

City of Chicago Disparity Study for Construction Contracts 2021



CH COLETTE
HOLT
& ASSOCIATES

CITY OF CHICAGO

DISPARITY STUDY 2021

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About the Study Team

Colette Holt & Associates

Colette Holt & Associates (“CHA”) is a national law and consulting firm specializing in disparity studies, affirmative action contracting programs, expert witness services, compliance monitoring and strategic development related to supplier diversity initiatives. Founded in 1994, it is led by Colette Holt, J.D., a nationally recognized attorney and expert. In addition to Ms. Holt, the firm consists of Steven C. Pitts, Ph.D., who serves as the team’s economist and statistician; Ilene Grossman, B.S., Advisors Project Administrator; Glenn Sullivan, B.S., Advisors Director of Technology; Victoria Farrell, MBA, Advisors Assistant Principal Researcher; and Joanne Lubart, J.D., Special Counsel. Advisors is certified as a Disadvantaged Business Enterprise, Minority-Owned Business Enterprise and a Woman-Owned Business Enterprise by numerous agencies.

Sandi Llano & Associates, Inc.

With more than 30 years of experience, Sandi Llano established Sandi Llano & Associates, Inc. to continue advocating for equal access to business opportunities for disadvantaged, minority- and women-owned firms. After retiring as the Disadvantaged Business Enterprise Director for Metra, Ms. Llano provides consulting services to governments and firms on compliance with contracting equity requirements, best practices for M/W/DBE programs, and representation for M/W/DBEs as their mentor and advocate.

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I. EXECUTIVE SUMMARY

Colette Holt & Associates was retained by the City of Chicago to perform a disparity study for its Minority- and Women-owned Business Enterprise (“M/WBE”) program for its construction contracts. The study was designed to meet the City’s federal constitutional obligations governing the implementation of a race- and gender-conscious program and to provide recommendations for program enhancements to reflect current national best practices for such programs. This report contains the following elements:

- A legal analysis, to provide a thorough examination of the case law on M/WBE programs.
- A review of the City’s current M/WBE construction program, including summaries of extensive interviews with business owners, assist agencies and industry trade groups and City staff.
- Qualitative evidence of discriminatory barriers in the Chicago area construction industry gathered through 175 extensive interviews with business owners, and representatives from assist agencies and trade associations, as well as an electronic survey.
- Disparity analyses of opportunities and outcomes in the Chicago area and Illinois construction industries, using Census Bureau data sets, and a review of the government and academic literature on race- and gender-based barriers to equal access to financial and human capital.
- Determination of the City utilization of M/WBEs presented in dollars and number of contracts; the availability of minority- and woman-owned firms to provide construction services and goods to the City and its prime contractors; and the results of disparity testing between utilization and availability.
- Recommendations for program improvements.

Overall, we found ample qualitative and quantitative evidence that race or gender continue to significantly impede M/WBEs’ full and fair opportunities to compete for City construction prime contracts and associated subcontracts. Stereotypes, biased perceptions, assumptions of incompetency and outright hostile work environments and harassment remain all too common. Industry networks often remain closed to minority and female owners. M/WBEs report that prime contractors that use them to meet government affirmative action goals rarely even solicit them to bid on non-goals work. Private sector contracts remain especially difficult to obtain for minority and woman businesses. The City’s program remains critical to the success and often even the existence of these firms. Without the affirmative remedial intervention of the use

of contract goals, it is likely that the results of City contracts would mirror the disparities found throughout the wider construction industry economy, causing it to become a passive participant in the market failure of discrimination. While the City has achieved “parity” overall in its own contracting activities, M/WBEs for the most part remain relegated to the market for City subcontracts while more lucrative subindustries such as heavy civil work remain out of reach for most. In our judgment, these results provide the “strong basis in evidence” the courts require to support the City’s continued use of race- and gender-conscious contracting remedies.

To continue to narrowly tailor its program, we make the following major recommendations:

- Reaffirm the MBE and WBE annual, aspirational goals in the current ordinance.
- Use the highly detailed estimates of MBE and WBE availability to set contract goals.
- Revise the business size standard for program eligibility to 150 percent of the applicable U.S. Small Business Administration (“SBA”) gross receipts limit and lengthen the period over which receipts are averaged from five to seven years.
- Revise the personal net worth standard for program eligibility by excluding investments in other businesses, real estate holdings, retirement accounts and other illiquid assets.
- Create new a department to administer and enhance the program, reporting directly to the Mayor, with additional program resources.
- Fix the slow payment problem.
- Focus on increasing prime contract awards to M/WBEs.
- Increase contract performance monitoring.
- Develop a technical assistance program, including bonding and financing elements to increase M/WBE availability and capacity.
- Develop metrics for program success.

A. Legal Standards for Government Contracting Affirmative Action Programs

To be effective, enforceable, and legally defensible, a race-based affirmative action program for public sector contracts must meet the judicial test of constitu-

tional “strict scrutiny”.¹ Strict scrutiny is the highest level of judicial review. Strict scrutiny analysis is comprised of two prongs:

1. The government must establish its “compelling interest” in remediating race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
2. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.

The compelling governmental interest prong has been met through two types of proof:

1. Statistical evidence of disparities between the utilization of minority- or woman-owned businesses by the agency and/or throughout the agency’s geographic and industry market area compared to their availability in the market area. General population is irrelevant.
2. Anecdotal evidence of race- or gender-based barriers to the full and fair participation of M/WBEs in the market area or in seeking contracts with the agency.

The narrow tailoring prong has been met by satisfying five factors to ensure that the remedy “fits” the evidence:

1. The necessity of relief;
2. The efficacy of race-neutral remedies at overcoming identified discrimination;
3. The flexibility and duration of the relief, including the availability of waiver provisions;
4. The relationship of numerical goals to the relevant market; and
5. The impact of the relief on the rights of third parties.

Programs that have been held to fail any element of this framework have been struck down by courts. Programs that have met the strict scrutiny test have been upheld, including recently the Illinois Tollway’s Disadvantaged Business Enterprise program for its construction and related services contracts.

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

B. The City of Chicago’s Minority- and Women-Owned Business Enterprise Construction Program

1. Program History

The City of Chicago’s contracting affirmative action program was first established by Executive Order in 1985. It set goals of 25 percent MBE participation and 5 percent WBE participation. In 1990, the City’s adopted its first ordinance establishing the M/WBE Program.² The 1990 ordinance was challenged in 1996 as applied to construction contracts.³ Following the 2003 trial, a revised ordinance established the current construction program in 2004. In 2009 and 2015, the City considered new evidence and found that discriminatory barriers continued to exist for M/WBEs. The ordinance was extended to December 31, 2020, and further extended until September 30, 2021, in response to the novel coronavirus pandemic and the commissioning of this Report.

2. Program Elements

The following are the major components of the construction program.

a. Determining Program Eligibility

The 2015 Ordinance sets forth the general provisions of the M/WBE construction program and sets aspirational and biannual goals of 26 percent for MBEs and 6 percent for WBEs. The program is administered by the Department of Procurement Services (“DPS”). The program is overseen by the Chief Procurement Officer (“CPO”). Executive departments and agencies work with the CPO to achieve the program’s goals.

Chicago provides stringent criteria for participation in its program. MBEs and WBEs are defined as small⁴, local⁵ business enterprises that are owned by one or more economically disadvantaged⁶ minorities⁷ or by women.

2. Sections 2-92-420 through 2-92-570 of the Municipal Code of the City of Chicago.

3. *Builders Association of Greater Chicago v. City of Chicago*, Number 96 C 1122 (N.D. Ill.).

4. A Small Business Enterprise as is defined by the U.S. Small Business Administration size standards for its North American Industry Classification System (“NAICS”) code, determined by total gross receipts averaged over its most recent five fiscal years. The current maximum limit is \$39.5M dollars, applicable to only certain NAICS codes.

5. Local business enterprise is defined as a business entity located within the state of Illinois’ six-County region of Cook, DuPage, Kane, Lake, McHenry, and Will, with its principal office and majority of its full-time work force in this Region.

6. “Economically Disadvantaged” individuals as evidenced by their Personal Net Worth and their five most recent individual federal income tax returns. Net worth cannot exceed \$2,000,000, indexed annually for inflation; the current limit is \$2,379,730. The value of the applicant’s primary residence and equity interest in the firm seeking certification are excluded, and retirement accounts are discounted down to present value.

7. Minorities are defined as African-Americans or Blacks, Hispanics, Asian-Americans, American Indians. Individual members of other groups, such as Arab-Americans, can be included if they can demonstrate they are socially disadvantaged.

Applicants must demonstrate ownership and control that is real and substantial; demonstrate expertise in all areas of the firm's critical operations; and have the financial resources to actually acquire ownership. Certification is valid for five years but must be revalidated every year by submission of a No Change Affidavit. An applicant's certification is limited to its area of specialty as defined by NAICS codes.

b. Establishing Contract Goals

Goals are set by the City department initiating the project and submitted to DPS for review and approval. Contract goals are established based on the scopes of work of the project, the type of work and the availability of at least three M/WBEs certified in the applicable NAICS codes for the scope of work. The aspirational goals for construction can be used as a baseline. If possible, contract goals should exceed the aspirational goals. Contract goals apply to any later modification, including change orders directed by the City.

If there is not adequate MBE and/or WBE capacity to support a goal recommendation, the user department may submit a No Stated Goal(s) Request. Bidders and contractors are still required to make good faith efforts ("GFEs") towards achieving the maximum possible M/WBE participation. Where there is insufficient M/WBE capacity, the user department is asked to inform DPS and the Compliance Unit so that outreach can be specifically targeted to reach minority and woman vendors in underrepresented markets.

c. Counting Certified Firms' Participation Towards Contract Goals

The City has detailed rules for counting M/WBE participation on a contract:

- Certified MBEs and WBEs can only be counted on a bidders' compliance plan as either an MBE or WBE, but not both.
- Participation of firms in the 6-digit NAICS codes for which they have not been certified will not count.
- Firms must be certified by the time the bid is submitted.
- MBEs or WBEs self-performing through their own forces may count 100 percent of their self-performance dollars.
- Joint ventures may count the portion of the total dollar value of the contract equal to the portion of work that the M/WBE performs. Goal credit is given commensurate with the work performed by the M/WBEs' own forces.

- Any subcontracted work to other MBEs or WBEs that meet the other goal counting criteria can be counted at 100 percent.

To be counted towards the goals, a firm must perform a “commercially useful function” (“CUF”), defined as responsibility for working on the contract and performing, managing and supervising the work. The subcontracted work must be commensurate with the payment amount.

d. Monitoring M/WBE Contractual Commitments

DPS is responsible for monitoring contracts to ensure compliance with M/WBE utilization commitments. Monthly payments to M/WBEs are tracked and verified and measured against goal attainment through the C2 system, a web-based reporting system. DPS conducts audits and site visits to physically observe and collect data to ensure that a CUF is being performed.

In March 2021, Mayor Lori Lightfoot issued Executive Order 2021-2 to enhance reporting requirements to understand how diverse firms are being utilized on City contracts. Contractors are required to submit quarterly reports on the usage of certified firms throughout the duration of the contract that compare actual usage against the usage projected at the start of the contract. An explanation and recovery plan must be submitted if participation is “materially below” projected usage.

e. Additional Program Incentives

In addition to these critical program elements, the City also offers several incentives to increase the participation of M/WBEs:

- The Diversity Credit Program is designed to encourage utilization of M/WBEs on non-government contracts without goals.
- The Mentor Protégé program is designed to assist small businesses to develop capacity and to become more competitive through partnering with larger, more experienced firms.
- The Phased Graduation Program allows firms that have exceeded the size or personal net worth limits to be counted towards decreasing amounts of contract goal credit over three years.
- Bidders may receive certain credits for specified usage of M/WBEs.

f. Race- and Gender-Neutral Measures

The City implements several race- and gender-neutral remedies to increase opportunities for all small firms:

- The Small Business and Mid-Size Business Initiatives (“SBI” and “MBI”) provide for certain sizes of contracts to be set aside for bidding only by small, local businesses.
- To encourage City prime contractors to utilize project-area subcontractors, tiered incentives are available based on the percentage of the work conducted by the project-area subcontractor.
- The City provides bid incentives to City-based businesses to increase their participation.
- The City conducts extensive outreach, training and technical support services programs, including networking opportunities, access to training in the areas of project management, business development, construction management, and support services to build capacity.

g. New Initiatives

In 2021, Mayor Lori Lightfoot announced two important supportive services initiatives to help small and diverse businesses:

- The \$25M Chicago Vendor Impact Fund will provide access to capital and more affordable financing to diverse contractors and vendors.
- The Prompt Payment Working Group is planning to implement measures to help City vendors to be paid in an efficient and timely manner for their services.

We understand that the City is also exploring ways to provide more assistance services to small contractors to help them apply for bid and performance surety bonds.

3. Business Owners’ Experiences with the City of Chicago’s Minority- and Women-Owned Business Enterprise Construction Program

To explore the impacts of the City’s program, we interviewed 175 individuals about their experiences, or the experiences of their group’s members, and solicited their suggestions for changes. The discussions covered the following topics:

M/WBE Eligibility Requirements and Certification Processes: Overall, certified firms expressed support for the City’s rigorous certification process. Nevertheless, a number of deficiencies in the process were noted. Lengthy delays were reported in processing initial applications were compounded by lengthy delays in reviewing applications for recertification. Additionally, many M/WBEs stated that the City’s current definition of a small business

inhibits their growth and opportunities; the SBA limits on annual gross receipts were said not to be an accurate measure of a firm's ability to compete. M/WBEs who have "graduated" reported greatly diminished opportunities. Several large prime contractors agreed that the limits unfairly inhibit M/WBEs' growth and opportunities. However, some industry leaders opposed raising the business size standards.

Payments: There was universal agreement that the City pays way too slowly, negatively impacting all firms. Slow payment was the number one criticism of the City's construction activities. Payment delays discourage M/WBEs from seeking to work on City contracts, especially as prime contractors. Change orders present yet more payment challenges. Some WBEs suggested the City directly pay subcontractors rather than paying the prime contractor that then pays its subcontractors; others questioned whether that addresses the underlying problem and most prime contractors did not support the idea.

Technical Assistance, Supportive Services and Incentive Program: The City conducts many outreach events. However, some firms suggested a more targeted approach that focuses on mid-level M/WBEs. More training and technical support for M/WBEs was also urged by several large prime contractors. Many business owners urged the City to provide some sort of working capital program or at least up-front mobilization payments to get a job started. The current SBI and MBI efforts and the Mentor-Protégé program were reported to need revamping.

Meeting Contract Goals: Most prime contractors were able to meet M/WBE contract goals. However, many expressed concerns about the availability of certified firms to perform on City jobs. Goals that were greater than availability were believed to sometimes hurt M/WBEs by stretching them beyond their current financial and operational capacities. Further, many prime contractors questioned how the City sets contract goals. Some bidders found the City's directory of certified firms difficult to use. Bidders who were unable to meet the contract goals reported they did not bid the job because they assumed that their submission of GFE documentation would not be accepted. Some prime firms reported that it is nearly impossible to get a substitution of a non-performing certified subcontractor approved. Some White male owners felt that they suffer discrimination because of the program; they urged the City to "graduate" M/WBEs faster and stated that the program should not function as a "hand out".

Contract Administration and Performance Monitoring: There was close to universal agreement that the program is under resourced for the size and scope of its functions. This lack of staffing may lead to, among other things, insufficient monitoring of prime contractors' compliance with M/WBE utili-

zation plans. An advocate or ombudsperson for M/WBEs was proposed by many interviewees as a much-needed enhancement to the City program.

Contract Closeouts: M/WBEs and large prime contractors agreed that the length of time to close out contracts presents special challenges.

C. Qualitative Evidence of Race and Gender Barriers in the City of Chicago’s Market

To develop anecdotal evidence relevant to whether, despite the successful operations of the program, M/WBEs continue to face discriminatory barriers to their full and fair participation in City construction opportunities, we interviewed 175 business owners, and representatives from assist agencies and trade associations, as well as conducted an electronic survey. Consistent with other evidence reported in this Study, the interviews and the survey results strongly suggest that minorities and women continue to suffer from significant discriminatory barriers to full and fair access to City construction contracts. These results also shed light on the likely efficacy of using only race- and gender-neutral remedies to combat discrimination.

M/WBEs reported the following:

- Many M/WBEs reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications, professionalism and capabilities.
- Owners sometimes still suffer from racial and gender harassment.
- Many female interviewees had experienced sex discrimination, ranging from gender bias to hostile work environments to outright sexual harassment. Sexist attitudes were reported to still be common.
- Many minorities and women reported that there still exists a “good old boys” network that makes it difficult for them to fairly obtain construction opportunities. They are often excluded from the industry networks necessary for success.
- Many M/WBEs experienced barriers to obtaining working capital and surety bonds. Prime contracts were especially hard to obtain.
- M/WBEs reported that suppliers often charge their firms higher pricing and offer more unfavorable terms than they do their non-M/WBE counterparts.
- There was almost universal agreement that the City’s M/WBE program remains necessary to reduce these types of barriers. Without the use of contract goals, most M/WBEs believe they would receive little or no City

work; many believed that majority-owned prime firms use them only if forced to do so.

- Despite being used on public contracts, many M/WBEs were almost locked out of the market for larger, private sector jobs in the Chicago area.

D. Analysis of Economy-Wide Race and Gender Disparities in the City of Chicago’s Construction Market

We explored the Census Bureau data and relevant government and academic reports relevant to how discrimination in the Chicago metropolitan area’s construction market and throughout the wider Illinois economy adversely affects the ability of minorities and women to fairly and competitively engage in the City’s contract opportunities. We found:

- Data from the Census Bureau’s Annual Business Survey indicate M/WBE firms experience large disparities compared to similar non-M/WBE firms in sales or payrolls.
- Data from the Census Bureau’s American Community Survey (“ACS”) indicate that Blacks, Hispanics, Native Americans, Asians, Others, and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men.
- Reports on access to commercial credit and the development of human capital further indicate that minorities and women continue to face constraints on their entrepreneurial success based on race and gender. These constraints negatively impact the ability of firms to form, to grow, and to succeed.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will likely become a passive participant in overall marketplace discrimination without some type of affirmative intervention. Taken together with anecdotal data, these results suggest that, in the absence of M/WBE contract goals, the City will likely again become a passive participant in discriminatory systems for its construction contracts.

E. Utilization, Availability and Disparity Analyses of the City of Chicago's Construction Contracts

The study examined City of Chicago contract and procurement data dollars for 2015 through 2019, totaling approximately \$1.55B. We found the City's geographic market area for construction contracts to be the Chicago area six-County region.

The utilization of M/WBEs on City prime contracts and associated subcontracts strongly suggests that the construction program has met the objective of removing overall barriers to participation on City projects on the basis of race and gender. In the aggregate across industry codes and for all groups presumed to be "socially disadvantaged" under the City's ordinance, utilization by groups as prime contractors and subcontractors for the study period was 54.2 percent for M/WBEs (7.7 percent for Black-owned businesses, 17.1 percent for Hispanic-owned businesses, 16.4 percent for Asian-owned businesses, 0.0 percent for Native American-owned businesses), 13.0 percent for White woman-owned businesses and 45.9 percent for non-M/WBE owned businesses.

We found the "expected" availability (the availability that might be expected "but for" the discriminatory outcomes identified in the Census Bureau's ACS data, described above) of 16.8 percent for MBEs (4.4 percent for Black-owned businesses, 8.4 percent for Hispanic-owned businesses, 3.9 percent for Asian-owned businesses, 0.1 percent for Native American-owned businesses) and 9.5 percent for WBEs.

A closer look revealed additional patterns of the distribution of contracts across groups and industry codes, as well as for the distribution of dollars. These additional analyses shed light on whether these outcomes are the result of the cessation of discrimination or are an artifact of the operations of the program. In other words, is the overall success of the program in setting goals for M/WBE utilization masking differences in outcomes and opportunities when examined at a more granular level?

We found that M/WBEs are much more reliant on subcontracts compared to non-M/WBEs. For Black, Hispanic, and White woman-owned firms, over 90 percent of their work is as subcontractors. In contrast, for non-M/WBE-owned firms, just under 73 percent of their work is as subcontractors. In addition, the results demonstrate that when examining the dollars received by M/WBEs, there is a small number of firms that receive a large share of the dollars in each NAICS code, and that amongst the various disaggregated racial, ethnic and gender groupings, this pattern continues. This suggests that while the City's program has had some meaningful success in breaking down barriers to provide significant opportunities to M/WBEs on certain sub-industries, these dollars are highly concentrated

amongst a small group of firms and there is not yet parity when comparing a group's share of contracts to its share of dollars.

F. Recommendations for City of Chicago's Minority- and Women-Owned Business Enterprise Construction Program

We found that although M/WBEs as a whole received ample dollars on City jobs, this was likely due largely to the existence of the program, and widespread discrimination continues in the construction industry. Further, opportunities were concentrated amongst a somewhat limited number of firms and were mostly in subcontracting. These results provide the City with the evidence necessary to support the continuing need for race- and gender-conscious remedies and to narrowly tailor the program. The following are the major recommendations based upon these findings.

- *Reaffirm the Current MBE and WBE Program Goals:* The City should continue to set annual, overall targets for utilization of MBEs and WBEs on its construction contracts. The current goals of 26 percent for MBE participation and 6 percent for WBE participation have been achieved and there is no reason to expect that these levels cannot be maintained going forward.
- *Revise the Business Size Standard for Program Eligibility:* The current ordinance adopts the U.S. Small Business Administration's size standards for program eligibility, which vary by 6-digit NAICS codes, ranging from the highest limit at \$39.5M for heavy civil work to \$16.5M for specialty trade contractors. However, these national numbers do not fully reflect the costs of doing business in the Chicago construction marketplace. Firms somewhat above these thresholds are still not able to fully compete with long established non-M/WBEs, who in many cases, have had decades to make critical business and financial connections, build client networks, gain expertise, acquire market share and build their businesses from public contracts. We therefore suggest that the threshold be raised to 150 percent of the applicable NAICS code size standard. While still relatively small by comparison to major area construction companies, this will permit minority and woman businesses to better compete for larger subcontracts and prime contracts, as well as to make inroads into the market for privately financed projects. We further recommend that the period over which gross receipts will be averaged be lengthened to seven years from the current five-year period. This will more accurately reflect the market strength of the certified firm.

