such a program would likely require new legislation to establish and fund it. Because positive assistance of this type would not entail reverse discrimination and would not elevate less qualified contractors over more qualified contractors, it would probably be found consistent with the Equal Protection Clause and the more specific restrictions of I-200. Furthermore, this type of educational and positive assistance program would not be viewed as violating Art. VIII, §§ 5 & 7 of Washington's constitution.

Adjusting and Rationalizing Bonding Statutes. This would involve amending more than three dozen statutes to rationalize bid bond, and payment and performance bond requirements. The inconsistencies among the requirements for various state agencies and political subdivisions could be made more consistent, with a single general framework for bonds. The types and dollar levels of bonds would be determined by the type of work and size of the contract. Also, the required dollar amounts of bonds (as a percentage of contract size) could be reduced, especially for small and medium-sized contractors. A reduction in bond sizes would be beneficial to all small contractors, but particularly the HUBs. This would also be consistent with a recommendation on p. 130 of WSDOT's Disparity Study 2017. *This type of program would be lawful under the United States and Washington Constitutions and would be consistent with I-200* so long as it does not provide different bonding levels based on race or sex.

A Colorado-type program under which the State provides a partial payment/performance bond and bid bond guarantee for small contractors**.** The Colorado Department of Transportation provides this program by establishing a pool of money that covers 50 percent of the risk in the event of a contractor failure. This materially reduces the premium costs for the qualifying contractors. *The program might be effective* in assisting HUB and other small contractors, *but it would be inconsistent with Art. VIII, Sections 5 & 7 of the State Constitution*, which prohibit using public funds to provide credit-support to private sector businesses. This type of program *would* be constitutional if the subsidies were funded entirely with federal or private-sector money. The State could probably use public funds to manage a program funded from federal or private sources, though care would need to be taken to ensure that the allocation of benefits of the program was consistent with the anti-discrimination provisions of I-200.

Conclusions

There are many stakeholders in the surety market, which is one of the reasons for its complexity. The knowledge barrier is high for any new contractor entering the surety market, and the lack of state-specific support programs may be a disadvantage to new and emerging contractors. Determining what types of support programs would be most beneficial to HUBs requires careful consideration.

The barriers faced by minority and women-owned contractors are often the cause of underlying biases that can affect contractors' ability to attain work experience, build business relationships, produce quality references, acquire contracts, and build credit, among many other crucial business operations that affect surety bond qualification. For this reason, effective support programs must understand and address the cause of these challenges through a multi-faceted approach.

While the barriers to knowledge about surety bonds and surety bond resources may be one of the largest challenges faced by HUBs, part of the problem is that the burden is placed on HUBs to educate themselves on the resources available. Since every business is at a different stage in their industry knowledge and experience, the places that they think to look for resources will vary. A precursory Google search of "surety bond resources" often returns federal education programs that do not include state-specific information or private bond companies that offer free educational resources on their websites.

Due to the lack of a central hub for information, many HUBs may first contact surety brokers for information on prequalification and assistance. However, when we called surety brokers who offered surety bonds in Washington State, very few of them knew of any support systems, programs, websites, or other resources. If a broker was aware of a support program, it was most likely the SBA Surety Bond Guarantee Program. This was also the only resource offered when the Surety Association of Washington State was asked the same question.

For this reason, education and training programs for underrepresented contractors and for surety brokers may be beneficial in increasing awareness of HUB-specific resources and help to reduce some credit, financial, and experience barriers. Including bonding information and resources within requests for proposals (RFPs) for contracting projects may be one way to ensure that all those bidding on projects have equal access to information regarding bonding. In addition, we recommend revising existing statutes on surety bonding to increase consistency and reduce confusion and informational barriers. While revising these statutes, it will also be worthwhile to see where bonding requirements can be reduced or made more accessible.

HUBs face a variety of barriers in obtaining surety bonds, but one of the most common barriers is in building, improving, and repairing credit scores in order to get approved for future bonds. Therefore, a state-run credit repair program may be useful to help HUBs gain access to the surety bonds they need to further build their credit, gain experience, and become established companies within the industry. This program could be permissible under current Washington State laws, though limitations on use of state funds remain, which restricts the direct credit-assistance that the state can offer. However, credit and financial literacy coupled with a work experience-building program can help HUBs build credit without violating the limitations on use of state funds.

While this research does not allow us to conclusively state whether or not a state-sponsored bond program is a necessity, the research does suggest that this can be an important step toward removing barriers to bonding for underrepresented businesses. Our legal analysis suggests that, if a partial-bond guarantee program were funded through federal or private dollars, it would likely be legal within Washington State. Other bonding education, financial literacy, experience building, and networking assistance programs are also permissible and would help to address some of the barriers faced by HUBs in Washington State.

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