- *Revise the Personal Net Worth Standard for Program Eligibility:* The personal net worth limit likewise functions as a ceiling on the growth and success of certified firms. While also required by the courts, the current test does not reflect the actual cash flow needs of construction firms. Construction firms need liquidity. We therefore suggest that the City exclude equity interests in other businesses other than publicly traded stocks and funds; equity interests in real estate; the market value of goods such as art, furnishings, jewelry, vehicles, and other non-monetary assets; and the full value of all retirement accounts.
- *Create a Department of Business Opportunity:* From its inception, the program has been housed in the procurement department. While this made sense when the first ordinance was enacted in 1990, more than 30 years of national experience suggests that business inclusion and equity should be a separate, standalone department or office apart from DPS. While not in conflict with non-discrimination and inclusion, the purchasing function's mission does not focus on remediating barriers or advocating for small and minority and woman-owned firms. A new office would support equal access to contracts and support the growth and success of M/WBEs and small firms and lead the effort to make process improvements. This Department should be given sufficient staff to remedy the current shortfall in adequate staffing of the program.
- *Pay Promptly and Ensure Prime Vendors Promptly Pay Subcontractors:* Slow payment by the City was the number one criticism of the City's construction activities. Fixing the payment problem is the most important administrative improvement the City can make. The Mayor's Prompt Payment Working Group should be an integral part of this effort.
- *Use the Detailed Study Availability Data to Set M/WBE Contract Goals:* Using study data to set narrowly tailored goals will provide transparency and defensibility, as well as reduce requests for waivers. The C2 electronic data collection and monitoring system contains a contract goal setting module developed to utilize the study data as the starting point. Written policies explaining the contract goal setting steps should be disseminated so that all contracting actors understand the methodology.
- *Revise the Employee Location Requirement for Program Eligibility:* Since the inception of the ordinance, not only must the applicant firm be located in the six-County Chicago region, but the majority of the firm's full-time work force must also live in the region. Chicago's program may be unique in the nation by imposing this extra requirement. In our view, this is an unnecessary limitation on the pool of available firms and places a burden on M/WBE firms that is not placed on non-M/WBE firms. The residence of a firm's employees

has no relationship to whether the firm faces discriminatory barriers on the basis of the race or gender of its owner and this limitation should be dropped.

- *Address Certification and Recertification Delays:* We suggest that the City review the application and reapplication process for timeliness, and work towards eliminating any roadblocks. While program integrity is of paramount value, legitimate firms can be discouraged by reports of long wait times. Prime contractors who might otherwise use new subcontractors, may demur because of concerns that a firm will not be certified, or not remain certified, by the time of bid or proposal submission. Another revision to reduce the impact of delays on recertification would be to eliminate the expiration of certification status, as is the case in the DBE program, so that eligibility must be affirmatively removed.
- *Focus on Supporting Opportunities for M/WBEs to Perform as Prime Contractors:* While certified firms regularly receive subcontracts, contracts for prime work are either out of reach for most M/WBEs (especially Black contractors), or too risky to take on, especially in industry codes of large City spending.⁸ We recommend the City place special emphasis on reducing barriers to prime awards, so that M/WBE dollars are not concentrated in less lucrative subsectors.
- *Ensure Full and Complete Contract Data Collection:* All departments should enter their contract data in the C2 system, including full information on non-certified subcontractors. This will facilitate contract monitoring and increase uniformity and transparency.
- *Clarify, Revise and Publicize the Requirements for Good Faith Efforts to Meet Contract Goals:* Numerous prime contractors reported that it is very difficult to establish their Good Faith Efforts to meet a contract goal. Many will not bid a project unless they are certain they can meet the goals. To address this possible diminution of competition and provide the flexibility that is required by strict constitutional scrutiny, we recommend that the City provide targeted training to bidders and City staff on how to submit and evaluate acceptable GFEs. Further, to assist firms that have grown beyond the size or personal net worth limits of the program, but who still face discriminatory barriers because they remain owned by socially disadvantaged individuals, we suggest that a prime bidder's utilization of such firms be counted towards evidence of its GFEs to meet a contract goal. While these dollars would not be credited towards meeting the goal, the use of non-certified M/WBEs would demonstrate non-discrimination.

8. NAICS code 237110, Water and Sewer Line and Related Structures Construction and NAICS code 237310, Highway, Street, and Bridge Construction, together account for almost two thirds of City construction spending in the study file.

- *Ensure Contract Monitoring*: Many M/WBEs reported that while the City does a good job of outreach, they often felt that little attention was paid to contract compliance during performance. This appears to be a resource issue. More staff to conduct actual field audits, and/or insisting that project managers from the user departments conduct commercially useful function and prompt payment reviews, would alleviate concerns about the actual operations of the program after contracts have been awarded.
- *Revise, Streamline and Develop Success Metrics for Procurement Bid Incentives*: The City currently has several bid incentives for prime contractors to utilize M/WBEs. There appears to have been no evaluation of the success of these measures. Further, most contractors we interviewed were unaware of them. We suggest that the City conduct an information campaign and begin to keep records of how many contracts were subject to which incentives; the dollars paid to M/WBEs on contracts with incentives; the effect on prices of these incentives; and the contracting community's overall satisfaction with these approaches.
- *Implement a Technical Assistance, Capital Access and Guaranteed Surety Bonding Program for M/WBEs*: While there are many training opportunities available through the City and assist agencies, M/WBE and non-M/WBE interview participants suggested that the City develop a robust technical assistance, capital access and bonding support program.
- *Revise the Mentor-Protégé Program*: The City's current Mentor-Protégé program is project-based rather than focused on building long term relationships. We suggest the program be revised to establish the elements of a relationship-based approach rather than a project-based approach.
- *Establish a Construction M/WBE Program Working Group*: An organized vehicle to obtain input from all segments of the construction contracting community is needed to address the issues raised in this report and to advance the program's objectives. This group should consist of City staff from the new department and major construction departments; M/WBE-focused construction organizations; and general industry associations. We suggest a first report within 90 days of the first meeting, and then quarterly updates on issues and the impact of new program elements or policy changes.
- *Develop Performance Measures for Program Success*: The City should develop performance measures to evaluate the effectiveness and the overall success of the program in reducing the systemic barriers identified by the study. In addition to meeting the MBE and WBE goals, possible benchmarks include:
 - Increased number of firms becoming certified.
 - Increased prime contract bidding by certified firms.

- Increased prime contract awards to certified firms.
- Increased subcontracting by certified firms in industries where their activity levels have been lower.
- Increased “capacity” of certified firms as measured by the ability to perform more varied and specialized work, increased bonding limits, size of jobs, profitability, or other factors.
- Progress towards achievement of the annual aspirational MBE and WBE goals.
- The number of bids and the dollar amount of the awards and the goal shortfall where the bidder submitted good faith efforts to meet the contract goal and the outcomes of such submissions.
- The number, type, and dollar amount of substitutions of certified firms during contract performance.
- Annual evaluation of the results of contracts with no goals where there is ample M/WBE availability.

II. LEGAL STANDARDS FOR LOCAL GOVERNMENT CONTRACTING EQUITY PROGRAMS

A. Summary of Constitutional Equal Protection Standards

To be effective, enforceable, and legally defensible, a race-based affirmative action program for public sector contracts, regardless of funding source, must meet the judicial test of constitutional “strict scrutiny”.⁹ Strict scrutiny constitutes the highest level of judicial review.¹⁰ The strict scrutiny analysis is comprised of two prongs or elements:

1. The government must establish its “compelling interest” in remediating race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
2. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.¹¹

The compelling governmental interest prong has been met through two types of proof:

1. Quantitative evidence of the underutilization of minority- or woman-owned firms by the agency and/or throughout the agency’s geographic and industry market area as compared to their availability in the market area.
2. Qualitative evidence of race- or gender-based barriers to the full and fair participation of minority- and woman-owned firms in the market area or in seeking contracts with the agency.¹² Anecdotal data can consist of

9. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

10. Strict scrutiny is used by courts to evaluate governmental action that classifies persons on a “suspect” basis, such as race. It is also used in actions purported to infringe upon fundamental rights. Legal scholars frequently note that strict scrutiny constitutes the most rigorous form of judicial review. *See, for example*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA Law Review* 1267, 1273 (2007).

11. *Croson*, 488 U.S. at 510.

12. *Id.* at 509.

interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

The narrow tailoring prong has been met by satisfying the following five factors to ensure that the remedy “fits” the evidence upon which the agency relies:

1. The necessity of relief;¹³
2. The efficacy of race-neutral remedies at overcoming identified discrimination;¹⁴
3. The flexibility and duration of the relief, including the availability of waiver provisions;¹⁵
4. The relationship of numerical goals to the relevant labor market;¹⁶ and
5. The impact of the relief on the rights of third parties.¹⁷

In *Adarand v. Peña*¹⁸, the United States Supreme Court extended the analysis of strict scrutiny to race-based federal enactments such as the United States Department of Transportation (“USDOT”) Disadvantaged Business Enterprise (“DBE”) program for federally assisted transportation contracts. Just as in the local government context, the national legislature must have a compelling governmental interest for the use of race, and the remedies adopted must be narrowly tailored to that evidence.¹⁹

Most federal courts, including the Seventh Circuit,²⁰ have subjected preferences for Woman-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny”.²¹ Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.²² The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to satisfy strict scrutiny. However, appellate courts have applied strict scrutiny to the

13. *Id.* at 507; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-238 (1995) (“*Adarand III*”).

14. *United States v. Paradise*, 480 U.S. 149, 171 (1987).

15. *Id.*

16. *Id.*

17. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (“*Adarand III*”).

18. *Croson*, 488 U.S. at 506.

19. *See, for example, Croson*, 488 U.S. at 492-493; *Adarand III*, 515 U.S. 200, 227; *see generally Fisher v. University of Texas*, 133 S. Ct. 2411 (2013).

20. *W.H. Scott Construction Co., Inc., v. City of Jackson, Mississippi*, 199 F.3d 206, 215 n.9 (5th Cir. 1999).

21. *See, e.g., Associated Utility Contractors of Maryland v. Mayor of Baltimore*, 83 F. Supp. 2d 613, 620 (D. Md. 2000); *Scott*, 199 F.3d at 206, 215, *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997) (“*Engineering Contractors II*”); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (“*Concrete Works II*”); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990, 1009-1011 (3rd Cir. 1993) (“*Philadelphia II*”); *Coral Construction Co. v. King County, Washington*, 941 F.2d 910, 930-931 (9th Cir. 1991).

22. *Cf. United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).

gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program²³ or held that the results would be the same under strict scrutiny.²⁴

Classifications not based upon a suspect class (race, ethnicity, religion, national origin or gender) are subject to the lesser standard of review referred to as “rational basis scrutiny”.²⁵ The courts have held there are no equal protection implications under the Fourteenth Amendment of the United States Constitution for groups not subject to systemic discrimination.²⁶ In contrast to both strict scrutiny and intermediate scrutiny, rational basis means the governmental action or statutory classification must be “rationally related” to a “legitimate” government interest.²⁷ Thus, preferences for persons with disabilities or veteran status may be enacted with vastly less evidence than that required for race- or gender-based measures to combat historic discrimination.²⁸

Unlike most legal challenges, the defendant bears the initial burden of producing “strong evidence” in support of its race-conscious program.²⁹ As held by the Seventh Circuit,³⁰ the plaintiff must then proffer evidence to rebut the government’s case, and bears the ultimate burden of production and persuasion that the affirmative action program is unconstitutional.³¹ “[W]hen the proponent of an affirmative action plan produces sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”³²

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”³³ To successfully rebut the government’s evidence, a plaintiff must introduce “credible, particularized evidence” that rebuts the government’s showing of a strong basis in evidence.³⁴ For example, in

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23. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007), *cert. denied*, _ U.S. ___, June 26, 2017 (“*Northern Contracting III*”).
 24. *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).
 25. *See generally, Coral Construction Co v. King County*, 941 F. 2d 910 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997).
 26. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
 27. *Heller v. Doe*, 509 U.S. 312, 320 (1993).
 28. The standard applicable to status based on sexual orientation or gender identity has not yet been clarified by the courts.
 29. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).
 30. *See generally, Dunnett Bay Construction Company v. Borggren*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).
 31. *Scott*, 199 F.3d at 219; *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), 532 U.S. 941, *cert. granted then dismissed as improvidently granted*, 534 U.S. 103 (2001) (“*Adarand VII*”).
 32. *Engineering Contractors II*, 122 F.3d at 916.
 33. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (10th Cir. 2003) (“*Concrete Works IV*”).

the challenge to the Minnesota and Nebraska DBE programs, “plaintiffs presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to, and participation in, federally assisted highway contracts. Therefore, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.”³⁵ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.³⁶ A plaintiff cannot rest upon general criticisms of studies or other related evidence; it must meet its burden that the government’s proof is inadequate to meet strict scrutiny, rendering the legislation or government program illegal.³⁷

To meet strict scrutiny, studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of minority- and woman-owned firms and their actual utilization compared to White male-owned businesses. More rigorous studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored. The following is a detailed discussion of the legal parameters and the requirements for conducting studies to support legally defensible programs.

B. Elements of Strict Scrutiny

In its decision in *City of Richmond v. J.A. Croson Co.*, the United States Supreme Court established the constitutional contours of permissible race-based public contracting programs. Reversing long established Equal Protection jurisprudence,³⁸ the Court, for the first time, extended the highest level of judicial examination from measures designed to limit the rights and opportunities of minorities to legislation that inures to the benefit of these victims of historic, invidious discrimination. Strict scrutiny requires that a government entity prove both its “compelling governmental interest” in remediating identified discrimination based

34. *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233 (4th Cir. 2010); *Midwest Fence Corp. v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (“*Midwest Fence I*”), *affirmed*, 840 F.3d 932 (7th Cir. 2016) (“*Midwest Fence II*”).

35. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

36. *Coral Construction*, 941 F. 2d at 921; *Engineering Contractors II*, 122 F.3d at 916.

37. *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1522-1523 (10th Cir. 1994) (“*Concrete Works II*”); *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999), *aff’d per curiam*, 218 F. 3d 1267 (11th Cir. 2000); *see also Wyygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

38. U.S. Const. Amend. XIV, §1.

upon “strong evidence”³⁹ and that the measures adopted to remedy that discrimination are “narrowly tailored” to that evidence. However benign the government’s motive, race is always so suspect a classification that its use must pass the highest constitutional test of “strict scrutiny”.

The Court struck down the City of Richmond’s Minority Business Enterprise Plan (“Plan”) because it failed to satisfy the strict scrutiny analysis applied to “race-based” government programs. The City’s “set-aside” Plan required prime contractors awarded City construction contracts to subcontract at least 30 percent of the project to Minority-Owned Business Enterprises (“MBEs”).⁴⁰ A business located anywhere in the nation was eligible to participate so long as it was at least 51 percent owned and controlled by minority citizens or lawfully-admitted permanent residents.

The Plan was adopted following a public hearing during which no direct evidence was presented that the City had discriminated on the basis of race in contracts or that its prime contractors had discriminated against minority subcontractors. The only evidence before the City Council was: (a) Richmond’s population was 50 percent Black, yet less than one percent of its prime construction contracts had been awarded to minority businesses; (b) local contractors’ associations were virtually all White; (c) the City Attorney’s opinion that the Plan was constitutional; and (d) generalized statements describing widespread racial discrimination in the local, Virginia, and national construction industries.

In affirming the court of appeals’ determination that the Plan was unconstitutional, Justice Sandra Day O’Connor’s plurality opinion rejected the extreme positions that local governments either have *carte blanche* to enact race-based legislation or must prove their own active participation in discrimination:

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment...[I]f the City could show that it had essentially become a “passive participant” in a system of racial exclusion ...[it] could take affirmative steps to dismantle such a system.”⁴¹

39. There is no precise mathematical formula to assess what rises to the level of “strong evidence”. However, statistical evidence of discrimination constitutes a primary method used to determine whether strong evidence exists to adopt a program to remediate that discrimination.

40. The City described its Plan as remedial. It was enacted to promote greater participation by minority business enterprises in public construction projects.

41. 488 U.S. at 491-92.

Strict scrutiny of race-based remedies is required to determine whether racial classifications are in fact motivated by notions of racial inferiority or blatant racial politics. This highest level of judicial review “smokes out” illegitimate uses of race by ensuring that the legislative body is pursuing an important enough goal to warrant use of a highly suspect tool.⁴² It also ensures that the means chosen “fit” this compelling goal so closely that there is little or no likelihood that the motive for the classification was illegitimate racial prejudice or stereotype. The Court made clear that strict scrutiny is designed to expose racial stigma; racial classifications are said to create racial hostility if they are based on notions of racial inferiority.

Richmond’s evidence was found to be lacking in every respect.⁴³ The City could not rely upon the disparity between its utilization of MBE prime contractors and Richmond’s minority population because not all minority persons would be qualified to perform construction projects; general population representation is irrelevant. No data were presented about the availability of MBEs in either the relevant market area or their utilization as subcontractors on City projects.

According to Justice O’Connor, the extremely low MBE membership in local contractors’ associations could be explained by “societal” discrimination or perhaps Blacks’ lack of interest in participating as business owners in the construction industry. To be relevant, the City would have to demonstrate statistical disparities between eligible MBEs and actual membership in trade or professional groups. Further, Richmond presented no evidence concerning enforcement of its own anti-discrimination ordinance. Finally, the City could not rely upon Congress’ determination that there has been nationwide discrimination in the construction industry. Congress recognized that the scope of the problem varies from market to market, and, in any event, it was exercising its powers under Section Five of the Fourteenth Amendment. Local governments are further constrained by the Amendment’s Equal Protection Clause.

In the case at hand, the City has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in City construction projects. The City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the City has demonstrated “a strong basis in evidence for its conclusion that remedial action was necessary.”⁴⁴

42. See also *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”).

43. The City cited past discrimination and its desire to increase minority business participation in construction projects as the factors giving rise to the Plan.

44. *Crosby*, 488 U.S. at 510.

This analysis was applied only to Blacks. The Court emphasized that there was “absolutely no evidence” of discrimination against other minorities. “The random inclusion of racial groups that, as a practical matter, may have never suffered from discrimination in the construction industry in Richmond, suggests that perhaps the City’s purpose was not in fact to remedy past discrimination.”⁴⁵

Having found that Richmond had not presented evidence in support of its compelling interest in remediating discrimination—the first prong of strict scrutiny—the Court made two observations about the narrowness of the remedy—the second prong of strict scrutiny. First, Richmond had not considered race-neutral means to increase MBE participation. Second, the 30 percent quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.⁴⁶ The Court noted that the City “does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁴⁷

Recognizing that her opinion might be misconstrued to eliminate all race-conscious contracting efforts, Justice O’Connor closed with these admonitions:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the City could act to dismantle the closed business system by taking appropriate measures against those who discriminate based on race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion... Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.⁴⁸

While much has been written about *Croson*, it is worth stressing what evidence was, and was not, before the Court. First, Richmond presented *no* evidence

45. *Id.*

46. *See Grutter*, 529 U.S. at 336-337 (quotas are not permitted; race must be used in a flexible, non-mechanical way).

47. *Croson*, 488 U.S. at 502.

48. *Id.* at 509 (citations omitted).

regarding the availability of MBEs to perform as prime contractors or subcontractors and *no* evidence of the utilization of minority-owned subcontractors on City contracts.⁴⁹ Nor did Richmond attempt to link the remedy it imposed to any evidence specific to the program; it used the general population of the City rather than any measure of business availability.

Some commentators have taken this dearth of any particularized proof and argued that only the most particularized proof can suffice in all cases. They leap from the Court's rejection of Richmond's reliance on only the percentage of Blacks in the City's population to a requirement that only firms that bid or have the "capacity" or "willingness" to bid on a particular contract at a particular time can be considered in determining whether discrimination against Black businesses infects the local economy.⁵⁰

This argument has been rejected explicitly by some courts. In denying the plaintiff's summary judgment motion to enjoin the City of New York's M/WBE construction ordinance, the court stated:

[I]t is important to remember what the *Croson* plurality opinion did and did not decide. The Richmond program, which the *Croson* Court struck down, was insufficient because it was based on a comparison of the minority population in its entirety in Richmond, Virginia (50%) with the number of contracts awarded to minority businesses (0.67%). There were no statistics presented regarding the number of minority-owned contractors in the Richmond area, *Croson*, 488 U.S. at 499, and the Supreme Court was concerned with the gross generality of the statistics used in justifying the Richmond program. There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.⁵¹

Further, Richmond made no attempt to narrowly tailor a goal for the procurement at issue that reflected the reality of the project. Arbitrary quotas, and the unyielding application of those quotas, did not support the stated objective of ensuring equal access to City contracting opportunities. The *Croson* Court said nothing about the constitutionality of flexible goals based upon the availability of MBEs to perform the scopes of the contract in the government's local market area. In con-

49. *Id.* at 502.

50. *See, for example, Northern Contracting III*, 473 F.3d at 723.

51. *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785, *28-29 (E.D. N.Y. 1998); *see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2nd Cir. 1992) ("Croson made only broad pronouncements concerning the findings necessary to support a state's affirmative action plan"); *cf. Concrete Works II*, 36 F.3d at 1528 (City may rely on "data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion").

trast, the USDOT DBE program avoids these pitfalls. 49 C.F.R. Part 26 “provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*”.

While strict scrutiny is designed to require clear articulation of the evidentiary basis for race-based decision-making and careful adoption of remedies to address discrimination, it is not, as Justice O’Connor stressed, an impossible test that no proof can meet. Strict scrutiny need not be “fatal in fact”.

C. Establishing a “Strong Basis in Evidence” for the City of Chicago’s Program for Minority- and Woman-Owned Construction Businesses

The case law on the DBE program should guide the City’s program for locally funded contracts. Whether the program is called an M/WBE program or a DBE program or any other moniker, the strict scrutiny test applies. As discussed, 49 C.F.R. Part 26 has been upheld by every court, and local programs for Minority- and Woman-Owned Business Enterprises (“M/WBEs”) will be judged against this legal framework.⁵² As previously noted, programs for veterans, persons with disabilities, preferences based on geographic location or truly race- and gender-neutral small business efforts are not subject to strict scrutiny but rather the lower level of scrutiny called “rational basis”. Therefore, no evidence comparable to that in a disparity study is needed to enact such initiatives.

It is well established that disparities between an agency’s utilization of M/WBEs and their availability in the relevant marketplace provide a sufficient basis for the consideration of race- or gender-conscious remedies. Proof of the disparate impacts of economic factors on M/WBEs and the disparate treatment of such firms by actors critical to their success is relevant and probative under the strict scrutiny standard. Discrimination must be shown using sound statistics and economic models to examine the effects of systems or markets on different groups, as well as by evidence of personal experiences with discriminatory conduct, policies or systems.⁵³ Specific evidence of discrimination or its absence may be direct or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs.⁵⁴

Croson’s admonition that “mere societal” discrimination is not enough to meet strict scrutiny is met where the government presents evidence of discrimination in the industry targeted by the program. “If such evidence is presented, it is immate-

52. *Midwest Fence II*, 840 F.3d. at 953.

53. *Adarand VII*, 228 F.3d at 1166 (“statistical and anecdotal evidence are appropriate”).

54. *Id.*

rial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry... The genesis of the identified discrimination is irrelevant.” There is no requirement to “show the existence of specific discriminatory policies and that those policies were more than a reflection of societal discrimination.”⁵⁵

The City of Chicago need not prove that it is itself guilty of discrimination to meet its burden. In upholding Denver’s M/WBE construction program, the court stated that Denver can show its compelling interest by “evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination...[by] linking its spending practices to the private discrimination.”⁵⁶ Denver further linked its award of public dollars to discriminatory conduct through the testimony of M/WBEs that identified general contractors who used them on City projects with M/WBE goals but refused to use them on private projects without goals.

The following are the evidentiary elements courts have looked to in examining the basis for, and determining the constitutional validity of, race- and gender-conscious local programs and the steps in performing a disparity study necessary to meet those elements.

1. Define the City of Chicago’s Construction Market Area

The first step is to determine the construction market area in which the City operates. *Croson* states that a state or local government may only remedy discrimination within its own contracting market area. The City of Richmond was specifically faulted for including minority contractors from across the country in its program, based on national data considered by Congress.⁵⁷ The City must therefore empirically establish the geographic and product dimensions of its construction contracting and procurement market area to ensure that the program meets strict scrutiny. This is a fact driven inquiry; it may or may not be the case that the market area is the government’s jurisdictional boundaries.⁵⁸ This study employs long established economic principles to empirically establish the City’s geographic and product market area to ensure that any program based on the study satisfies strict scrutiny.

A commonly accepted definition of geographic market area for disparity studies is the locations that account for at least 75 percent of the agency’s contract

55. *Concrete Works IV*, 321 F.3d at 976.

56. *Id.* at 977.

57. *Croson*, 488 U.S. at 508.

58. *Concrete Works II*, 36 F.3d at 1520 (to confine data to strict geographic boundaries would ignore “economic reality”).

and subcontract dollar payments.⁵⁹ Likewise, the accepted approach is to analyze those detailed industries that make up at least 75 percent of the prime contract and associated subcontract payments for the study period.⁶⁰ This produces the utilization results within the geographic market area.⁶¹

2. Determine the City of Chicago’s Utilization of M/WBEs on Construction Contracts

The study should next determine the City’s utilization of M/WBEs in its geographic market area. Generally, this analysis should be limited to formally procured contracts, since it is unlikely that it is realistic or useful to set goals on small dollar purchases. Developing the file for analysis involves the following steps:

- Develop the initial contract data files. This involves first gathering the City’s records of its payments to prime contractors, and if available, associated subcontractors.
- Develop the final contract data file. Whatever data are missing (often race and gender ownership, North American Industry Classification System or other industry codes, work descriptions or other important information not collected by the agency) must be reconstructed by the consultant. Using surveys is unlikely to yield sufficient data. It is also important to research whether a firm that has an address outside the market area has a location in the geographic market area (contract records often have far flung addresses for payments). All necessary data for at least 80 percent of the contract dollars in the final contract data files should be collected to ensure a comprehensive file that mirrors the City’s contracting and procurement activities.

3. Determine the Availability of M/WBEs in the City of Chicago’s Construction Market Area

Next, the study must estimate the availability of minorities and women in the City’s market area to participate in the City’s contracts as prime contractors and associated subcontractors. Based on the product and geographic utilization data, the study should calculate unweighted and weighted M/WBE avail-

59. National Academies of Sciences, Engineering, and Medicine 2010, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14346> (“National Disparity Study Guidelines”).

60. *Id.* at 50-51.

61. For this Report, we found the City’s market area to be the counties of Cook, Dupage, Lake, Kane, Will and McHenry, Illinois. Firms in these counties received 97.5 percent of the dollars spent by the City in the Final Contract Data File. Please see Chapter III for additional details.

ability estimates of ready, willing and able construction firms in the City's market. These results will be a narrowly tailored, dollar-weighted average of all the underlying industry availability numbers; larger weights will be applied to industries with relatively more spending and lower weights applied to industries with relatively less spending. The availability figures should be sub-divided by race, ethnicity, and gender.

The availability analysis involves the following steps:

1. The development of the Merged Business Availability List. Three data sets are used to develop the Merged Business Availability List:
 - The firms in the M/WBE Master Directory. This methodology includes both certified firms and non-certified firms owned by minorities or women.⁶² The Master Directory consists of all available government and private D/M/WBE directories, limited to firms within the City's geographic and product market.
 - The firms contained in the City's contract data file. This will require the elimination of any duplications because a firm might have received more than one contract for work in a given North American Industry Classification System ("NAICS") code during the study period.
 - Firms extracted from the Dun & Bradstreet MarketPlace/Hoovers database, using the relevant geographic and product market definitions.
2. The estimation of unweighted availability. The Merged Business Availability List will be the available universe of relevant firms for the study. This process will significantly improve the identification of minority-owned and woman-owned businesses in the business population. Race and sex must be assigned to any firm not already classified.⁶³ This will produce estimates of woman and minority business availability in the City's markets for each NAICS code in the product market; for woman and minority business availability for all NAICS codes combined; and for the broad industry categories of goods, services and construction. The detailed results should also be the basis for contract specific goal setting methodology.
3. The estimation of weighted availability. Using the weights from the utilization analysis, the unweighted availability should be adjusted for the share of the City's spending in each NAICS code. The unweighted

62. See *National Disparity Study Guidelines*, Chapter III, at 33-34.

63. We note this is an improvement over the approach described in the *National Disparity Study Guidelines*, which recommended a survey to assign classifications. While it is more labor intensive to actually assign race, gender and industry code to each firm than using a mathematical formula derived from survey results, it greatly improves the accuracy of the assignments, resulting in more narrowly tailored results.

availability determination will be weighted by the share of dollars the City actually spends in each NAICS code, derived from the utilization analysis. These resulting weighted availability estimates will be used in the calculation of disparity indices.

This adjustment is important for two reasons. First, disparity analyses compare utilization and availability. The utilization metrics are shares of dollars. The unweighted availability metrics are shares of firms. In order to make comparable analyses, the dollar shares are used to weight the unweighted availability. Second, any examination of the City's overall usage of available firms must be conducted with an understanding of what NAICS codes received what share of agency spending. Absent this, a particular group's availability share (high or low) in an area of low spending would carry equal weight to a particular group's availability share (high or low) in an area of large spending.

This methodology for estimating availability is usually referred to as the "custom census" approach with refinements to. This approach is favored for several reasons. As recognized by the courts and the National Model Disparity Study Guidelines,⁶⁴ this methodology in general is superior to the other methods for at least four reasons.

- First, it provides an internally consistent and rigorous "apples to apples" comparison between firms in the availability numerator and those in the denominator. Other approaches often have different definitions for the firms in the numerator (*e.g.*, certified M/WBEs or firms that respond to a survey) and the denominator (*e.g.*, registered vendors or the Census Bureau's County Business Patterns data).
- Second, by examining a comprehensive group of firms, it "casts a broader net" beyond those known to the agency. As held by the federal court of appeals in finding the Illinois Department of Transportation's program to be constitutional, the "remedial nature of [DBE programs] militates in favor of a method of D/M/W/SBE availability calculation that casts a broader net" than merely using bidders lists or other agency or government directories. A broad methodology is also recommended by the USDOT for the federal DBE program, which has been upheld by every court.⁶⁵ A custom census is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in the agency's market areas that have not been able to access its opportunities.

64. *National Disparity Study Guidelines*, pp.57-58.

65. *See Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program*, https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf.

- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. Several courts have held that the results of discrimination – which impact factors affecting capacity – should not be the benchmark for a program designed to ameliorate the effects of discrimination. They have acknowledged that minority and woman firms may be smaller, newer, and otherwise less competitive than non-M/WBEs because of the very discrimination sought to be remedied by race-conscious contracting programs.
- Racial and gender differences in these “capacity” factors are the *outcomes* of discrimination and it is therefore inappropriate as a matter of economics and statistics to use them as “control” variables in a disparity study.⁶⁶
- Fourth, it has been upheld by every court that has reviewed it, including in the failed challenge to the Illinois Department of Transportation’s DBE program⁶⁷ and most recently in the successful defense of the Illinois State Toll Highway’s DBE program, for which we served as testifying experts.⁶⁸

Other methodologies relying only on vendor or bidder lists may overstate or understate availability as a proportion of the City’s actual markets because they reflect only the results of the agency’s own activities, not an accurate portrayal of marketplace behavior. Other methods of whittling down availability by using assumptions based on surveys with limited response rates or guesses about firms’ capacities easily lead to findings that woman and minority businesses no longer face discrimination or are unavailable, even when the firm is actually working on agency contracts.

Many plaintiffs have argued that studies must somehow control for “capacity” of M/WBEs to perform specific agency contracts. The definition of “capacity” has varied based upon the plaintiff’s particular point of view, but it has generally meant firm age, firm size (full time employees), firm revenues, bonding limits and prior experience on agency projects (no argument has been made outside of the construction industry).

This test has been rejected by the courts when directly addressed by the plaintiff and the agency. As recognized by the courts and the *National Disparity Study Guidelines*, these capacity factors are not race- and gender-neutral vari-

66. For a detailed discussion of the role of capacity in disparity studies, see the *National Disparity Study Guidelines*, Appendix B, “Understanding Capacity.”

67. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007) (7th Cir. 2007).

68. *Midwest Fence, Corp. v. U.S. Department of Transportation et al*, 840 F.3d 932 (2016); see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *cert. denied*, 137 S.Ct. 2292 (2017).

ables. Discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors. In a perfectly discriminatory system, M/WBEs would have no “capacity” because they would have been prevented from developing any “capacity”. That certainly would not mean that there was no discrimination or that the government must sit by helplessly and continue to award tax dollars within the “market failure” of discrimination and without recognition of systematic, institutional race- and gender-based barriers. It is these types of “capacity” variables where barriers to full and fair opportunities to compete will be manifested. Capacity limitations on availability would import the current effects of past discrimination into the model, because if M/WBEs are newer or smaller because of discrimination, then controlling for those variables will mask the phenomenon of discrimination that is being studied. In short, identifiable indicators of capacity are themselves impacted and reflect discrimination. The courts have agreed. Based on expert testimony, judges understand that factors such as size and experience reflect outcomes influenced by race and gender: “M/WBE construction firms are generally smaller and less experienced *because* of discrimination.”⁶⁹ Significantly, *Croson* does not “require disparity studies that measure whether construction firms are able to perform a *particular contract*.”⁷⁰

To rebut this framework, a plaintiff must proffer its own study showing that the disparities disappear when whatever variables it believes are important are held constant and that controlling for firm specialization explained the disparities.⁷¹ “Since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. Speculative criticism about potential problems will not carry that burden.”⁷² “To successfully rebut the [Illinois] Tollway's evidence of discrimination, [plaintiff] Midwest {Fence} must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *See, Concrete Works IV*, 321 F.3d at 959 (citation omitted). Again, the Court finds that Midwest has failed to make this showing.”⁷³ “

There are also practical reasons to not circumscribe availability through “capacity” limitations. First, there is no agreement concerning what variables

69. *Concrete Works IV*, 321 F.3d at 983 (emphasis in the original).

70. *Id.*

71. Conjecture and unsupported criticism of the government are not enough. The plaintiff must rebut the government’s evidence and introduce “credible, particularized evidence” of its own. *See Midwest Fence II*, 840 F.3d at 942 (upholding the Illinois Tollway’s program for state funded contracts modeled after Part 26 and based on CHA’s expert testimony).

72. *Midwest Fence II*, 840 F.3d at 952.

73. *Midwest Fence I*, 2015 WL 1396376 at *22).

are relevant or how those variables are to be measured for the purpose of examining whether race and gender barriers impede the success of minority and woman entrepreneurs. [“Plaintiff’s’ expert] and Midwest Fence have not explained how to account for relative capacity.”⁷⁴ For example, a newly formed firm might be the result of a merger of much older entities or have been formed by highly experienced owners; it is unclear how such variations would shed light on the issues in a disparity study. Second, since the amount of necessary capacity will vary from contract to contract, there is no way to establish universal standards that would satisfy the capacity limitation. Third, firms’ capacities are highly elastic. Businesses can add staff, rent equipment, hire subcontractors or take other steps to be able to perform a particular scope on a particular contract. Whatever a firm’s capacity might have been at the time of the study, it may well have changed by the time the agency seeks to issue a specific future solicitation. Fourth, there are no reliable data sources for the type of information usually posited as important by those who seek to reduce availability estimates using capacity factors. While a researcher might have information about firms that are certified as M/WBEs or that are prequalified by an agency (which usually applies only to construction firms), there is no database for that information for non-certified firms, especially White male-owned firms that usually function as subcontractors. Any adjustment to the numerator (M/WBEs) must also be made to the denominator (all firms), since a researcher cannot assume that all White male-owned firms have adequate capacity but that M/WBEs do not.

Capacity variables, such as the length of time the owner has been in business, the receipts of the firms, the number of employees and other information, should be examined at the economy-wide level of business formation and earnings, discussed in Chapter V, not at the first stage of the analysis. To import these variables into the availability determination would confirm the downward bias that discrimination imposes on M/WBEs’ availability and the upward bias enjoyed by non-M/WBEs. These factors should also be explored during anecdotal data collection, discussed in Chapter IV, to develop data on how the formation and development of M/WBEs are affected by these types of factors. The ability of firms to perform a particular contract or scope of work is also relevant to contract goal setting, where the agency must use its judgment about whether to adjust the initial goal that results from the study data based on current market conditions and current firm availability.

74. *Midwest Fence II*, 840 F.3d at 952.

4. Examine Disparities between the City of Chicago’s Utilization of M/WBEs and M/WBE Availability

A disparity study for a local government must analyze whether there are statistically significant disparities between the availability of M/WBEs and their utilization on agency contracts.

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise... In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.⁷⁵

This is known as the “disparity ratio” or “disparity index” which is a critical element of the statistical evidence. A disparity ratio measures the participation of a group in the government’s contracting opportunities by dividing that group’s utilization by the availability of that group and multiplying that result by 100. Courts have looked to disparity indices in determining whether strict scrutiny is satisfied.⁷⁶ An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability.

The courts have held that disparity results must be analyzed to determine whether the results are “significant”. There are two distinct methods to measure a results’ significance. First, a “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80 percent of the availability measure. This is based on the Equal Employment Opportunity Commission’s “80 percent rule” that a ratio less than 80 percent presents a *prima facie* case of discrimination by supporting the inference that the result may be caused by the disparate impacts of discrimination.⁷⁷ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone.⁷⁸ A more in-depth discussion of statistical significance is provided in Appendix C.

75. *Croson*, 488 U.S. at 509; see *Webster*, 51 F.Supp.2d at 1363, 1375.

76. *Scott*, 199 F.3d at 218; see also *Concrete Works II*, 36 F.3d at 1526-1527; *O’Donnell Construction Co., Inc. v. State of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992); *Cone Corporation v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990).

77. 29 C.F.R. § 1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”); see *Engineering Contractors II*, 122 F3d at 914.

In addition to creating the disparity ratio, correct measures of availability are necessary to determine whether discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors, known as an “economy-wide” disparity analysis.⁷⁹

The City of Chicago need not prove that the statistical inferences of discrimination are “correct”. In upholding Denver’s M/WBE Program, the Tenth Circuit Court of Appeals noted that strong evidence supporting Denver’s determination that remedial action was necessary need not have been based upon “irrefutable or definitive” proof of discrimination. Statistical evidence creating inferences of discriminatory motivations was sufficient and, therefore, evidence of market area discrimination was properly used to meet strict scrutiny. To rebut this type of evidence, the plaintiff must prove by a preponderance of the evidence that such proof does not support those inferences.⁸⁰

Nor must the City demonstrate that the “ordinances will *change* discriminatory practices and policies” in the local market area; such a test would be “illogical” because firms could defeat the remedial efforts simply by refusing to cease discriminating.⁸¹

The City need not prove that private firms directly engaged in any discrimination in which the government passively participates do so intentionally, with the purpose of disadvantaging minorities and women.

Denver’s only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination.... Denver was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. To impose such a burden on a municipality would be tantamount to requiring proof of discrimination and would eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence.⁸²

78. A chi-square test – examining if the utilization rate was different from the weighted availability - is used to determine the statistical significance of the disparity ratio.

79. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868 at *69 (Sept. 8, 2005) (“*Northern Contracting II*”) (IDOT’s custom census approach was supportable because “discrimination in the credit and bonding markets may artificially reduce the number of M/WBEs”).

80. *Concrete Works IV*, 321 F. 3d at 971.

81. *Id.* at 973 (emphasis in the original).

82. *Id.* at 971.

Similarly, statistical evidence by its nature cannot identify the individuals responsible for the discrimination; there is no need to do so to meet strict scrutiny, as opposed to an individual or class action lawsuit.⁸³

5. Analyze Economy-Wide Evidence of Race- and Gender-Based Disparities in the Chicago Area Construction Market

The courts have repeatedly held that analysis of disparities in the rates at which M/WBEs in the government's markets form businesses compared to similar non-M/WBEs, their earnings from such businesses, and their access to capital markets are highly relevant to the determination of whether the market functions properly for all firms regardless of the race or gender of their ownership. These analyses contributed to the successful defense of the Illinois Tollway's DBE program.⁸⁴ As similarly explained by the Tenth Circuit, this type of evidence

demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.... The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.⁸⁵

83. *Id.* at 973.

84. *Midwest Fence I*, 2015 WL 1396376 at *21 ("Colette Holt's updated census analysis controlled for variables such as education, age, and occupation and still found lower earnings and rates of business formation among women and minorities as compared to white men.").

85. *Adarand VII*, 228 F.3d at 1147, 1168-69.

Business discrimination studies and lending formation studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. “Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it similarly demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”⁸⁶ Despite the contentions of plaintiffs that possibly dozens of factors might influence the ability of any individual to succeed in business, the courts have rejected such impossible tests and held that business formation studies are not flawed because they cannot control for subjective descriptions such as “quality of education”, “culture” and “religion”.⁸⁷

For example, in unanimously upholding the DBE Program for federally assisted transportation-related-contracts, the courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.⁸⁸ The Eighth Circuit Court of Appeals took a “hard look” at the evidence Congress considered, and concluded that the legislature had

spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, [the plaintiffs] presented evidence that the data were susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.⁸⁹

86. *Id.*

87. *Concrete Works IV*, 321 F.3d at 980.

88. *Id.*; *Western States*, 407 F.3d at 993; *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2004 U.S. Dist. LEXIS 3226 at *64 (N.D. Ill., Mar. 3, 2004) (“*Northern Contracting I*”).

89. *Sherbrooke*, 345 F.3d. at 970; *see also, Adarand VII*, 228 F.3d at 1175 (Plaintiff has not met its burden “of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market.”).

6. Evaluate Anecdotal Evidence of Race- and Gender-Based Barriers to Equal Opportunities in the Chicago Area Construction Market

A study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities because it is relevant to the question of whether observed statistical disparities are due to discrimination and not to some other non-discriminatory cause or causes. As observed by the Supreme Court, anecdotal evidence can be persuasive because it “brought the cold [statistics] convincingly to life.”⁹⁰ Testimony about discrimination practiced by prime contractors, bonding companies, suppliers, and lenders has been found relevant regarding barriers both to minority firms’ business formation and to their success on governmental projects.⁹¹ While anecdotal evidence is insufficient standing alone, “[p]ersonal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a [government’s] institutional practices that exacerbate discriminatory market conditions are [sic] often particularly probative.”⁹² “[W]e do not set out a categorical rule that every case must rise or fall entirely on the sufficiency of the numbers. To the contrary, anecdotal evidence might make the pivotal difference in some cases; indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”⁹³

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making as opposed to judicial proceedings. “Plaintiff offers no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not— indeed cannot— be verified because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perception.”⁹⁴ Likewise, the Tenth Circuit held that “Denver was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.”⁹⁵

90. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

91. *Adarand VII*, 228 F.3d at 1168-1172.

92. *Concrete Works II*, 36 F.3d at 1520,1530.

93. *Engineering Contractors II*, 122 F.3d at 926.

94. *Rowe*, 615 F.3d at 249.

95. *Concrete Works IV*, 321 F.3d at 989.

D. Narrowly Tailoring a Minority- and Woman-Owned Business Enterprise Construction Program for the City of Chicago

Even if the City has a strong basis in evidence to believe that race-based measures are needed to remedy identified discrimination, the program must still be narrowly tailored to that evidence. In striking down the City of Chicago’s earlier M/WBE construction program, the court held that “remedies must be more akin to a laser beam than a baseball bat.”⁹⁶ In contrast, as discussed above, programs that closely mirror those of the U.S. Department of Transportation’s Disadvantaged Business Enterprise Program⁹⁷ have been upheld using that framework.⁹⁸ The courts have repeatedly examined the following factors in determining whether race-based remedies are narrowly tailored to achieve their purpose:

- The necessity of relief;⁹⁹
- The efficacy of race- and gender-neutral remedies at overcoming identified discrimination;¹⁰⁰
- The relationship of numerical benchmarks for government spending to the availability of minority- and woman-owned firms and to subcontracting goal setting procedures;¹⁰¹
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;¹⁰²
- The relationship of numerical goals to the relevant market;¹⁰³
- The impact of the relief on third parties¹⁰⁴; and
- The overinclusiveness of racial classifications.¹⁰⁵

96. *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 742 (N.D. Ill. 2003).

97. 49 C.F.R. Part 26.

98. *See, e.g., Midwest Fence II*, 840 F.3d at 953 (upholding the Illinois Tollway’s program for state funded contracts modelled after Part 26 and based on CHA’s expert testimony).

99. *Croson* at 507; *Adarand III* at 237-238.

100. *Paradise* at 171.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Croson* at 506.

105. *Paradise* at 149, 171; *see also Sherbrooke*, 345 F.3d at 971-972.

1. Consider Race- and Gender-Neutral Remedies

Race- and gender-neutral approaches are necessary components of a defensible and effective M/WBE program,¹⁰⁶ and the failure to seriously consider such remedies has proven fatal to several programs.¹⁰⁷ Difficulty in accessing procurement opportunities, restrictive bid specifications, excessive experience requirements, and overly burdensome insurance and/or bonding requirements, for example, might be addressed by the City without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units that facilitate small business participation; providing technical support; and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.¹⁰⁸ Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.¹⁰⁹

The requirement that the agency must meet the maximum feasible portion of the goal through race-neutral measures, as well as estimate that portion of the goal that it predicts will be met through such measures, has been central to the holdings that the DBE program rule meets narrow tailoring.¹¹⁰ The highly disfavored remedy of race-based decision making should be used only as a last resort.

However, strict scrutiny does not require that every race-neutral approach must be implemented and then proven ineffective before race-conscious remedies may be utilized.¹¹¹ While an entity must give good faith consideration to race-neutral alternatives, “strict scrutiny does not require exhaustion of every possible such alternative...however irrational, costly, unreasonable, and unlikely to succeed such alternative might be... [S]ome degree of practicality is

106. *Croson*, 488 U.S. at 507 (Richmond considered no alternatives to race-based quota); *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) (“*Drabik II*”); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 609 (3rd Cir. 1996) (“*Philadelphia III*”) (City’s failure to consider race-neutral alternatives was particularly telling); *Webster*, 51 F.Supp.2d at 1380 (for over 20 years County never seriously considered race-neutral remedies); cf. *Aiken*, 37 F.3d at 1164 (failure to consider race-neutral method of promotions suggested a political rather than a remedial purpose).

107. *See, e.g., Florida A.G.C. Council, Inc. v. State of Florida*, Case No.: 4:03-CV-59-SPM at 10 (N. Dist. Fla. 2004) (“There is absolutely no evidence in the record to suggest that the Defendants contemplated race-neutral means to accomplish the objectives” of the statute.); *Engineering Contractors II*, 122 F.3d at 928.

108. *See* 49 CFR § 26.51; *Midwest Fence I*, 2015 WL 1396376 at *22 (“the Illinois Tollway has implemented at least four race-neutral programs to increase DBE participation, including: a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. The Tollway’s race-neutral measures are consistent with those suggested under the Federal Regulations”).

109. *Croson*, 488 U.S. at 503 n.3; *Webster*, 51 F.Supp.2d at 1380.

110. *See, e.g., Sherbrooke*, 345 F.3d. at 973

111. *Gutter*, 529 U.S. at 339.

subsumed in the exhaustion requirement.”¹¹² Actual results matter, too. “Like [the Illinois Department of Transportation], the [Illinois] Tollway uses race- and gender-neutral measures.... Those measures have not produced substantial DBE participation, however, so the Tollway also sets DBE participation goals.”¹¹³

2. Set Targeted M/WBE Goals

Numerical goals or benchmarks for M/WBE participation must be substantially related to their availability in the relevant market.¹¹⁴ For example, the DBE program rule requires that the overall goal must be based upon demonstrable evidence of the number of DBEs ready, willing, and able to participate on the recipient’s federally assisted contracts.¹¹⁵ “Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*.”¹¹⁶

It is settled case law that goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets; goals must be contract specific. In holding the City of Chicago’s former construction program to be insufficiently narrowly tailored, the court found that the MBE and WBE goals were “formulistic” percentages not related to the availability of firms.¹¹⁷ Contract goals must be based upon availability of M/WBEs to perform the anticipated scopes of the contract, location, progress towards meeting annual goals, and other factors.¹¹⁸ Not only is transparent, detailed contract goal setting legally mandated,¹¹⁹ but this approach also reduces the need to conduct good faith efforts reviews, as well as the temptation to create “front” companies and sham participation to meet unreasonable contract goals. While this is more labor intensive than defaulting to the annual, overall goals, narrow tailoring requires contract goal setting.

112. *Coral Construction*, 941 F.2d at 923.

113. *Midwest Fence II*, 840 F. 3d at 938.

114. *Webster*, 51 F.Supp.2d at 1379, 1381 (statistically insignificant disparities are insufficient to support an unexplained goal of 35 percent M/WBE participation in County contracts); *see also Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, et al.*, 83 F.Supp.2d 613, 621 (D. Md. 2000) (“*Baltimore I*”).

115. 49 C.F.R. § 26.45 (b).

116. *Sherbrooke*, 345 F.3d. at 972.

117. *BAGC v. Chicago*, 298 F. Supp.2d at 740.

118. *Midwest Fence I*, 2015 WL 1396376 at *23.

119. *See also Coral Construction*, 941 F.2d at 924.

3. Ensure Flexibility of Goals and Requirements

It is imperative that remedies not operate as fixed quotas.¹²⁰ An M/WBE program must provide for contract awards to firms who fail to meet the contract goals but make good faith efforts to do so. In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the USDOT’s DBE program¹²¹, a feature that has been central to the holding that the DBE program meets the narrow tailoring requirement. If the standards for evaluating whether a bidder who fails to meet the contract goal has made good faith efforts to so

seems vague, that is likely because it was meant to be flexible.... A more rigid standard could easily be too arbitrary and hinder prime contractors’ ability to adjust their approaches to the circumstances of particular projects. Midwest Fence’s real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. Midwest Fence contends this creates a de facto system of quotas because contractors believe they must meet the DBE goal in their bids or lose the contract. But Appendix A to the [DBE program] regulations cautions against this very approach.... Flexibility and the availability of waivers affect whether a program is narrowly tailored. The regulations caution against quotas; provide examples of good faith efforts prime contractors can make and states can consider; and instruct a bidder to use “good business judgment” to decide whether a price difference between a DBE and a non-DBE subcontractor is reasonable or excessive in a given case. For purposes of contract awards, this is enough to “give fair notice of conduct that is forbidden or required [citation omitted].¹²²

Chicago’s program failed narrow tailoring by imposing a “rigid numerical quota” on prime bidders’ utilization of MBEs and WBEs.¹²³ By contrast, the constitutionally sound Illinois Tollway’s program provides for detailed waiver provisions, including rights of appeal of adverse determinations that the bidder made a good faith effort to meet a contract goal.¹²⁴

120. See 49 C.F.R § 26.43 (quotas are not permitted and set-aside contracts may be used only in limited and extreme circumstances “when no other method could be reasonably expected to redress egregious instances of discrimination”).

121. *Croson*, 488 U.S. at 508; see also *Adarand VII*, 228 F.3d at 1181.

122. *Midwest Fence II*, 840 F3d at 948.

123. *BAGC v. Chicago*, 298 F. Supp.2d at 740 (“Waivers are rarely or never granted... The City program is a rigid numerical quota...formulistic percentages cannot survive strict scrutiny.”).

124. *Midwest Fence I*, 2015 WL 1396376 at *23.

4. Review Program Eligibility Over-Inclusiveness and Under-Inclusiveness

The over- or under-inclusiveness of those persons to be included in the City’s program is an additional consideration and addresses whether the remedies truly target the evil identified. Over-inclusiveness addresses the question whether a remedial program grants preferences or confers benefits to groups without examining whether each group is actually disadvantaged.

The groups to include must be based upon evidence demonstrating disparities caused by discrimination.¹²⁵ The “random inclusion” of ethnic or racial groups that may never have experienced discrimination in the entity’s market area may indicate impermissible “racial politics”.¹²⁶ In striking down Cook County, Illinois’ construction program, the Seventh Circuit remarked that a “state or local government that has discriminated just against Blacks may not by way of remedy discriminate in favor of Blacks and Asian-Americans and women.”¹²⁷ However, at least one court has held some quantum of evidence of discrimination for each group is sufficient; *Croson* does not require that each group included in the ordinance suffer equally from discrimination.¹²⁸ Therefore, remedies should be limited to those firms owned by the relevant minority groups, as established by the evidence, that have suffered actual harm in the market area.¹²⁹

The overinclusiveness concern is mitigated by the requirement that the firm’s owner(s) must be disadvantaged.¹³⁰ The DBE program’s rebuttable presumptions of social and economic disadvantage, including the requirement that the disadvantaged owner’s personal net worth not exceed a certain ceiling and that the firm meet the Small Business Administration’s size definitions for its industry, have been central to the courts’ holdings that it is narrowly tailored.¹³¹ “[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively

125. *Philadelphia II*, 6 F.3d 990, 1007-1008 (strict scrutiny requires data for each minority group; data was insufficient to include Hispanics, Asians or Native Americans).

126. *Webster*, 51 F.Supp.2d at 1380–1381.

127. *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001).

128. *Concrete Works IV*, 321 F.3d at 971 (Denver introduced evidence of bias against each group; that is sufficient); cf. *Midwest Fence II*, 840 F3d at 945 (“Midwest has not argued that any of the groups in the table [in the expert report] were not in fact disadvantaged at all.”).

129. *Rowe*, 615 F.3d at 233, 254 (“[T]he statute contemplates participation goals only for those groups shown to have suffered discrimination. As such, North Carolina’s statute differs from measures that have failed narrow tailoring for overinclusiveness.”).

130. In the DBE program, preferences are limited to small businesses and owners whose personal net worth is not over the prescribed threshold. Additionally, a qualifying small business owned by a White male can become a program beneficiary based upon criteria set forth in Part 26 for an individual showing of social and economic disadvantage. See generally, *Northern Contracting I*; Appendix E to Part 26, Individual Determinations of Social and Economic Disadvantage.

[socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.”¹³² In contrast, Chicago’s program was held to fail strict scrutiny because “[t]he “graduation” revenue amount is very high, \$ 27,500,000, and very few have graduated. There is no net worth threshold. A third generation Japanese-American from a wealthy family, and with a graduate degree from MIT, qualifies (and an Iraqi immigrant does not)”.¹³³

5. Evaluate the Burden on Third Parties

Failure to make “neutral” changes to contracting and procurement policies and procedures that disadvantage M/WBEs and other small businesses may result in a finding that the program unduly burdens non-M/WBEs.¹³⁴ The trial court in the City of Chicago case noted that “there was little testimony about the effectiveness of race-neutral programs”.¹³⁵ However, “innocent” parties can be made to share some of the burden of the remedy for eradicating racial discrimination.¹³⁶

The Court reiterates that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors. The Tollway's method of goal setting is identical to that prescribed by the Federal Regulations, which this Court has already found to be supported by “strong policy reasons” [citation omitted].... Here, where the Tollway Defendants have provided persuasive evidence of discrimination in the Illinois road construction industry, the Court finds the Tollway Program's burden on non-DBE subcontractors to be permissible.¹³⁷

131. *Sherbrooke*, 345 F.3d at 973; *see also Grutter*, 539 U.S. at 341; *Adarand VII*, 228 F.3d at 1183-1184 (personal net worth limit is element of narrow tailoring); *cf. Associated General Contractors of Connecticut v. City of New Haven*, 791 F.Supp. 941, 948 (D. Conn. 1992), *vacated on other grounds*, 41 F.3d 62 (2nd Cir. 1992) (definition of “disadvantage” was vague and unrelated to goal).

132. *Sherbrooke*, 345 F.3d. at 973.

133. *BAGC v. Chicago*, 298 F. Supp.2d at 739-740.

134. *See Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County*, 943 F.Supp. 1546, 1581-1582 (S.D. Fla. 1996) (“*Engineering Contractors I*”) (County chose not to change its procurement system).

135. *BAGC v. Chicago*, 298 F. Supp.2d at 742.

136. *Concrete Works IV*, 321 F.3d at 973; *Wygant*, 476 U.S. at 280-281; *Adarand VII*, 228 F.3 at 1183 (“While there appears to be no serious burden on prime contractors, who are obviously compensated for any additional burden occasioned by the employment of DBE subcontractors, at the margin, some non-DBE subcontractors such as *Adarand* will be deprived of business opportunities”); *cf. Northern Contracting II*, at *5 (“Plaintiff has presented little evidence that is [sic] has suffered anything more than minimal revenue losses due to the program.”).

137. *Midwest Fence I*, 2015 WL 1396376 at *22.

Burdens must be proven and cannot constitute mere speculation by a plaintiff.¹³⁸ “Implementation of the race-conscious contracting goals for which [the federal authorizing legislation] provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although the result places a very real burden on non-DBE firms, this fact alone does not invalidate [the statute]. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities.”¹³⁹

Narrow tailoring does permit certified firms acting as prime contractors to count their self-performance towards meeting contract goals, if the study finds discriminatory barriers to prime contract opportunities. There is no requirement that a program be limited only to the subcontracting portions of contracts. The DBE program rule provides this remedy for discrimination against DBEs seeking prime contractor work,¹⁴⁰ and it does not limit the application of the program to only subcontracts.¹⁴¹ The trial court in upholding the Illinois DOT’s DBE program explicitly recognized that barriers to subcontracting opportunities also affect the ability of DBEs to compete for prime work on a fair basis.

This requirement that goals be applied to the value of the entire contract, not merely the subcontracted portion(s), is not altered by the fact that prime contracts are, by law, awarded to the lowest bidder. While it is true that prime contracts are awarded in a race- and gender-neutral manner, the Regulations nevertheless mandate application of goals based on the value of the entire contract. Strong policy reasons support this approach. Although laws mandating award of prime contracts to the lowest bidder remove concerns regarding direct discrimination at the level of prime contracts, the indirect effects of discrimination may linger. The ability of DBEs to compete successfully for prime contracts may be indirectly affected by discrimination in the subcontracting market, or in the bonding and financing markets. Such discrimination is particularly burdensome in the construction industry, a highly competitive industry with tight profit margins, considerable hazards, and strict bonding and insurance requirements.¹⁴²

138. *Rowe*, 615 F.3d at 254 (prime bidder had no need for additional employees to perform program compliance and need not subcontract work it can self-perform).

139. *Western States Paving*, 407 F.3d at 995.

140. 49 C.F.R. § 26.53(g) (“In determining whether a DBE bidder/offeror for a prime contract has met the contractor goal, count the work the DBE has committed to perform with its own forces as well as the work that it has committed to be performed by DBE subcontractors and suppliers.”).

141. 49 C.F.R. § 26.45(a)(1).

142. *Northern Contracting II*, 2005 U.S. Dist. LEXIS 19868 at 74.

6. Examine the Duration and Review of the Program

Race-based programs must have durational limits. A race-based remedy must “not last longer than the discriminatory effects it is designed to eliminate”.¹⁴³ The unlimited duration and lack of review were factors in the court’s holding that the earlier iteration of the City of Chicago’s M/WBE construction program was no longer narrowly tailored; Chicago’s program was based on 14-year-old information which, while it supported the program adopted in 1990, no longer was sufficient standing alone to justify the City’s efforts in 2004.^{144,145} How old is too old is not definitively answered¹⁴⁶; however, governments would be wise to analyze data at least once every five or six years.¹⁴⁷

In contrast, the USDOT DBE program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.¹⁴⁸ Similarly, “two facts [were] particularly compelling in establishing that [North Carolina’s M/WBE program] was narrowly tailored: the statute’s provisions (1) setting a specific expiration date and (2) requiring a new disparity study every five years.”¹⁴⁹

E. Cases from the Seventh Circuit Court of Appeals

Although discussed above as part of the elements of studies upon which successful race- and gender-conscious programs have been defended, it is instructive to review the three cases from the Seventh Circuit Court of Appeals, which governs, Illinois to illustrate almost all of these principles.

1. Builders Association of Greater Chicago v. City of Chicago

Plaintiff brought suit in 1996 to challenge the constitutionality of the City of Chicago’s construction M/WBE Program. In defending the action, the City relied upon the types and quality of evidence discussed above in establishing

143. *Adarand III*, 515 U.S. at 238.

144. *BAGC v. Chicago*, 298 F.Supp.2d at 739.

145. The City’s program was revised to comply with the court’s decision in 2004 and subsequently reauthorized based on new data in 2009 and 2015.

146. *See, e.g., Associated General Contractors of Ohio, Inc. v. Drabik*, 50 F.Supp.2d 741, 747, 750 (S.D. Ohio 1999) (“*Drabik I*”) (“A program of race-based benefits cannot be supported by evidence of discrimination which is now over twenty years old.... The state conceded that it had no additional evidence of discrimination against minority contractors, and admitted that during the nearly two decades the Act has been in effect, it has made no effort to determine whether there is a continuing need for a race-based remedy.”); *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied sub nom. Brunet v. Tucker*, 510 U.S. 1164 (1994) (fourteen-year-old evidence of discrimination was “too remote to support a compelling governmental interest.”).

147. Chicago’s program was amended based on new evidence in 2009 and 2015.

148. *See Western States Paving*, 407 F.3d at 995.

149. *Rowe*, 615 F.3d at 253.

its strong basis in evidence for its M/WBE program designed to remedy discrimination against minority- and woman-owned construction firms.¹⁵⁰ However, the program as implemented in 2003 when the case was tried, had not been reviewed since its inception in 1990. The court therefore found it was no longer sufficiently narrowly tailored to meet strict constitutional scrutiny. The court stayed the final order enjoining the implementation of the Program for six months, to permit the City to review the ruling and adopt a new program.¹⁵¹

The opinion first reviews the historical proof of discrimination against minorities, particularly Blacks, in the Chicago construction industry. While not legally mandated, Chicago was a *de facto* segregated city and “City government was implicated in that history”. After the election of Harold Washington as the first Black mayor in 1983, several reports focused on the exclusion of minorities and women from City procurement opportunities as well as pervasive employment discrimination by City departments. Mayor Washington imposed an executive order mandating that at least 25 percent of City contracts be awarded to minority-owned businesses and 5 percent to woman-owned businesses.

In response to *Croson*, Chicago commissioned a Blue Ribbon Panel in 1990 to recommend an effective program that would survive constitutional challenge. Based upon the Panel’s Report, and 18 days of hearings with over 40 witnesses and 170 exhibits, Chicago adopted a new program that retained the 25 percent MBE and 5 percent WBE goals; and provided that larger construction contracts could have higher goals.

The court held that the playing field for minorities and women in the Chicago area construction industry in 2003 was still not level. The City presented a great amount of statistical evidence. Despite the plaintiff’s attacks about over-aggregation and disaggregation of data and which firms were included in the analyses, “a reasonably clear picture of the Chicago construction industry emerged... While the size of the disparities was disputed, it is evident that minority firms, even after adjustment for size, earn less and work less, and have less sales compared to other businesses”. That there was perhaps over-utilization of M/WBEs on City projects was not sufficient to abandon remedial efforts, as that result is “skewed by the program itself”.

150. *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003).

151. A similar suit was filed against Cook County’s Program, which was declared unconstitutional in 2000. *Builders Association of Greater Chicago v. County of Cook*, 123 F.Supp.2d 1087 (N.D. Ill. 2000); *aff’d*, 256 F.3d 642 (7th Cir. 2001). In contrast to the City of Chicago, Cook County presented very little statistical evidence, and none directed towards establishing M/WBE availability, utilization, economy-wide evidence of disparities, or other proof beyond anecdotal testimony. It also provided no evidence related to narrow tailoring.

Further, while it is somewhat unclear whether disparities for Asians and Hispanics result from discrimination or the language and cultural barriers common to immigrants, there were two areas “where societal explanations do not suffice”. The first is the market failure of prime contractors to solicit M/WBEs for non-goals work. Chicago’s evidence was consistent with that presented of the effects of the discontinuance or absence of race-conscious programs throughout the country and in Illinois. Not only did the plaintiff fail to present credible alternative explanations for this universal phenomenon but also this result “follows as a matter of economics... [P]rime contractors, without any discriminatory intent or bias, are still likely to seek out the subcontractors with whom they have had a long and successful relationship... [T]he vestiges of past discrimination linger on to skew the marketplace and adversely impact M/WBEs disproportionately as more recent entrants to the industry... [T]he City has a compelling interest in preventing its tax dollars from perpetuating a market so flawed by past discrimination that it restricts existing M/WBEs from unfettered competition in that market.”¹⁵²

The judge also relied upon the City’s evidence of discrimination against minorities in the market for commercial loans. Even the plaintiff’s experts were forced to concede that, at least as to Blacks, credit availability appeared to be a problem. Plaintiff’s expert also identified discrimination against White females in one data set.

The City provided a witness who spoke of market failures resulting in the inability of minority and woman owners to meet the three imperatives of construction: management, money, and markets. Market failure, in particular, resulted from prime contractors’ failure to solicit minority and woman business owners for non-goals work. Fourteen minority and woman construction firm owners testified to the race- and gender-based discrimination and barriers they encountered to full and fair opportunities to compete for City prime and subcontracts in construction. The overriding theme was that these firms were not solicited or were rarely solicited for non-goals works by prime contractors that bid city jobs, even though the M/WBEs expressed interest in performing private work.

After finding that Chicago met the test that it present “strong evidence” of its compelling interest in taking remedial action, the court held that the program was no longer narrowly tailored to address these market distortions and barriers because:

- There was no meaningful individualized review of M/WBEs’ eligibility;

152. *BAGC v. Chicago*, 298 F. Supp.2d at 738.

- There was no sunset date for the ordinance or any means to determine a date;
- The graduation threshold of \$27.5M was very high and few firms had graduated;
- There was no personal net worth limit;
- The percentages operated as quotas unrelated to the number of available firms;
- Waivers were rarely granted;
- No efforts were made to impact private sector utilization of M/WBEs; and
- Race-neutral measures had not been promoted, such as linked deposit programs, quick pay, contract downsizing, restricting prime contractors' self-performance, reducing bonds and insurance requirements, local bid preferences for subcontractors and technical assistance.

2. Northern Contracting, Inc. v. Illinois Department of Transportation

In this challenge to the constitutionality of the DBE program, the Seventh Circuit Court of Appeals affirmed the district court's trial verdict that the Illinois Department of Transportation's application of Part 26 was narrowly tailored.¹⁵³ Like every other circuit that has considered the issue, the court held that IDOT had a compelling interest in remedying discrimination in the market area for federally funded highway contracts, and its DBE Plan was narrowly tailored to that interest and in conformance with the regulations.

To determine whether IDOT met its constitutional and regulatory burdens, the court reviewed the evidence of discrimination against minority and woman construction firms in the Illinois area. IDOT had commissioned an Availability Study to meet Part 26 requirements. The IDOT Study included a custom census of the availability of DBEs in IDOT's market area similar to that employed in this Report, weighted by the location of IDOT's contractors and the types of goods and services IDOT procures. The Study determined that DBEs comprised 22.77 percent of IDOT's available firms.¹⁵⁴ It next examined the possible impact of discrimination on the formation of firms. As required by "step 2" of the DBE regulations, IDOT considered whether to adjust the step 1 base figure to

153. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007) (7th Cir. 2007) ("*Northern Contracting III*"). Ms. Holt authored IDOT's DBE goal submission and testified as IDOT's expert witnesses at the trial.

154. This baseline figure of DBE availability is the "Step 1" estimate USDOT grant recipients must make pursuant to 49 CFR §26.45(c).

account for the “continuing effects of past discrimination (often called the “but for” [discrimination] factor”.¹⁵⁵ The Availability Study analyzed Census Bureau data to determine whether and to what extent there are disparities between the rates at which DBEs form businesses relative to similarly situated non-minority men, and the relative earnings of those businesses. Controlling for numerous variables such as the owner’s age, education, and the like, the Study found that in a race- and gender-neutral market area the availability of DBEs would be approximately 20.8 percent higher, for an estimate of DBE availability “but for” discrimination of 27.51 percent.

In addition to the IDOT Study, the court also relied upon:

- An Availability Study conducted for Metra, the Chicago-area commuter rail agency;
- Expert reports relied upon in *BAGC v. Chicago*;
- Expert reports and anecdotal testimony presented to the Chicago City Council in support of the City’s revised 2004 M/WBE Program ordinance;
- Anecdotal evidence gathered at IDOT’s public hearings on the DBE program;
- Data on DBE involvement in construction projects in markets without DBE goals¹⁵⁶; and
- IDOT’s “zero goals” experiment. This was designed to test the results of “race-neutral” contracting policies, that is, the utilization of DBEs on contracts without goals. IDOT issued some solicitations for which there was significant DBE availability to perform the scopes of work without a DBE goal. In contrast to contracts with goals, DBEs received approximately 1.5 percent of the total value of these “zero goals” contracts.

Based upon this record, the Court of Appeals agreed with the trial court’s judgment that the Program was narrowly tailored. IDOT’s plan was based upon sufficient proof of discrimination such that race-neutral measures alone would be inadequate to assure that DBEs operate on a “level playing field” for government contracts.

The stark disparity in DBE participation rates on goals and non-goals contracts, when combined with the statistical and

155. 49 C.F.R. § 26.45(d)(3).

156. *Northern Contracting III*, 473 F.3d at 719 (“Also of note, IDOT examined the system utilized by the Illinois State Toll Highway Authority, which does not receive federal funding; though the Tollway has a DBE goal of 15 percent, this goal is completely voluntary -- the average DBE usage rate in 2002 and 2003 was 1.6 percent. On the basis of all of this data, IDOT adopted 22.77 percent as its Fiscal Year 2005 DBE goal.”).

anecdotal evidence of discrimination in the relevant marketplaces, indicates that IDOT's 2005 DBE goal represents a "plausible lower-bound estimate" of DBE participation in the absence of discrimination.... Plaintiff presented no persuasive evidence contravening the conclusions of IDOT's studies, or explaining the disparate usage of DBEs on goals and non-goals contracts.... IDOT's proffered evidence of discrimination against DBEs was not limited to alleged discrimination by prime contractors in the award of subcontracts. IDOT also presented evidence that discrimination in the bonding, insurance, and financing markets erected barriers to DBE formation and prosperity. Such discrimination inhibits the ability of DBEs to bid on prime contracts, thus allowing the discrimination to indirectly seep into the award of prime contracts, which are otherwise awarded on a race- and gender-neutral basis. This indirect discrimination is sufficient to establish a compelling governmental interest in a DBE program.... Having established the existence of such discrimination, a governmental entity has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.¹⁵⁷

3. Midwest Fence, Corp. v. U.S. Department of Justice, Illinois Department of Transportation and the Illinois Tollway

Most recently and saliently for the City of Chicago's local M/WBE construction program, the challenge to the DBE regulations, IDOT's implementation of those regulations and its DBE program for state funded contracts, and to the Illinois Tollway's¹⁵⁸ separate DBE program was rejected.¹⁵⁹

Plaintiff Midwest Fence is a White male-owned fencing and guardrail specialty contractor owned and controlled by White males that typically bids on projects as a subcontractor. From 2006-2010, Midwest generated average gross sales of approximately \$18M per year. It alleged that the DBE programs failed to meet the requirement that they be based on strong evidence of discrimination, and that the remedies were neither narrowly tailored on their face or as applied. In sum, plaintiff's argument was that the agencies lacked proof of discrimination, and it bore an undue burden under the programs as a specialty

157. *Northern Contracting II*, at *82 (internal citations omitted); see *Croson*, 488 U.S. at 492.

158. The Tollway is authorized to construct, operate, regulate, and maintain Illinois' system of toll highways. The Tollway does not receive any federal funding.

159. *Midwest Fence, Corp. v. USDOT et al.*, 2015 WL 1396376 (N. D. Ill. March 24, 2015) ("*Midwest Fence I*").

trade firm that directly competes with DBEs for prime contracting and subcontracting opportunities.

The district court granted summary judgment in favor of all defendants on all claims. It found that the USDOT DBE Program serves a compelling government interest in remedying a history of discrimination in highway construction contracting. The court observed that Midwest Fence’s challenge to the Tollway’s program¹⁶⁰ mirrored the challenge to the IDOT’s program and held that the Tollway, like IDOT, established a strong basis in evidence for its remedial program, finding that both programs imposed minimal burdens on non-DBEs, employed numerous race-neutral measures, and ensured significant and ongoing flexibility and adaptability to local conditions.¹⁶¹

The Seventh Circuit Court of Appeals affirmed the district court’s grant of summary judgment. It reiterated its decision in *Northern Contracting III* that the USDOT DBE Program is facially constitutional. “We agree with the district court and with the Eighth, Ninth, and Tenth Circuits that the federal DBE program is narrowly tailored on its face, so it survives strict scrutiny.”¹⁶²

The bases for holding the Tollway’s program were constitutional are especially instructive for the City of Chicago. Before adopting the Program, the Tollway set aspirational goals on a number of small contracts. These attempts failed: in 2004, the Tollway did not award a single prime contract or subcontract to a DBE. Additionally, in adopting its program, the Tollway considered anecdotal evidence provided in *Northern Contracting* consisting of the testimony of several DBE owners regarding barriers they faced.¹⁶³

The Tollway’s DBE program substantially mirrors that of Part 26 and was based on studies similar to those relied upon by IDOT.

Further, its

method of goal setting is identical to that prescribed by the Federal Regulations, which this Court has already found to be supported by “strong policy reasons.” [citation omitted] Although the Tollway is not beholden to the Federal Regulations, those policy reasons are no different here... [W]here the Tollway Defendants have provided persuasive evidence of discrimination in the Illinois road construction

160. The Tollway adopted its own DBE program in 2005. Although the Tollway does not receive federal funds, it opted to mostly mirror the provisions of Part 26.

161. *Midwest Fence Corp. v. U.S. et al*, 840 F. 3d 932 (7th Cir. 2016) (“*Midwest Fence I*”), cert. denied, 2017 WL 497345 (June 26, 2017).

162. *Midwest Fence II*, 840 F3d at 945

163. *Northern Contracting II*, 2005 WL 2230195 at *13-14.

industry, the Court finds the Tollway Program's burden on non-DBE subcontractors to be permissible... The Tollway's race-neutral measures are consistent with those suggested under the Federal Regulations. See, 49 U.S.C. § 26.51. The Court finds that the availability of these programs, which mirror IDOT's, demonstrates 'serious, good faith consideration of workable race-neutral alternatives.' [citations omitted] In terms of flexibility, the Tollway Program, like the Federal Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so... Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the Federal Regulations, the Court finds the Tollway Program sufficiently flexible. Midwest's final challenge to the Tollway Program is that its goal-setting process is "secretive and impossible to scrutinize." [reference omitted] However, the Tollway has plainly laid out the two goal-setting procedures it has employed since the program's enactment... The Tollway Defendants have provided a strong basis in evidence for their DBE Program. Midwest, by contrast, has not come forward with any concrete, affirmative evidence to shake this foundation.¹⁶⁴

164. *Midwest Fence I*, 2015 WL 1396376 at *22-23.

III. THE CITY OF CHICAGO'S MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE CONSTRUCTION PROGRAM

A. The City of Chicago's Minority and Woman Business Enterprise Construction Program Elements

1. History of the Program

The City of Chicago's first contracting affirmative action program was established in 1985 by Executive Order 85-2 under Mayor Harold Washington. The Executive Order set goals of 25 percent participation by certified Minority-Owned Business Enterprise ("MBEs") and 5 percent by Woman-Owned Business Enterprise ("WBEs").

In 1990, the City's adopted its first ordinance establishing the Minority- and Women-owned Business Enterprise ("M/WBE") Program.¹⁶⁵ The Ordinance was based upon the Blue Ribbon Panel Report produced by a group of experts appointed by Mayor Richard M. Daley, and 18 days of hearings and debate. These hearings were found by the City Council to have identified strong historical, statistical, scholarly and anecdotal evidence of past and present discriminatory practices in the Chicago-area market. This evidence included, but was not limited to, the Chicago area construction industry, which placed minorities and women in a position of social and economic disadvantage and imposed discriminatory barriers to the entry and continued viability of minority- and woman-owned businesses in the Chicago market and to their participation on City contracts.

The 1990 ordinance was challenged in 1996 by the Builders Association of Greater Chicago as applied to construction contracts.¹⁶⁶ At the 2003 trial, the City introduced evidence of past and current discriminatory practices, including statistical and anecdotal data about their impact, that result in the social

165. Sections 2-92-420 through 2-92-570 of the Municipal Code of the City of Chicago.

166. *Builders Association of Greater Chicago v. City of Chicago*, Number 96 C 1122 (N.D. Ill.).

and economic disadvantage of minorities and women in the local construction industry. Following the trial, the district court held that the City had a compelling interest in implementing a remedial race- and gender-conscious affirmative action program in the Chicago construction market, but that the City's 1990 ordinance was insufficiently narrowly tailored in 2003 as applied to construction. The court stayed the injunction for six months to give the City time to amend the legislation. A revised ordinance that established the current construction program was adopted in 2004.

In 2009 and 2015, the City Council considered new evidence and found that discriminatory barriers continued to exist for M/WBEs. The ordinance was extended to December 31, 2020, and further extended until September 30, 2021, in response to the novel coronavirus pandemic and the commissioning of this Report.

2. Program Administration

The objective of the City's M/WBE construction program continues to be the remediation of the effects of discrimination in the City's construction contracting to create equal access for all contractors and subcontractors. The 2015 Ordinance sets forth the general provisions of the M/WBE construction program, including the responsibilities of the Chief Procurement Officer ("CPO"), aspirational and biannual goals, and directs executive departments and agencies to work with the CPO to achieve the program's goals. It sets a 26 percent overall goal on the annual dollar value of all construction contracts for qualified MBEs and 6 percent overall goal on the annual dollar value of all construction contracts for qualified WBEs. Executive departments or agencies with contracting authority are to consult with the CPO to achieve the set goals.

The M/WBE program is administered by the Department of Procurement Services ("DPS"). The CPO has direct accountability and authority for the program and reports directly to the Mayor's Office. The CPO is responsible for formally establishing administrative rules and regulations and their implementation, including establishing biannual, aspirational goals for M/WBE construction contracts and subcontracts, based on available data.

DPS has established department areas that monitor implementation of the program to ensure compliance.

- The DPS Certification Unit is responsible for managing the City's Supplier Diversity program, including outreach and vendor relations, and monitoring the overall MBE/WBE/DBE program for compliance with the City's ordinance.
- The DPS Compliance Unit monitors the overall MBE/WBE/DBE program for compliance with the City's ordinance.

- The DPS Contract Administration Unit is responsible for managing the public bidding and contracting processes for the procurement of various goods and/or services for approximately 35 City departments and agencies.

3. Eligibility Requirements for the City of Chicago’s M/WBE Construction Program

Chicago provides stringent criteria for participation in its program. In 2018, DPS issued regulations governing certification for participation in the program. These regulations establish detailed eligibility requirements for M/WBE certification under the program, and oversight procedures to monitor compliance with the requirements.

- Minorities are defined African Americans or Blacks, Hispanics, Asian Americans, American Indians. Individual members of other groups, such as Arab-Americans, can be included if they can demonstrate they are socially disadvantaged by having suffered racial or ethnic prejudice or cultural bias within American society that has resulted in decreased opportunities to do business with the City or compete in the Chicago marketplace.
- MBEs and WBEs are defined as small, local business enterprises that are owned by one or more economically disadvantaged minorities or by women. In the case of publicly held corporations, economically disadvantaged minorities or women must own at least 51 percent of each class of the corporation’s stock and exercise control over the corporation’s policies and business operations.
- Local business enterprise is defined as a business entity located within the state of Illinois’ six-County region of Cook, DuPage, Kane, Lake, McHenry, and Will, with its principal office and majority of its full-time work force in this Region.
- To qualify for MBE and/or WBE certification and the program, the firm must demonstrate the following:
 - That it is controlled by one or more “Economically Disadvantaged” individuals as evidenced by their Personal Net Worth (“PNW”) and their five most recent individual federal income tax returns. Net worth cannot exceed \$2,000,000, indexed annually for inflation. The value of the applicant’s primary residence and equity interest in the firm seeking certification are excluded, and retirement accounts are discounted down to present value. The current limit is \$2,379,730.

- That it qualifies as a Small Business Enterprise as defined by the U.S. Small Business Administration (“SBA”) size standards¹⁶⁷ for its North American Industry Classification System (“NAICS”) code, determined by total gross receipts averaged over its most recent five fiscal years. The current maximum limit is \$39.5M dollars, applicable to only certain NAICS codes.

MBE and WBE firms eligible for certification must demonstrate ownership and control that is real and substantial; demonstrate expertise in all areas of the firm’s critical operations; and have the financial resources to acquire ownership. To establish their eligibility and firm ownership, applicants must document they possess the financial resources to acquire ownership; exercise responsibility; have the capability to engage in the work for which certification is sought; possess the resources to operate as a self-sufficient concern; bear risk and ownership equal to their ownership interests, including receipt of 51 percent of any dividends; exercise control of company; hold the highest officer position; and hold any licenses or credentials required for their type of firm by state or local laws¹⁶⁸. The regulations define in detail the business structure, records and arrangements that are examined to determine whether a firm satisfies the ownership requirements.

An initial application for certification is filed with the CPO and completed online. Completed applications are reviewed by the Certification Unit. Site visits are conducted for firms in construction codes. Determinations must be made within 90 days of receiving all the required information. False information can result in a determination to deny certification or recertification or in decertification. Applicants cannot have been debarred or convicted within five years of criminal or civil offenses in transacting business with government entities; there must be no record of corruption with the City. Denied certifications cannot reapply for one year

Certification is valid for five years but must be revalidated every year by submission of a No Change Affidavit.

An applicant’s certification is limited to its area of specialty as defined by NAICS codes. Certification in additional NAICS codes requires filing an expansion request. The firm must meet all the eligibility criteria to be approved for additional NAICS codes.

Changes in firm ownership or eligibility criteria must be communicated in writing to the CPO within 10 business days.

167. 13 C.F.R. Part 121.

168. For example, City mason, plumber, electrician, crane operator and elevator mechanic licenses.

The regulations define criteria for decertification and the appeals process. This includes referral to the Corporation Counsel, the City's Inspector General, and disclosure to other governmental entities.

4. Establishing Contract Goals

In 2018, DPS issued a formal policy for contract goal setting to ensure that goals are set consistently across City departments. The policy document covers the process for goal setting, along with tools that can be used by the user departments for determining goals on construction projects. To satisfy the program's aspirational goals, almost all City funded construction projects require M/WBE contract goals. Goals are set by the City department initiating the project and submitted to DPS for review and approval. Under the Construction Manager at Risk ("CMR") procurement method, the CMRs are expected to set their own goals for their own trade packages in order to meet the overall goal for each project.

Contract goals are established based on the scopes of work that will be performed on the project, the type of work and the availability of MBE and WBE firms to perform the work. When determining availability, there must be at least three certified M/WBEs certified in the applicable NAICS codes for the scope of work. The aspirational goals for construction can be used as a baseline. If possible, project goals should exceed the "baseline" goals. Contract goals established at the time of bid apply to any later modification to the contract, including change orders directed by the City.

Construction Manager at Risk contracts have project-wide MBE and WBE goals. These goals are to be defined on a package-by-package basis in order to meet the overall contract goals set forth by the City.

The DPS City-wide Buying Plan can be used to assist in goal setting. The plan provides historical records of the percentage of MBE/WBE participation that has been achievable on similar completed projects.

If there is not adequate MBE and/or WBE capacity to support a goal recommendation, the user department may submit a 'No Stated Goal(s) Request. This still requires bidders and contractors to make good faith efforts ("GFEs") towards meeting the maximum possible MBE/WBE participation. Where there is insufficient MBE/WBE capacity, the user department is asked to inform DPS and the Compliance Unit so that outreach can be specifically targeted to reach minority and woman vendors in underrepresented markets.

5. Counting Certified Firms' Participation Towards Contract Goals

The City's "Special [contractual] Conditions Regarding Minority Owned Business Enterprise Commitment and Women Owned Business Enterprise Commitment in Construction Contracts" govern how participation by certified firms will be counted towards contract goals.

- To meet contract goals, certified MBEs and WBEs can only be counted on a bidders' compliance plan as either an MBE or WBE, but not both.
- Participation of firms in the 6-digit NAICS codes for which they have not been certified will not count towards fulfillment of the contract goal.
- Firms must be certified by the time the bid is submitted to count towards the goal.
- MBEs or WBEs self-performing through their own forces may count 100 percent of their self-performance dollars towards the goal. This includes the cost of supplies purchased, or equipment leased, by the MBE or WBE from third parties or second-tier subcontractors to perform the contract.
- Joint ventures may count the portion of the total dollar value of the contract equal to the portion of work that the MBE or WBE partner performs. Goal credit is given commensurate with the work performed by the MBE/WBE partner by its own forces.
- Any subcontracted work to other MBEs or WBEs that meet the other goal counting criteria can be counted at 100 percent.

To be counted towards the goals, a firm must perform a "commercially useful function" ("CUF"). CUFs are monitored by DPS. To perform a CUF, the certified firm must be responsible for work on the contract and must perform, manage and supervise the work. Whether a M/WBE is performing a CUF is determined by whether the subcontracted work is commensurate with the payment amount for the work.

6. Submission of Bid and Compliance Plans

Invitations for Bid are issued for construction projects. Bid documents include special conditions language setting the contract goal and the terms and conditions that are required to be a responsive and responsible bidder. MBE/WBE compliance is required. A compliance plan for MBE & WBE utilization, Schedule D, Affidavit of Prime Contractor, must be submitted at the time of the bid for bids over \$10,000 in order for the bid to be deemed responsive. A bid may be rejected as non-responsive if the bid is submitted without an MBE/WBE compliance plan or documentation that Good Faith Efforts were made to find MBE and WBE firms to participate (Schedule H) to support a request for a

reduction or waiver of the goals. The City also requires documentation of all subcontractors and suppliers solicited for participation on the contract (Schedule F) to be submitted with the bid to be considered responsive.

For purposes of evaluating the bidder's responsiveness, the MBE/WBE contract-specific goals shall be percentages of the bidder's total base bid. However, the MBE/WBE contract specific goals apply to the total value of the contract, including all amendments and modifications. Contract specific goals established at the time of contract bid also apply to any additional work or money added to the contract. The CPO is responsible for reviewing contract modifications and amendments that increase the contract value by 10 percent of the initial award or \$50,000, whichever is less, to increase MBE/WBE participation. The bidder must meet the MBE participation goals on the amended contract. It also must produce a statement of MBEs and WBEs that will be used on the project, or an explanation of good faith efforts, if none are expected to be used for the amended scope.

In addition to submitting a compliance plan or documentation of Good Faith Efforts, the bidder must submit an MBE/WBE Letter of Intent to Perform as a Subcontractor or Supplier (Schedule C) for each MBE and WBE at the time of the bid. First-tier subcontractors must also submit this form to the prime contractor for lower tier subcontractors. This form describes in detail the work that will be performed by the MBE or WBE and the agreed upon rates.

For bidders who are unable to meet the contract specific goals, documentation of good faith efforts (Schedule H) is required, along with a log of all MBEs and WBEs contacted to participate in the contract. The bidder has three business days after the CPO determines their status as the lowest bidder to provide full documentation and evidence of their good faith efforts.

The City has adopted specific criteria that the CPO must evaluate to determine whether a bidder has made sufficient good faith efforts to meet the goal. These include whether the bidder solicited through reasonable and available means at least 50 percent of MBEs and WBEs certified in the subcontracting scope within 7 days prior to the date the bid is due; advertising contract opportunities in media directed to MBEs and WBEs; providing adequate information about project contract specifications; negotiating in good faith with interested MBEs/WBEs that have submitted bids, the validity of reasons for rejecting MBEs/WBEs; sizing work that will facilitate MBE/WBE participation to meet the goal; providing MBEs/WBEs with assistance in obtaining financial supports, including bonding; and working with assist agencies to help with recruitment of MBEs/WBEs.

If the proposer will be meeting the goal through a joint venture agreement, an MBE/WBE Affidavit of Joint Venture (Schedule B), along with the joint venture agreement, must be submitted at the time of bid. Joint Ventures must meet

specific requirements. One firm must be a certified MBE or WBE, the relationship must be a true joint partnership where each firm shares equally in the risk, control and capital contribution, and the joint venture partners must have a written agreement specifying the terms and conditions of their relationship.

7. Compliance Plan Modifications Pre- and Post-Award

All terms and conditions for MBE and WBE participation must be completed prior to submission of the Compliance Plan with the completed bid package. A bidder may not modify its Compliance Plan after bid opening unless approved by DPS, and the correction must be for minor errors and omissions. The Compliance Plan must be approved before a notice to proceed is issued.

Once the contract is awarded, contractors are not entitled to a reduction or waiver of M/WBE goals, unless a subcontractor is unavailable/refuses to perform, or there is a change to contract scope. All changes to the Compliance Plan, including substitutions, must be approved in writing by the CPO. Any unauthorized changes or substitutions are considered a breach of contract. Substitutions are permitted if the subcontractor is unavailable or failed to perform, has experienced financial incapacity or cannot meet insurance, licensing or bonding requirements, refuses to honor the bid or proposal price and scope, withdraws the bid or proposal, is decertified or a mentor protégé agreement was terminated. Substitutions and changes are also authorized when appropriate when the City has made a change to the contract scope. A new subcontract must be executed and submitted to the CPO within five business days of the CPO's approval of the change or substitution.

Failure to carry out the commitments of the MBE and WBE Compliance Plan can constitute a material breach of contract and can result in termination of the contract or other remedy as deemed appropriate by the City. Payments may be withheld until corrective action is taken. Sanctions may include disqualification from contracting or subcontracting for up to three years. Disputes between the contractor and MBE or WBE are resolved through binding arbitration.

8. Contract Monitoring

DPS is responsible for monitoring contracts to ensure compliance with commitments to utilize M/WBEs. During the contract period, prime contractors are responsible for submitting monthly subcontractor payment certification forms, weekly certified payrolls and waivers of lien to monitor compliance with commitments to MBE/WBE utilization.

Monthly payments to M/WBE firms are tracked and verified and measured against goal attainment through the C2 system, a web-based reporting system.

DPS Field Analysts, which are an extension of the Compliance Officer's role, conduct audits and site visits to physically observe and collect data to ensure that a commercially useful function is being performed. Audit information is recorded in Contractor Inspection Reports.

In March 2021, Mayor Lori Lightfoot issued Executive Order 2021-2 to enhance reporting requirements to understand how diverse firms are being utilized on City contracts. Contractors will be required to submit quarterly reports on the usage of certified firms throughout the duration of the contract that compare actual usage against the usage projected at the start of the contract. These reports will also be made through the C2 system. An explanation and recovery plan must be submitted if participation is "materially below" projected usage.

9. Good Faith Efforts at Contract Closeout

DPS has issued rules for determining Good Faith Efforts and participation of MBE/WBEs at contract closeout. These standards are used to determine whether to grant a contractor's request for waiver of its MBE/WBE participation commitments during performance of the contract. In general, waivers or reduction of goals during the contract or at close-out are not permitted, unless the prime contractor can demonstrate that it has made good faith efforts to meet utilization goals. The request must be made in writing to the CPO. Based on the GFE evidence provided, the CPO will determine whether a full waiver or partial waiver is warranted.

The contract close-out process requires the City to provide the contractor with a preliminary report of MBE and WBE participation based on the contractor's submission. Any application for waiver of contract goals by the contractor must be submitted within 10 business days in writing to the CPO with sufficient documentation showing good faith efforts to meet the contract participation commitment. To make the determination to grant or deny the request, the CPO takes into consideration a set of factors that are the same with a few exceptions, as those considered for GFEs and waiver requests submitted during contract bid submission. The additional factors include actions by the City that caused the shortfall, such as a change in the scope of work.

After the CPO has issued a final written decision on the waiver request based on the final utilization report and additional information submitted by the contractor, the contractor can request a reconsideration in the event additional information becomes available or the CPO's decision contains an error of law or regulation. The contractor can file a written appeal 15 days after the CPO's final decision to request a hearing by the City's Department of Administrative Hearings to be held by an administrative law officer.

10. Additional Incentives for M/WBE Participation

a. Diversity Credit Program

The Diversity Credit Program is designed to encourage utilization of MBE/WBEs on non-government contracts without goals. Prime contractors utilizing certified City and Cook County M/WBE subcontractors on eligible contracts can receive credit towards MBE/WBE participation goals on future City Contracts. To take advantage of this program, the contract must be for a private entity, may not have affirmative action goals, must meet commercially useful function requirements, and must be in area of specialty approved by the City. Only direct participation at the primary subcontracting tier is eligible. Established business that are phasing out of the M/WBE program are also eligible. One dollar of credit is awarded for every three dollars of expenditures with M/WBEs, with a maximum of five percent of the total contract value. Credits are counted and applied once and must be used within one year of being awarded. The subcontractor must also file a notarized statement confirming participation and eligibility.

b. Mentor Protégé Program and Incentive Credits

The City has implemented a Mentor Protégé program to assist small businesses to develop capacity and to become more competitive through partnering with larger, more experienced firms. To encourage firms to become mentors and encourage committed participation in the program, the City has implemented two program incentives.

One allows eligible primes on eligible contracts to earn additional participation credit towards MBE/WBE goals and the other allows a 1 percent bid preference to be applied to the base value of a contract bid. Under the first program, prime contractors who are in an approved Mentor Protégé relationship can earn up to a five percent credit of the value of the work self-performed by the protégé toward participation goals. The credit can be earned for every one percent of the value of the contract performed by the protégé up to five percent. These programs are only available on contracts valued at \$100,000 or over.

Eligibility for both programs requires that the CPO approve a written mentoring agreement detailing the terms of the relationship. Quarterly affidavits and reports must also be submitted to the CPO in order to remain in compliance with the rules for the program.

c. MBE/WBE Phased Graduation Program

The City has implemented an incentive program to support M/WBEs that are no longer eligible for certification because they have exceeded the size

standards or personal net worth limits. The program allows M/WBEs to continue in the program for at least three additional years. Contractors will receive 75 percent credit for participation on new contracts for the first year, 50 percent credit the second year and 25 percent the third year if starting a new contract. Firms can remain listed in the City's Directory of M/WBE firms until it no longer receives any credit for participation in the M/WBE program.

d. Incentive Programs

The City has adopted a number of preferences and incentives to increase utilization of M/WBEs on construction contracts. At the discretion of the CPO, these incentives give prime contractors preferential consideration in the bidding process by reducing their bidding price or providing extra credit to their goals when meeting specific criteria for utilization of M/WBEs. These incentives do not affect the actual amount of the bid and are used only for bid evaluation purposes. Incentives can be earned credit certificates that are applied to future bids or bid preferences that reduce the comparative bid price. Bidders are required to submit an affidavit and all requested documentation disclosed in the bid package in order to be considered for the incentive.

To ensure compliance, the City may require documentation to be submitted at contract closeout or throughout the performance period demonstrating that commitments are being met. Failure to meet commitments may result in fines of up to three times the amount of the incentive granted, and the denial of an earned credit certificate, and a finding of non-responsibility.

To encourage MBE/WBE participation on contracts where no goals can be assigned, the City has implemented a tiered program to provide prime contractors with a credit against the contract's base bid. The credit is up to 5 percent of the base bid for a utilization commitment of 30 percent. This credit is used on City contracts where there is an insufficient number of certified firms available. To be eligible, a compliance plan must be submitted with the bid, along with a letter of intent from the M/WBE that will be used on the contract.

11. Race- and Gender-Neutral Initiatives

a. Small Business Initiative and Mid-Size Business Initiative

The City has implemented two race and gender-neutral programs applicable only to construction contracts. The Small Business and Mid-Size Business Initiatives ("SBI" and "MBI"), which are administered by DPS, are

designed to increase opportunities for all small and mid-sized local businesses in obtaining construction contracts. To take advantage of the programs, firms must be:

- Independent.
- Meet specific size standards measured by gross receipts and employees set forth in 13 C.F.R. Part 121.
- Be owned at least 51 percent by individuals who do not exceed specific personal net worth limits set by the City Municipal Code.
- Perform at least 51 percent of the work with its own forces or with subcontractors that are also small or medium local business enterprises.
- Have their principal place of business, and the majority of their full-time work force, located in the six-County region.

To increase participation, each program is broken into two tiers, based on firm size and personal net worth requirements. For the lowest SBI tier (SBI II), firm size and PNW are limited to one half of the SBA size standards and the City's PNW limit for M/WBE certification. These increase by increments of 50 percent for each tier. The fourth and highest tier, MBI I, is capped at two times the SBA size standards and the City's PNW limit. These tier limits are used to determine the minimum and maximum project size measured in dollars that can be assigned to each tier. Construction costs are limited to a maximum of \$3M for SBI Tier I; \$2M for SBI Tier II; \$20M for MBI Tier I; and \$10M for MBI Tier II.

DPS is responsible for identifying construction projects to procure through the two programs on a quarterly basis using the City's Buying Plan. City certified M/WBEs automatically qualify for SBI Tier I and both MBI tier projects based on their certification but must submit documentation to prove their eligibility when bidding on projects in on SBI II contracts. Non-certified firms must prove their eligibility by affidavit in all tiers. Rules for the programs include sanctions for false representation or fraudulent activity regarding eligibility status. Violations can result in criminal consequences, debarment from contracting or subcontracting with the City, or fines of not less than \$1,000 and not more than \$5,000 for each violation.

The Chicago Department of Aviation ("CDA") and its Construction Managers at Risk ("CMR") promote these programs extensively. The CMRs have awarded several SBI/MBI subcontracts, including the TSA Expansion and Renovation General Construction Package, the Taxiway A/B Cargo Tunnel Reinforcement Package, and the Runway 4R-22L Landscaping Package.

b. Project-Area Subcontractor Bid Incentive

To encourage City prime contractors to utilize project-area subcontractors, tiered incentives are available based on the percentage of the work conducted by the project-area subcontractor. There are four bid preference tiers which range from 0.5 percent to 2 percent. To qualify, the project area subcontractor must be a small business. The subcontractor must conduct meaningful day-to-day business at a facility in the project area and must be the place of employment for the majority of its regular full-time workforce, as well as be subject to City taxes.

c. City-Based Bid Incentives

Similar to the Project-Area Subcontracting Bid Incentive, the City-based business bid incentive is design to increase contracting opportunities and participation by City-based businesses. Contracts of \$100,000 or more are eligible to receive up to an 8 percent incentive depending on the location of the firm's full-time workforce of City residents and who live in socio-economically disadvantaged areas.

d. Outreach, Training and Supportive Services

The City conducts extensive outreach, training and technical support services programs to encourage MBE and WBE participation in construction projects. These services and outreach events provide networking opportunities, access to training in the areas of project management, business development, construction management, and support services to build capacity.

i. Outreach Activities

Vendor conferences and fairs are held throughout the year, hosted by various user departments. These include DPS' two large annual conferences that provide M/WBEs the opportunity to gain information about upcoming construction projects and to network with prime vendors and meet City staff.

- The Construction Summit exclusively focuses on local construction industry members. It offers a full day of informational and training workshops and speakers, including key City of Chicago infrastructure departments that manage hundreds of construction projects annually.
- The Vendor Fair is several full days of workshops covering all aspects of government contracting and also includes valuable information about City construction projects, how to do business with the City and the opportunity to network with prime vendors.

To provide information about the many opportunities available for airport work, CDA conducts the O'Hare 21 Construction Fair and Industry Day that brings together Construction Managers at Risk, local businesses and assist agencies.

Bid opportunities are announced and publicized through the DPS website, individual events, social media and electronic newsletters and the CDA Bid and Resource Center.

ii. Information Resources

The City provides many channels to access information about contracting opportunities.

- Weekly bid opportunities are posted in the Bid & Bond Room at City Hall and on the DPS website, where they can be downloaded.
- DPS and CDA regularly holds pre-bid conferences not only to provide information about the project but also to allow MBEs and WBEs to network with primes, possible joint venture partners or to learn more about submission as a prime.
- Bid Take Out Lists are available on the DPS website that provide MBEs and WBEs with valuable information about prime contractors.
- DPS offers weekly email newsletter "Alerts" which provides information about current and upcoming bid opportunities.
- Bid openings are livestreamed via YouTube and information is posted on a number of social media platforms including Facebook, Twitter and YouTube.
- CDA regularly publicly opens bids that are read aloud and videotaped. Hardcopies are available in the CDA Bid and Resource Center.
- Formal bid solicitations of \$100,000 or more are advertised in the various local newspapers.

To accomplish the objective of reaching as many M/WBEs and small businesses as possible, the City offers broad range of support activities and events that are sponsored through the City's various user departments and DPS. The City's multi-faceted approach to delivering services and reaching M/WBEs includes informational and training workshops; partnering with local community agencies; contracting fairs, conventions, and vendor events; classroom instruction; roundtable discussions; luncheons/breakfasts; meet and greets; and digital marketing. Dedicated business centers in City Hall and O'Hare Airport's Aviation

Administration Building offer information about bidding opportunities, prequalification, certification assistance and other resources.

While DPS is primarily responsible for conducting outreach, CDA also offers outreach through its own channels because of the number and scale of its projects.

The DPS website is the primary source of information to assist M/WBEs. It offers updates about construction projects, awarded contracts and modifications, payments, bid tabulations, weekly bid opportunities, a searchable MBE/WBE Directory, bid incentives, a calendar of events and workshops and access to workshop presentations.

DPS offers over 60 different workshops covering a wide range of topics to assist MBEs and WBEs. These workshops have been traditionally conducted in-person but are now delivered virtually due to the Covid-19 pandemic. Over 15 different classes are taught monthly or quarterly on topics such as certification, how to navigate DPS' website, how to submit monthly prime payment verification and use the C2 system, how to do business with the City, EProcurement 101, how to take advantage of the City's incentive programs, and construction contracting overviews. These workshops are livestreamed via YouTube and can be viewed on the DPS website.

In addition to DPS-hosted workshops, the City and the Aviation Department's CMRs offer outreach and training to perspective M/WBEs and small business interested in doing business at the airports. These include CDA's first time prime contractors round table discussions and the Aviation Learning Series conducted by Turner-Paschen Aviation Partners.

The City also participates in a number of training and outreach opportunities provided by other Chicago area organizations. These include:

- The Turner School of Construction Management's seven-week training course for M/WBE firms to enhance technical, administrative and managerial skills.
- The Chicago Urban League's workshop "How to Become Certified with the City of Chicago".
- The Chicago Minority Supplier Development Council's Annual Chicago Business Opportunity Fair.
- The Illinois Black Chamber of Commerce's procurement and networking conventions.
- Metra's Annual On Track to Success Vendor Fair.

- The Metropolitan Water Reclamation District of Greater Chicago's Construction Contractors Vendor Outreach Fair.

A critical component of the City's outreach and technical support is conducted through local assist agencies that represent the interests of, and have strong connections to, the M/WBE business community. In addition to promoting the M/WBE program and informing their members about contract opportunities, assist agencies are instrumental in providing training and guidance to help M/WBEs become more competitive. Services provided range from increasing M/WBE availability by identifying qualified firms for certification and assisting them with the process, to providing technical training to build business skills and improve operations.

e. Department of Business Affairs and Consumer Protection Programs

The City of Chicago Department of Business Affairs and Consumer Protection (BACP) has two programs that can assist M/WBEs in construction:

- The Chicago Business Centers program supports regional hubs providing business licensing assistance and other resources for small businesses, particularly for entrepreneurs in historically underserved locations and populations. Services include business License, public way Use permit, and City resources support; business funding (debt and/or non-debt) resources especially to those who have historically lacked access to banks and capital networks; and professional development and specialized, sector-specific, business resources, including the Corporate Partner Webinar Series.
- The Neighborhood Business Development Centers program provides grants to Chicago-based chambers of commerce and business support organizations to assist in the development of small businesses in Chicago, serve as liaison between local businesses and the City of Chicago, and provide neighborhood business development services.

f. New Initiatives

In 2021, the Mayor announced two important supportive services initiatives to help small and diverse businesses:

- The \$25M Chicago Vendor Impact Fund will provide access to capital and more affordable financing to diverse contractors and vendors. Certified vendors or contractors with the City will receive preference to access Small Business Administration "7(a) loans" for project financing, working capital, and capital investments and funds through the federal Paycheck Protection Program. Technical assistance to help

businesses navigate the application process and the loan forgiveness process will be provided through two local business development and industry groups, Urban Strategies, LLC and Hire360. These organizations have strong partnering relationships with the City.

- The Prompt Payment Working Group is planning to implement measures to help City vendors, particularly M/WBE firms, to be paid in an efficient and timely manner for their services. This Group is conducting a pilot program to review existing processes and policies for the City's four major infrastructure departments that manage construction contracts, to increase the speed of processing payments for both prime contractors and their subcontractors.

The City is also exploring ways to provide more assistance services to small contractors to help them apply for bid and performance surety bonds.

B. Experiences with The City of Chicago's M/WBE Construction Program

To explore the impacts of race- and gender-neutral contracting policies and procedures and the implementation of the City's M/WBE program, we interviewed 175 individuals and industry group representatives about their experiences and solicited their suggestions for changes. These reports informed our recommendations for enhancements to the City's current policies and procedures, provided in Chapter VII.

The following are summaries of the topics discussed. Quotations are indented and have been edited for readability. They are representative of the views expressed during the interviews.

1. M/WBE Eligibility Requirements and Certification Processes

Overall certified firms expressed support for the City's rigorous process to ensure that only eligible firms receive the benefits of the program. Lengthy delays in processing initial applications were compounded by lengthy delays in reviewing applications for recertification.

Forever, one of the issues has been the fact that every five years you basically have to resubmit everything like as if you're a whole new M/WBE which, I think it's ridiculous to have to do that, particularly for companies that have been in business for a very long time. And once again, they're asking for the original checks, come on. There's some downsides to that too, because you don't want those companies that have gone through

changes to just kind of skirt it. But I think that if they just require some of the more or some of the established companies to just perhaps submit some recent financials that should be satisfactory, particularly if somebody is a DBE, they've kind of already gone through all that process. They know that they're below the thresholds. I don't know why they would make those people go back through it again.

You have two speeds. You have slow, and slower.

The process is extremely long. The accumulation of paperwork that you need to submit does take the applicant a while, but it is doable. The problem is the lack of resources at the City to process the files in a very timely fashion. Months is easy to say, it can go on longer than months, into a year or more for certification. So, if you know of anybody that's interested in certification, they should've applied yesterday.

Not only do they ask for that same check, when they started the business, they started the business as a sole proprietorship. Then the fellow went off to Iraq for a few years. He came back and he became a corporation. So, the original check was in a bank account. And he luckily that he had the paperwork, but it didn't match the incorporation papers, even though they had submitted this 11 years ago. And it was a whole big thing.... It was a whole list of questions that had nothing to do with the price of tea in China.... This was a tremendous waste of time. Let's see what this firm did in the last couple of years. Let's update any type of paperwork that you want.

A few certified businesses stated that there are firms that are not eligible for the program but obtain certification on the basis of fraud.

Because everyone on this page knows a fraudulent company. They see it happening and we wait for enforcement to take place. Because when you have frauds, what it does, it drives the market price down. It drives it down tremendously. Because frauds do not have an office building, a staff, insurance, all the burden that it takes to run a legitimate company. So, now you're competing with firms that don't have these costs. So, by not monitoring and exposing these and asking the simple questions, it hurts the entire, entire DBE and MBE market. So, as far as enforcement and people on site, there has to be some additional common-sense measures taken.

[M/WBEs] don't have time to [act as police for the integrity of the program] because we're trying to run our business.... Our community is relatively small. So, you should kind of know who's out there. You know all the certified firms because you should, because they're in the same space and you know who your competitors are within the community. So, when they come up with this name, I've never heard of them. Then I start looking them up. But I don't have time to police it myself and say, "Oh, who is that? I've never heard of them."... I just kind of move on because I'm trying to get the next job. I'm not going to worry about it, but I agree there might need to be some more enforcement.

Many M/WBEs stated that the City's current definition of a small business inhibits their growth and opportunities.

I think the revenue limits can be a problem. They don't necessarily increase with inflation. Because even though I'm marching towards graduation right now and I'm trying to prep for that, I'm doing less business than I was 10 years ago. 10 years ago, I had over a hundred guys, running a hundred guys. I had doing way more work. And I'm still, it took us forever to recover from that last recession. And now we're probably going into another one and I might graduate. That's a bit of a scary prospect. All because of this revenue limit that has not really increased with the cost of labor and the cost of copper in these last 10 years.

At some point, someone is going to say, "Well, you don't have enough contractors to fulfill the goals that you have, especially now that the private sector has been pulled into it by the City. You don't have enough contractors to keep up." What's to keep these contractors from saying, "We need you to lower this 26 and six, because you don't have enough contractors to even fulfill these goals."

I've heard myself from general contractors who say ... "We don't want to give you too much work. You could be the low bidder, but we don't want you to graduate out of the program. We want you to stay at your revenue stream where you need to be at, so you don't graduate."

In order to be able to have a substantial share that will actually affect change and produce better results as it relates to Black participation in construction in Chicago, you got to do

something with those standards. It doesn't work for today's market, for today's businesses.

There's a historical advantage that [White-owned contractors] have and what happens because they've a historical advantage, they're allowed to grow to a certain size, they're allowed to achieve these economies of scale and those variables are not overcome simply because [name of MBE] has gotten to a certain level and graduated out of the program. He still hasn't graduated to that point where he can command the buying power of all those situations.

The more Black contractors that you have that have the capabilities to bring on more Black contractors help builds more Black contractors. If you stifle that, if you pull the rug from the upper echelon of contractors that are helping to bring on smaller contractors, we definitely put our arms around and give them those additional secrets of how to do business.

We only have two Black mechanical guys. You have about a half a dozen or more Black electrical firms. I mean, we can say that people are going to be upset and think as though they're missing out on opportunity, if we increase the size of the program. But quite frankly, even at the size that it is right now, there's still not enough contractors to handle the amount of work that's on the table right now. We need to allow the program to allow the contractors that are larger to continue to grow. If you want to put some sort of incentive in there to push for Tier 1 and Tier 2 smaller contractors to be a part of the project, I think that's a great idea. And I would definitely support that, but if you pull the rug from underneath the larger ones, you're going to lose some leadership in the construction community, definitely in the Black construction community.

Many larger currently certified firms explained that gross receipts— the basis for the current size calculation in the City's program— is not an accurate measure of a firm's ability to compete outside the program.

They're being penalized for their growth.

We need to look at what success is and define success, because just a revenue number does not mean success, a revenue number does not define profitability. You get on these projects and things could go sideways. You don't get paid, or subs go bad on you and you wind up losing six figures worth of money because an estimate went bad, or a foreman didn't do a good

job. Now what? Is it all about really the revenue number? I think it's really more about the bottom line. We should be looking at that number because that's the number that defines if we're successful or not, if we're not making money, we're not successful. The point that I have, all of this back office, documentation, estimates, this staff that I have to employ, and they don't come cheap in terms of doing good work. That's a cost, that comes at a cost. Now I have to carry this cost, but I also have to cover this cost with the dollars in my revenue. If I don't have the revenue, I can't have a good staff. In order to be profitable, you have to have a good staff, you have to have revenue and it all has to translate to profit. I think we have to take another look at that and not just say if you're doing 20 million and the cap is 15, 16 million, "Oh, you must be making money," because I can tell you from experience, that's not the case.

God forbid you have a loss. That's not even taken into consideration.

Construction I think on a good day, by the time you cover all your expenses on your back office, you're one or two percent in. So, operating off the top number doesn't really help in construction, especially when you think about the way businesses have to work today, the compliance issues, the back office, the admins, the marketing, all the other parts of their job that doesn't exactly get paid off that contract, whether it's your overhead that you have to have, to be able to survive in today's marketplace. That's not factored into just your revenue. Using the revenue as a revenue standard, I think it's a big misrepresentation.

The more costs that I have to incur by processing documentation and the bureaucracy on the project and waiting to get paid, floating money, that's all cost to do business. But that weighs down my opportunity for profitability. But the size standard does not change. That cap is that cap.

The application of a national size standard was also mentioned as an unrealistic limit on opportunities and growth.

The size standard is a joke based on the billions of dollars that are done here in Chicago, you have the same size standards as Paducah, Kentucky. And this is the City of Chicago where you have many more subcontractors, many larger Black subcontractors, than you have anywhere else, and you have

this extremely small size standard. It just absolutely doesn't make sense.

You got to have bigger [minority] subcontractors in the marketplace. The big projects that are coming down the pipeline, they're not all small projects. We're talking about billions and billions of dollars' worth of projects that are coming down the pipeline. You need minority prime contractors to be able to compete. And you need them bigger.

Some White woman business owners believe that the City unfairly applies a higher standard to reviewing their eligibility under the limits on the owner's personal net worth more stringently than for racial and ethnic minority owners.

I have run into occasions where the City has been focusing particularly on the White women, even when the spouse is not part of the business but focusing on like that potential access to wealth. And look, it's arbitrary at best, but here's the thing, are they doing it to like the other M/WBEs? And I don't want there to be like this racial division thing, but the fact of the matter is the only cases that have been brought to my attention have been White women.

The M/WBEs who have "graduated" from the program because of the size standards reported greatly diminished opportunities once they were no longer eligible for credit towards meeting contract goals.

There was no transition program. So, we went from being certified to not being certified. The way the City's rules are, we got to finish out all our existing contracts and whomever we were working for, whether we were working as a prime or as a sub, would continue to get those credits and the existing contracts. And our transition, because we do work, we had moved at the time we were originally certified. We did work primarily as a subcontractor. Now we do work more as a prime contractor so we could control our own destiny. I think it's a lot more difficult in the trades that are always going to be a subcontractor. Not every contractor wants to grow up to be a prime contractor. So, I think for trades who work only as a subcontractor, I think it becomes more difficult.

When they do graduate, it's hard for them to compete because you're really prevented from building a truly viable organization.... If you look at the top contractors and construction managers and general contractors in the entire

Midwest, there's over 300 of them. If you just look at the top 100, the biggest firm is \$2.7B. The contractor that's ranked about a hundred, they're doing 248 million. On that list, there isn't a Black contractor or an African American-owned contractor, Hispanic-owned contractor on that list.

I've had developers and larger contractors squarely tell me, why do we need you? You're no longer an MBE.

We have had situations, many situations, where no one wants to talk to us or will consider putting us on their teams for the larger projects because we don't check a box. So, then that puts businesses who have graduated from the program at a disadvantage because we serve, in their eyes, no purpose so to speak.

We are a minority partner that gives them no credit. So, we're a midsize business. So, I bring midsize capacity, but I'm not one of the bigger boys to whom we are now competing. So, when we are competing at the GC level, now we're looking at RFPs that may come out. Show me where you built five of these exact buildings within the five counties in the last four years, three years. There's no way that a business like ours can come up with those stats and compete on a fair playing field.

I graduated from the DBE about seven, eight years ago, maybe. You become less attractive for a while. And then it definitely has an impact because the reality is, that they only use you when they need you, unless you have some really deep relationships. So, if they don't need to use you, they don't have to use you, they won't use you.

When you're looking at joint ventures, the way the math works, it makes much more sense to partner up and get the 26 percent and the 6 percent at a subcontractor level. Which means general contractors are never going to grow through that means.

In some of my conversations, which they'll ask, "Are you MBE?" And they'll say, "Well, we don't get any more credit for using you." And I go, "Yeah, but you still can't find anybody to build that school." So, I think that the program was very instrumental in who we are now. It's only been a year and a half, I think if year number five, if we're still going in this direction, I think we can say, "Okay. All right. It does what it's supposed to do." But there's been a big drop. I mean, we are experiencing some folks

[who] say, "Hey, using you is not going to help our program at all, so we're okay."

It's even harder when you're a minority business [compared to a similar White-owned business]. Because the guys that know the work that have been in the industry for years, and I don't care if they're Black or White, nobody wants to come to work for a small Black firm. Nobody wants to go from a big shop to a smaller shop.... I want to pay him more money, and it's more costly for me to hire one of these guys that's been in the industry longer, right? Because they don't want to come to a smaller shop. So, now my costs go up again, and it's the same cycle.

Even private sector or "no goals" work is negatively affected by outgrowing the program size limits.

There are some, we do have some long-term relationships that are based on our MBE contract. That even if we lost our MBE, we keep some of them. [But] I know that they just move on and find somebody else. And so, trying to create, trying to expose ourselves and create relationships with private entities is a must.

There are some incentives for contractors to do private work, but I'm not sure if they're really working all that well or a lot of people know about them. Because, again, I want to say like 90 percent of the work that I do is public work and about 10 percent is private. And so, we're in a mode right now where we're trying to figure out how to better, how to get those numbers to look a little better so that when we do graduate, we don't have that huge revenue drop.

And you have some of these mega projects that are going on in the City now that we're just not a part of. Nobody's called or had any interest in talking to us about it because ... they don't get any credit for, despite the fact that I think we've done more of the larger retail ground floor construction in the City while we're an MBE. So, I think it does, when you go out of it you see a downtick in an interest in the marketplace, but I'm hoping it's not the end of the world.

Several large prime contractors agreed that the current size limits unfairly inhibit M/WBES' growth and opportunities.

[When certified firms start] to reach the point of maximizing that ability, well, they have no longer become eligible. They quote unquote graduate from the program and I've had a number of subcontractors who we are trying to get on board on projects that can help to build their resume, can build their capacity, but they declined because, well, for the straight reason of we don't want to graduate, we don't want to get past our size standard.... You've got a technicality and you're really trying to do the right thing. We're trying to bring on small businesses to help grow them, help mentor them.

They need that dollar value to go up so that they can actually start to survive and thrive.... I think the gross revenue cap is... especially in the electrical side because our contracts are one of the larger contracts on a construction project, are true disincentive for contractors to grow and be successful. Same to a minority contractor, woman owned contractor, that you could only be successful to a certain point, just makes no sense. So, for our contractors that are partnering with other contractors, it becomes difficult. I'll also say the personal net worth cap is, again, it's that same disincentive that you're good as long as you can only be so successful. It just seems crazy to me that we're stuck with those numbers, to say that we're good as long as you're just partially successful.

What's more important is growing capacity of subcontractors and helping them grow just like we grew from a smaller company. And then when they graduate, then what happens to those subs after that? And there are some good success stories, but I bet you a whole lot more of her stories of just contractors that can't grow because of the way this MBE WBE system is put together.

There's some of my members that would like to see the graduating out of the program be eliminated. So, the parameters raised so they can stay in the program and not graduate out and many would like to see them stay in because they're good partners in projects in there. But there are some ones that are upcoming think that that's competition and they should graduate out. So, there's an internal conflict on a lot of [this]. But for the most part, we'd hate to lose the ones that have been well established and doing well because they're successful.

Firms that serve as general contractors were less impacted by outgrowing the program's size limits.

We were always a prime contractor. We just had to go out and solicit subs now to fulfill those same goals.

As we graduated, those doors have become relationships over the years. And those doors have become the way we execute and how we execute over the years.

Some industry leaders opposed raising the size standards.

Some of our successful African-American subcontractors are kind of skittish now about bumping up against the net worth thing for the SBA. I said to them, and I said to some Hispanic leaders, "I'm not convinced that we need to tinker with that now." I know they want relief because many of them are growing out of the program. But my position has, and continues to be, both from the legislative standpoint, as well as from the practical standpoint now, is that the program was designed to create successful [firms] that would grow out of the program. And so, I'm not a voice for changing it at this point.

2. Technical Assistance, Supportive Services and Incentive Programs

The City conducts many outreach events to connect certified firms with City decision makers and prime contractors. However, some firms suggested a more targeted approach that focuses on midlevel M/WBEs.

I've gone through all of the programs that are available for those beginning contractors. There's tons of programs for people entering the business, but now once you're in the business and you're established, how do you grow? That midlevel of, "Okay. I know the terminology; I know all the paperwork. None of that's a problem for me. So, how do I get bigger pieces?"

More training and technical support for M/WBEs was urged by several large prime firms.

We definitely do internal training... We try to help in that regard. And we do big scope reviews and we've sat down with folks even after we've not awarded just to try to get them to understand kind of where they're missing the mark. But I think that type of training is needed widespread, just because getting certified to step one, and being able to bid these larger City

jobs, that's a whole different ball game. So, to the extent that the City can provide some assistance there, I think they'd be doing an awful lot of good.

Several M/WBEs urged the City to provide some sort of working capital program or at least up-front mobilization payments to get a job started.

For certain sized women and minority-owned firms, a mobilization payment could be required. It could be monitored, but something to help people get going.... I couldn't even get my invoices factored. So, some sort of funding tool to help us grow and maybe a mobilization requirement.

The requirement to sign the City's Project Labor Agreement adds another financial hurdle for small firms that they believe City assistance would help to overcome. The financial squeeze of the requirement to pay into the union funds regardless of whether the City has paid the prime contractor, or the prime has paid the subcontractor, is a significant barrier to M/WBEs of all sizes and all small firms.

The unions have no mercy, and they have egregious fines and penalties, and they refuse to recognize any type of barriers as far as lines of credit.

In order for this MBE program to work, there has to be some kind of collective program in order to help the MBEs and the union has to work together if the unions are going to exist and or if the MBEs are going to exist in this program.

[Smaller firms] just can't afford to start up and buy into that pension debt.

If you're going to say it's all got to be a union, it's a union shop town, you're going to have smaller firms that don't want to buy that pension liability, don't want to deal with it. So, that's another barrier to entry.

One suggestion was for the City to provide a sort of waiver, stating that the certified payrolls have been submitted and the workers have been paid but the contractor is awaiting payment.

It's a requirement that you have to be union to be on [a City] project and they don't pay you in a timely fashion, so you can pay the union. Watch as your money be stretched in and you incur additional costs and financing costs because they have not paid their bills. I want a waiver from that particular project to say, "Hey, here's my certified payroll. These are the guys that

worked, and I have not been paid from this project." Package that up, give it to the union. If they have an issue with it, call the City.

The relatively low dollar ceiling and limited volume of the contracts chosen for the Small Business Initiative diminishes the utility of this contracting method.

There are not enough opportunities that flow through the SBI. I just went online to the Fly Chicago website and DPS website, and there are no opportunities, as I thought, for prime contractors at the small level.

The SBI program that you mentioned, that's garbage because they do not put enough money in the SBI program to really set aside for smaller businesses, such as myself, to work on any jobs in the City. That program, it just doesn't work. Every time I look at the list of projects under SBI, nothing is there.

Other more established MBEs reported that the contracts are so small they are not profitable.

Some of the projects that are so small, my overhead costs so much, it's not cost effective for me to even do those projects.

Some prime contractors had tried to work with M/WBEs in the SBI and MBI programs but found that few firms were knowledgeable about the benefits.

The City hasn't educated these companies that, if you're a DBE or presumed to be a small business or mid-sized business, and these businesses don't know it. So, these opportunities come up and we're scrounging to find people to bid on these packages that we've put together. So, it's kind of a lack of communication and information that we've found ourselves putting together informational sheets so we can let the people getting to us know that they might qualify for this.

As larger general contractors, I think we bear some responsibility for helping the subcontractor partners, but I think the City of Chicago can do a lot more in regards to just educating them on the programs that the City has, like the SBI or the MBI, and helping to provide some ongoing training so that they could be more competitive in pursuing the opportunities that are out there.

Several participants, both M/WBEs and prime contractors, urged the City to reinvent its Mentor-Protégé program.

Incentivize them at the Mentor-Protégé program.

The first thing I would like for to see the City do is more of the Mentor-Protégé, more of the, like the [Illinois] Tollway [program].

I criticized the program recently because Mentor-Protégé should be an opportunity for a small business and a large business to have a relationship that's mutually beneficial, mutually. The new program, it used to be a term program, a one-year multiple year program. Now, it's by project.... The requirements became too hefty, and a lot of the small business I worked with said that the commitment for the large business is too hefty. It's too hefty. It says something like you have to spend eight hours a week with the small business. That's unheard of. So, the mentor protege could be a great program. I've seen it on the federal side.

If that's done properly, that would create the access that's missing, that I'm hearing all the other participants talking about.

The Mentor-Protégé program needs to be overseen a little bit more to make sure that they're actually following through in the things that they're doing. I've had two partnerships so far; one was good, one was bad.

Joint venture partnerships between a certified firm and a larger prime contractor were suggested by some firm representatives as one way to increase M/WBES' capacities.

[Joint venture relationships have] been one of the integral parts that help us grow the way we've done.... I think what you get with a good joint venture is access to the back office, access to their technology, access to how they do work that you get to see and understand and incorporate.

[Large prime contractor has] a joint venture with a woman-owned firm, and it works on the federal [level] great. And this woman-owned firm has made more money with us than she's ever made, and I told her, "Eventually, compete against me. I have no problem with it, but right now, we're joint venturing to go after work together that I otherwise couldn't get." So, those relationships that help small businesses join together, I think they're great, but somehow, they seem prohibitive on the City programs right now.

An MBE sounded a cautionary note.

Let's use 60 [percent majority-owned firm], 40 [percent M/WBE] as an example, and it's set up. You got your name on a fence, the deals struck. You're going to have this person, that person. You're going to share this area of work. Halfway through the job, something happens, which it does in construction. That 60, 40 starts going to 70, 30, 80, 20. And by the time the job ends, you're lucky if you're getting 10 percent of the profits, and the other 30 percent has been diluted with what they're calling their management cost or their additional overhead, or contingency overruns, and things that happen on the project that no one's actually auditing. Why? Because first of all, unless you're in construction, you can't really figure it out, and it's hard for you to understand. I mean, if there's an overrun or out of scope item that you have to now cover, so where do you get it from? Well, let's take it from the MBE firm because in their mind they didn't do anything anyways, right? We just have to do this, and we just have to partner with them, so if we have risk and exposure, why should we get hurt? Just take it from their bucket.

As discussed in Chapter IV, many M/WBEs reported difficulties in accessing working capital and surety bonds. Several prime contractors agreed that M/W/SBEs could benefit from increased financial assistance to do work on City projects.

If there was some access to capital program that might be available to some [MWBs] because I think that traditionally has been an issue especially if you're talking about second-tier subcontractors who maybe don't have access to a working line of credit and things like that.

If there's some sort of bonding program that covers over those smaller to medium sized contractors, they can start taking advantage of those opportunities and then start growing their business

I think that could help them a lot.

3. Meeting Contract Goals

As born out in the utilization data in Chapter VI, most prime contractors were able to meet M/WBE contract goals. However, many prime contractors expressed concerns about the availability of certified firms with sufficient capacity to perform as subcontractors on City jobs.

The biggest issue is a matter of capacity and figuring out whether it's the project size, whether it's company size, whether it's the scope of work. We have a fundamental issue of capacity in our industry here where the opportunities exist, the opportunities are out there, and everybody is looking to maximize those opportunities either at a first-tier level or second-tier level. But the challenge is you have in many cases, magnitudes of millions, if not tens of millions of dollars that are in a specific skill set that frankly they may not be able to accomplish.

There's no way that you can get an aggregate of \$200M worth of participation because it just doesn't exist. It doesn't exist from a capacity standpoint. The firms don't exist from that type. They don't have the resources. You're going to have only a handful that can bid as a prime

The larger the project, the more difficult it is to find and meet those goals.

The lack of capacity for the existing MBE DBEs, to be able to find enough of them to do the work when it's 26 [percent MBE], six [percent WBE] and the 50 percent residency [requirement], the capacity of those firms that can do the work has to be increased. And just not being increased. So, they are competitive, the pricing is out of whack because they are the fewer to deal with. So, the capacity just is not being built to be able to fulfill those goals sometimes. And [prime contractors] want it. They want a partner. They want to follow the policy. They support the policy.

We're making the percentages because people are buying equipment through a supplier who is a minority business, and you get a certain amount of credit for that, not full credit. Those are the kinds of things that occur when you have to make the goal and you don't have the capacity in the overall industry.

We almost never have a problem meeting the goals on a particular job. The issue though is you may pay more for it because we might not be able to take the low bidder in a trade because we have to juggle things around to meet the M/WBE goals.

Too high goals were believed to sometimes hurt certified firms.

We're trying to set them up for success. And instead, you could have a situation where there would be either spread too thin, not have the resources available. Whether it's manpower, whether it's the financial capacity, whether it's projects or similar scope in nature.

Some bidders found the City's Directory of certified firms to be difficult to use to identify potential subcontractors and suppliers.

When you're going into their database and there's hundreds of people that you pull down for a trade 500, how do you get through all them? So, I think they need to do a better job of being able to drill down on their database.: When I'm using a certified firm that apparently the City has vetted and certified, you want to have some assurances that they're able. Yes, we do have to make sure they're doing a commercial use function, but the one piece you want to make sure is that they're being able to perform the work they've been certified in.... It would help if the City can kind of get that database a little bit more streamlined.

The City's database is a little unruly and I've seen it both ways. I've seen firms certified for trades. We found them not capable of performing. I've also had some issues with firms that are clearly capable of performing certain trades that cannot get certified by the City to perform those trades. So, I cannot take credit.... So, to the extent that that database can get significantly cleaned up, I think it would be helpful. The other thing is a lot of us are union certified. That database does not differentiate between companies that are certified, that are union signatory and those that are not.... If you look at the overall database, you see hundreds of firms that are certified by the City, but those that are actually able to perform on contracts of a certain size through various trades, that number is actually much smaller.... We're constantly having to combat on the misperception of there's ample capabilities out there.

We don't use the broad list all that often. I don't think we've ever found [it] very productive.

If they're going to go through the exercise of certifying a company, I think that a lot more information needs to be collected because that's their opportunity to do something meaningful is through the collection of that information, through the due diligence of looking into whether or not they can perform. That is the biggest service [the City] can provide.

I would never expect the City to certify as to the capabilities of a subcontractor and frankly, I don't think I would trust them if they did. That's part of our role as a GC to decide if somebody's capable of doing the work. What I look to the City to do is certify them as an M or WBE. And that's it.

If you're not asking that question [whether the applicant for M/WBE certification is a union contractor], you are misleading certified firms into thinking there's an awful lot of opportunities out there for them when there might not be because that [Project Labor Agreement] exists.

The City's online database, frankly, we don't use it. It's useless. Just because the City has certified them doesn't mean that they're [qualified]. So, we use the same companies we've used for a long time or through word of mouth. Who's actually capable of doing this work?

One suggestion is for the City to attach some sort of capability statement to the record of a certified firm.

Matching that talent to the certification is one of the challenges we face.... [If] the business was to take a class, and then that certification was attached to their WB or MBE or DBE certification, it would help a majority owner know the capacity of that business.... A lot of the conversations with majority owners is how do we weed through [the certification directory]?

Some interviewees questioned how the City sets contract goals. They believe that the City does not set the contract goals based on the types of work of the contract.

What is the capacity, and does it really meet these 26 and six goals?

The goals exist in LALA land.

One thing the City doesn't do, which [the Illinois Department of Transportation] does, is they don't modify the goal. And I know, I think their program is supposed to be tailored to a specific project, but their goals are across the board. Like 26 and 6 or 30 and 5 percent. And they don't vary. And we bid a job at O'Hare for a very specialized piece of construction. And the reason we didn't meet the goal is because the construction was so specialized, we kind of proved to them through our good faith effort that 80 percent of the work, there were no certified firms

for it. I mean, there are no certified WBE or MBE sheet piling contractors. Those are usually done by the primes or [name] or somebody like that. There are no big mechanical subcontractors. Pump manufacturers are not MBE or WBE. So, the goal was just unattainable, in simple terms. And they gave us a royally hard time about it until finally they pushed the easy button and rejected all the bids.

The City doesn't evaluate each contract for participation. It's across the board, every contract they have, they put out with 26 and 6. So, it can actually be 10 percent participation there possibly, but they put across the board 26 and 6.

[If at the end of the contract the goals were not met, you] plead for mercy.

Fraud was reported to sometimes be the suspected result of "standard" unrealistic goals.

Fraud can be the result of unrealistic goals.

The City generally sets goals far too high. And honestly, to open up the gorilla in the room that promotes fraud. That promotes pass throughs. That promotes just the wrong thing. It'd be far better to have a much smaller goal and have it more real participation as opposed to just the name on the sign or something else.... And then you know for a fact that other bidders on that project are using, I don't want to say not legitimate participation, but participation that just doesn't really stand the test of true contractor getting out there with shovel in hand and doing the work. And that's a real problem, much better to have smaller goals and have real participation.

How do you find a bona fide minority owned business? Somebody may be tempted to take a shortcut. That doesn't serve anybody. But that kind of thing, I think could be an inevitable outcome of ever-increasing goals without the market to back it up.

What promotes [fraud] is the really high goals and the need for capacity. That's what promotes that kind of level of, I don't want to call it fraud, but it kind of is.

This is what creates fraud because contractors know they're not going to get waivers if they really get a little bit out of sorts when they're contracting with some of these small firms. And

maybe if it was on a contract-by-contract basis, it would be a little bit more above board.

Bidders who were unable to meet the contract goals reported they did not bid the job because they assumed that their submission of good faith efforts documentation would not be accepted by the City.

We just assumed that if we have to ask for a waiver, we're not getting that job.

Goals are being met for the City if people want the work, because there's a perception that no waivers, to use a common vernacular, are going to be granted.

[The City's] reputation is that they don't give out waivers. So, it's either meet the goal at some expense or don't get the job.

There's a perception, whether warranted or not, that don't even bother trying to seek a goal modification because it's not going to be granted.

That's our impression.... And perhaps you're driving up prices for the public entity that way.

It's a very subjective set of documents to determine good faith or not. And I can tell you that we've been successful, we haven't done anything different. And then we've been unsuccessful. So, our experiences is mixed, and it depends on the whims of who's looking at our program any given day and I invest too much money into a proposal to put it on somebody's whims, downtown Chicago. I don't feel very comfortable about that, and I wouldn't do it.

Some prime firms reported that it is nearly impossible to get a substitution of a non-performing certified subcontractor approved by the City.

Substitutions are about impossible.

DPS is where things go to die.

On contracts with few or even only one scope, MBEs that were successful in being awarded prime contracts urged the City to consider not setting both goals on the contract. While M/WBE prime bidders can count their own participation towards meeting the contract goal, MBEs must still meet the WBE goal, and vice versa, and firms owned by minority women are not allowed to double count.

They're forcing me to hire a WBE when I've given them a hundred percent MBE. And typically, with demolition, we're all

self-performed work. So, therefore, you're telling me to go hire a WBE to do what?

Some White male owners felt that they suffer discrimination because of the program. They urged the City to “graduate” M/WBEs faster; the program should not function as a “hand out”.

We pretty much exclusively bid as a subcontractor, and we've lost jobs due to minority or women business enterprise certification restraints. My frustration is there's been several competitors who have certification as a disadvantaged business that come from positions in life that really weren't disadvantaged. Whereas I am a person who started a company from nothing and much risk and yet lose work because of my gender and my race.... Instead of chasing work that you start to believe you have no shot at, you go and start doing private work or work outside the City, especially when the pay history isn't that good. Why chase work that's not going to pay? Go through all these hoops to get work that you're going to wait for your money.... It doesn't look like a fair playing field. And there've been other situations where you have somebody who puts their wife in business and was not disadvantaged again, other than the fact that the gender and it gets disheartening when you're told that, well, you're the low bidder or you're the most qualified bidder, but you can't get the job because we need to fill this requirement.... We're losing work to these [minority- or woman-owned] companies that have been around for so long and that's disheartening. And as a non-DMBE, you have to live between the contract goal, where the contract goal ends and where the prime or general contractor does their work. How much is the prime contractor going to do with their forces? And then subtract off what the goal is, and that's the percentage of the contract is potentially available to a non-DMBE. And oftentimes, that's a very small window or nonexistent window.

We were talking about losing jobs to higher bidding DBEs and race and gender. Well, our case it's women and Hispanic, and until very recently, African-American has been very, very low bid rejections, low bid rejections that we experience. And over the last 38 years there, it's just a massive amount of jobs, or maybe who knows, 50, 60 jobs a year, we experience this phenomenon. So, it really adds up over time. And I've drawn the conclusion that you could have a much better fairer program if the disparity studies with focus on subcontract data

and see what's going on there and see what the overutilization and subcontracting is.

And some groups it might be time for them to graduate entirely from the program. And, perhaps, we have a much smaller program and a much fairer program, and one that does more good at the same time. And existentially, I think we should ask, is a DB program meant to be forever? If you get a certification, is that supposed to exist into perpetuity?... The point is though it's so entrenched, but how do you un-entrench it. At some point it's become entrenched. [We should be a] colorblind society. At some point, we got to untether ourselves from this way of thinking.... Almost everybody [that is an M/WBE] that I talked to, they have no interest in bidding as a prime. They have businesses like [name's] and [name's], and they're very familiar with their expertise in a certain area. And for the City of Chicago or any owner to expect these folks to jump up into the prime contractor position, I've never really talked to anybody that's very interested in doing that. It's taking on way too much, and they're not prepared for that.... My advice [to M/WBEs that aspire to do prime work] would be to stay small for a while, and come back when you've got some real expertise, and it's going to take some time.

[The M/WBE program is] requiring us to give up certain aspects of our work, to use other minority companies or women owned business companies. And one of the frustrations is contractors we're bidding against. We bid as a general contractor and we bid against other general contractors that are certified as an M or a W. And these companies are out there. They're bigger than us. You know, we do about 20 to 25 million a year. We're bidding against MBE companies that do 30 to 35. I'm not sure why they're considered disadvantaged if they're able to bid on jobs, these large complete jobs, these large, provide the bonding. At what point do you graduate? And as far as after you graduate, I don't know what more help do you need to give these companies? You've already helped them get their feet on the ground. You've already let them build themselves up big enough where they're doing 30 to 35 million a year. Big enough where they're doing 30 or 35 million a year and graduating the program. You've done more than anyone can ask for. Everybody on this call has started their business from the bottom with presumably no help. You can't just hand somebody [work].

What truly is the goal of the program?... The program should be designed to help a person up, to give them the skill sets that they need, and eventually be able to off ramp them to be able to do it on their own. And it just seems like it draws people in and then they stay in the program. And I know contractors who manage their volumes so that they stay [in].... A lot of us didn't have that hand up, so we had to learn through hard knocks, and we had to struggle through it and figure it out. And sometimes, if you're always handed it, you never take those steps you need to, to really learn it to the depth you need to, to survive in Chicago, which is an extremely competitive business environment. I've always tried to give back to my industry.... I've been on the boards of several trade associations where I try to help those younger companies and try to teach them the right way to do things, but it seems like these programs miss that point. That it's a limited time. There should be that expectation. We're going to help you for a while. At some point, you need to do this on your own, like most of the rest of the world has to.

Experienced DBEs should not get a dime price advantage over their competition.... If they don't have access to capital, there's only two reasons. They shouldn't get more capital because they're too high of a risk or perhaps they've been discriminated against. And the City of Chicago should want to know something about that. But that's not a contractor problem. And it's nothing that we can really help with.

4. Contract Administration and Performance Monitoring

There was close to universal agreement among prime contractors, subcontractors and City staff that the program is severely under resourced.

[The program has] been understaffed for a very, very long time.

I don't think there is enough staffing in each of these, from procurement, all the way through to comptroller's office, all the way through to the aviation department.

This lack of staffing has led many M/WBEs to conclude that there is insufficient monitoring of prime contractors' compliance with M/WBE utilization plans.

You have to have [City staff with] a basic knowledge of how the construction industry works. If you see a landscaping contractor on there and they don't show up for six or eight months, okay that makes sense because they're when grass grows. They're at

the end. But when you see a concrete guy who's pouring foundations, he should be there in the beginning. If you don't see him show up on the sworn statement, how do you keep on going?

The GCs or someone, they always find out a way to, I don't want to say beat the system but figure out the system. And then the same MBEs are the ones that either continue to get the work or don't get the work.

It's those jobs that aren't getting monitored properly where things end up going awry.

They need to enhance their compliance staff.... We could even maybe do a train the trainer kind of thing because we've been around this ball game a long time. We know a lot of the tricks that the GCs use, a lot of the excuses that they give. And enable a compliance officer to be able to counter that when they know it's not accurate or it's a convenient excuse. I think that would go a long way to helping. And I think they just need more folks. They have a lot of contracts that they have to deal with. And many of them don't get much attention because it's more the, "I cried wolf over here. Let's deal with that problem", which is fine, but some systematic auditing of these firms.... If you have a tough voice in that department, user departments will pay more attention, contractors will pay more attention and compliance will improve. If you've got somebody who's not willing to challenge them and takes their excuses, then they see the opportunity, the GCs will see the opportunity to walk all over compliance staff all they want.

There really needs to be monitoring throughout the whole process.

If I were going to change one thing, I would change that ... compliance is actually done.

There's a lot the City could be doing that they're not doing to hold them more accountable.

They really need to start focusing on what is already on the books, how to move it, how to monitor it, and again, it goes back to that compliance thing.

One of the problems in this business for us, as minority, the City, whoever they hire to do the monitoring, don't do a good job. I can walk on every construction job and can tell you

whether they're meeting their goals or not. They meet them on paper, but they don't physically have the boots and shovels on the ground doing the work.

I'd rather go bid five jobs to the [Illinois] Tollway than one job in the City, just because it just becomes frustrating after a while. When you're in there and you get in, you're competing, and you're doing the job the right way. And then there's no backup.

Hold these companies more accountable.... The Water Reclamation [District is] a great example. We have a contract with them, and if the person that we have the contract with, they literally ask us for our information each month. They want to make sure we got paid. They want to make sure we got paid what the prime said they paid us.

Some minority contractors want the City to mediate disputes between certified firms and their prime contractors.

There has to be somebody from that government agency or somewhere at the top that can come in and mediate to say, this is what we need to do. And then once that decision is made, it has to happen ASAP because we can't sit here and wait months for something to be paid.

The City can have control over the downstream contracts or subcontract agreements between the GCs and their subcontractors.

An advocate or ombudsperson for M/WBEs was mentioned by many interviewees as a much-needed enhancement to the City program.

The reality is unfortunately there is nobody to go to when somebody is trying to do something improper. There's nobody really to complain to because there isn't that one person to contact when that happens.

The City could have some sort of ombudsman or mediator that the City funds. When women- and minority-owned contractors have an issue with an agency, we need to be able to go somewhere. Right now, in order to do that, you have to play politics and sometimes that costs time and money. But the City should have some place where we can go when we're having an issue.

Who do you go to?... Do you just call the inspector general and shoot a nuclear warhead? It would be nice to have somebody

as a liaison to help navigate this without having to hit that big red button [of] going to the Inspector General.

Those people in those positions should be empowered, like an ombudsman, right, so they're there to support you and find out what's going on and bring some attention to it because oftentimes, they don't have the power to make an impact in the contracting for that agency.

I just want to know what the rules are, and are we all playing by the same rules? That's it. So, that office helps to ensure that there's a voice for the small business to say, "In this particular area, I don't think this was fair, and I'd like some attention brought to it before I have to escalate it."

Gray areas can cause the playing field not to be equal... [It] really does affect the playing field when the rules aren't clear, and we as a small business don't have the manpower and the finances to be able to present our points and be fairly at the table.

Sometimes it came down to just, when you need to call the City to get something, you don't have the phone number of the person you need to get ahold of. So, you just need information and it's not readily available. So, unless you have someone to help you with that, it's near impossible to get to who to call to get paid, who to call to sit on somebody to get those change orders processed. It's hard.

Put together an MBE task force, so that this task force can have a place for contractors when they have issues and problems, is made up of contractors, is made up of assist agencies... Meet once a month, or what have you and talk about are these contractors being successful and what's preventing them from being successful? What's preventing them from taking more opportunities and working with the City?

Some prime contractors raised concerns about running afoul of the rules that determine whether the M/WBE is performing a commercially useful function in developing mentorship relationship.

Another issue that we've had with mentoring, from contractor to contractor, which is that commercially useful function that we've actually had contractors get in trouble for trying to help. And this is something else that I don't think there's necessarily enough information out there about that and what the

requirements are and how to make sure that if somebody is trying to do the right thing, that they're not going to end up getting hurt in the process.

When I'm involved in technical assistance programs and you have new businesses, sometimes they're under the impression that they are at liberty to do whatever they want as far as having their prime contractor get them materials or equipment, or even list them for services that they're on the fringe of doing, but they cannot do. And sometimes not for a fault of their own, they end up in a bad place or sometimes the contractors themselves end up in a bad place. And I really think that more education needs to be done on both sides to avoid the situation.

Some certified firms want the rules governing commercially useful function reviews to be reevaluated or modified for clarity.

Here's the difference: as an M/WBE, we can't take advantage of the general contractor's pricing, like other non-MWB subcontractors can. They can utilize the general contractor's discounts. We can't because it would put our MWB status in jeopardy.... A lot of [general contractors] are really trying to help the subcontractors. They want many of the ones that they do business with to stay in business. So, they're looking at ways that they can help. And they look at that as an innocuous way to help. They're like, well, I told them that they can utilize our discount, but they right away said, no, they can't because of the regulations.

5. Payments

There was universal agreement that the City pays way too slowly. This impacts all firms: prime contractors, subcontractors, M/WBEs and non-M/WBEs alike.

[Invoices] were just sitting on somebody's desk. Or it was downtown, and the one person that was supposed to sign it was on vacation or got hit by car, who knows. But there's always some excuse.... San Francisco International is two weeks. Don't tell me it's an airport problem. It's a Chicago problem. And it's been a problem for over 30 years.

Where is the leadership and making sure that the procurement process works? And quite frankly, everybody that's working, prime, subcontractor, Black, White, everybody needs to get paid on time.

Most subcontractors fail because of lack of money. Not because they do poor work or they don't show up, or they don't have the right workforce or underestimate. It's because they can't get paid.

I don't think it's the comptrollers. The comptroller's office does screw things up every once in a while. But I think in general, once they get the payment, once they get the payment voucher, I think they process it pretty quickly. It's getting it out of the user agency.

Each department does it a little different. There's difficulties faced by the vendors and their subcontractors with figuring out what they actually need to get the department to get the approvals needed to get paid.

There's no reason the City should not, at O'Hare, where they do so much construction, they shouldn't be paying more than 30 days. I mean, we've got a job, [name of prime contractor] is on it right now. We're going to be a hundred percent complete with it this month. We haven't been paid a dime yet on the project.

This is especially problematic for M/WBEs and small businesses, who may not be able to afford to continue working on the job.

The payment problems are one of the reasons why large companies who are well-financed have the historical advantage over small companies and primarily African-American companies who don't have access to the financing that's needed to be able to sustain themselves while they wait for it. So, if you want to identify something that truly is a racial inequity, it has to deal with directly with the fact that most African-American contractors have difficulty establishing a financing arrangement that allows them to carry themselves over, to deal with the payment terms of most contracts.

But delayed payments hurt larger firms, too.

You haven't gotten paid since March. We're at risk that the subs, keep this between us, that the subs may walk off the job.

I get pressure from the [City] to make sure that we'd get minority firms and minority workforce on this job, but yet they can't seem to pay us. So, the firms that are getting hurt the most are the small firms.... [Large firms] could probably float

their books, but no, it's what, five months later. Even [name] can't keep paying people ahead. We're not a bank.

This is what drives these companies out of business. It puts them in real trouble.

A third-tier sub would be really screwed, because got another and another and another and another. That's the littlest guy on the totem pole.

While the City's contract monitoring system requires prime contractors to detail their monthly payments to subcontractors, many M/WBEs felt that no one at the City monitors their responses.

[I get] tons of notices saying, please report your payment. The general contractors reported zero. And they see that you were paid zero, is this correct? Yes, it's correct. I've been paid zero. And it says, are they holding any retainage? And now you say no, because there is no retainage, but, well what about my three payments that are still there? You know what I mean? So, I've written notes on that thing, but you don't get a response.

Payment delays discourage M/WBEs from seeking to work on City contracts.

If I ever have the opportunity to not work with the City and still find a good job, I'm taking the other project because it's just too difficult to work with the City. It's paper by the pound and slow pay.

It makes you not want to be at their projects because payment takes a long.

There's no way in the world that a small contractor like myself could wait 90, 120 days to get paid. It's utterly ridiculous.

If it was just 60 days, I think we get our finances up at some point to do the 60 days, but it's the 120 or beyond, that's just not fair.

You still have bureaucrats who will sit on, people's pay requests. I mean, they just don't care. And they don't really realize that when you're a small business and you're meeting a payroll, and if you're on a City contract, you have to sign on to a PLA. So, you have to pay your crews. It's like there's still this whole neurotic infrastructure that will hurt small and minority contractors.

I'll more or less go and work with a [name of MBE prime] or a [name of MBE prime] to try to be a part of a City of Chicago project because I know, to the best of their ability, I'll get treated as fair as possible. But you even put contractors that want to work together at risk because they're not paying. Right? So, now I have to go back and forth with [name of MBE prime] because I'm not getting paid from them because they have not been paid.

I call it this predatory behavior, has sort of been created, where these large primes will seek out firms that they know that they can handle with for a little bit, but then utilize them and then really kind of grind them to a position where they'll just take any kind of payment because they know that they're going to be hung out to dry, and then the sub will probably take it because they want to keep the relationship there or develop a relationship there.

Delayed payments especially discourage M/WBEs from bidding as prime contractors on City jobs.

That's why you can't get a lot of minority firms to throw it in the hat to be a prime, maybe a sub, to a sub. But even then, it's kind of like the airport's telling us that, "why don't we have more minorities as primes?" But you won't pay us fast enough.

I would never, I have no intention of doing work for the City of Chicago as a general contractor. I refuse to go through the headache and put my organization through the stress and the pain. There's a lack of commitment to processes and the efficiency of those processes being done. They need real processes in City of Chicago, in procurement to make sure that people get paid.

Contractors flock to who they perceive, pays their bills on time. Everybody knows that the Tollway pays well, right? They have their own money, the approval time on change orders and all of that is just much faster than any other most entities.

Slow pay may result in higher costs to the taxpayers.

The issue that the City should look at is whether they think that they're not paying a premium because of that. And they absolutely are.

It's wrong of the City to expect any prime contractor to be a bank.

We have cash flow expenses, labor and material that we pay for on a monthly basis. And if I had to pay all my subs because my client wanted to take a longer time to pay me is just, then I've got to build financing into the job and it's going to cost more.

They must be paying a huge premium because of that.

Change orders present yet more payment challenges.

There needs to be some type of shared information with the owner. Whether the airport or the City, whatever, to say, look, these change orders need to be paid in a timely fashion because you just put out an extra 50, a hundred, 200 grand of hard dollars out of your cashflow that you're not going to see again.

There've been some cases I've heard of, six years or more. It's just, it got really crazy. It got a little better, Federal Highways had to intervene a few years ago to fix things, but it still can be improved. I think that will help the entire community, and DBEs especially, they just can't afford to put work out and then not get paid for it.

1. Some M/WBEs advocated that prime contractors should be required to pay their certified subcontractors by a date certain, regardless of whether the City had paid the prime for that scope of work.

I don't know why the City can't say, "Well okay, we're mandating that the minorities be there, we're mandating that you as a prime, you will pay them. Every 40 days and if you don't pay them you have to show cause."

We know the large GCs in Chicago can financially support these projects.

You have the challenge of the fact that most primes put in their contract paid when paid. And because that exists, then what the primes are doing is trying to make the subs wait to be paid when they, when they can get paid. The challenges there are to try to fight back on those provisions in the prime's contract, so that if you, and I've heard of some people who've actually been successful in doing that where you can negotiate the paid when paid out of your contract, primarily because you need to have the financing and you can't wait.

Some WBEs suggested direct pay, that is, the City would directly pay subcontractors rather than paying the prime contractor that then pays its subcontractors.

The direct pay, even if it got us paid two weeks, four weeks, six weeks faster. Direct pay, I feel like, would cut out 27 emails about payment through the audit system. So, that in itself would be a boon to me. I'd take that in a heartbeat, not having to submit paperwork multiple times, or respond to those emails even well after you've gotten paid, to tell them, "Okay, yeah, I finally got paid. Can you stop sending me these emails?" So direct pay, I'd welcome it.

There's a blatant disregard. It's an issue of if they've been paid by the City and they're not paying their subs, that's a blatant disregard for the law. Again, the recourse is a termination of their contract, which is pretty extreme and it's probably something that City user departments are going to want to do or be interested in doing. But I think it's something that requires some kind of punishment. Don't get another check. Period. That's one option. But again, that also affects everybody. They don't get a check. Nobody behind them gets a check. In my mind, and we've been saying this for quite some time, direct pay would be a resolution to a lot of these issues where they're able to hold us hostage.... There needs to be some consequence to their actions that matters to them. Liquidated damages don't matter to them. What do they do? They put it right in the bid. We pay for that, as taxpayers.... You need to have it be something that matters to them. Inability to bid a job? That would probably be something that would get their attention.

If they hold the money somehow for some reason, at least it forces them to sit down, to make the restitution with that subcontractor instead of holding that subcontractor hostage throughout the length of the job. Then, when they're really strung out, they make a deal with that at the end or in a year or two years or three years. I mean, it's almost like they go to school to learn how to do this.

Others questioned whether that addresses the underlying problem.

I'm sure some GCs delay between GC and subs, but it's that whole process of the City approving the payment, getting it into accounting and finally moving it forward is what really takes a long time.

Most prime contractors did not support the idea of the City directly paying subcontractors.

What has become glaringly clear is that direct pay is not particularly impressive in light of the fact that it takes the City so long to pay.

It's a disaster. It's the worst idea I ever heard. I pay promptly. Okay. And I know some of my competitors on this call, they would say the same thing. But you need to control the money, in terms of getting everything we've talked about. Performance, safety, meeting the schedule, turning in certified payrolls.... And how about terms and conditions and my entire subcontract is based on insurance and liability and many workers' comp issues that come up, they have ramifications on pay. And it's not that simple that it should be some automated payment, that just because X got done, you get your money. Paying people first is a really bad idea in business. It's tough to get money back if they fail in some other areas.

That assumes that there's a widespread issue of prime contractors holding subcontractors' money, that subs are due. And I don't know, you can hear a sob story all you want or the one offs of the bad primes. And I can tell you a lot of bad subs who say, "Give me my money. I'm not performing, but I want my money." I think it's a solution in search of a problem.

If you resolve the slow pay issue, you're not going to have a direct payment to sub issue. Secondly, the bigger picture is, are the agencies even going to want to take that on? Because that puts them in the place of the contractor. The contractor has to do all the work to make sure that the sub gets everything done and all the waivers are in and quantities, materials, have the unions been paid, all that stuff. I don't see [the City] saying, "Sure, I'll take on that responsibility and the headache of subs calling me to say, 'Where's my money?'" When they haven't complied with what they're supposed to comply with. So, we can talk about it.

You're doing a complex solution to a problem that exists for a small percentage of contractors.

6. Contract Closeout

M/WBEs and large prime contractors agreed that contract closeouts present special challenges.

You got to wait two, three years.

No one wants to wait three, four years to get paid. So, then you're paying them out and they get mad at [name] because they think it's [name's] fault that they're not getting paid.

Water department? They still lag. I mean, they're years and years behind.

It's a nightmare trying to close out these jobs.... It's a lot of bureaucracy and nobody's looking at it from a lean perspective to say, "Hey, every time this contractor has to do more paperwork or do more processes or respond to more things now his cost to do business goes up."

You have to run back and forth about trying to close out [a contract].

When are they going to take a look and invest in some technology that will help them run more efficient and leaner so that they can get these issues solved, get people paid faster, get the engineering issues answered faster so we're not waiting on answers to move on the project?

What they don't understand is, all things get pushed down, right? So, the prime, a lot of these rules and compliances, the City thinks they are putting on the prime contractors, but the prime just pushes it on down to the subcontractors. And it adds a lot of issues and a lot of problems.

Many interviewees stated the recent move to not hold retention dollars at the end of the project has had unintended consequences.

The City of Chicago does not hold retainage anymore, but what does that mean? Because they don't pay on time and so it doesn't matter. And then they don't clear up anything old.

We got a contract, a several year contract and they don't hold anything back. So, they got to close out the due contracts first and then compliance reviews that afterwards. So, you're paid in full before compliance even sees it and goes through all the audits. And then you're trying to collect money from subs who are lower than you, that didn't meet their goals and try and backtrack everybody. It's a tough situation.

I think they had the best intentions when they passed this ordinance, but at the end of the day, it isn't going to stop. They didn't solve a problem. I think it made it worse and it will make

it even more complicated when they go to close out these projects.

I think the original idea was if we get rid of the retention, then our M/W/DBE contractors will get paid in a more timely fashion. Except for the fact that when the engineer doesn't approve their quantities, they don't get paid. And when we start to look at some of the shortages that we've seen on some of our projects, sometimes it's more than 10 percent.

C. Conclusion

Overall, the City's M/WBE construction program has succeeded in the objective of ensuring that existing M/WBEs generally have access to contracting opportunities. The program contains the elements of defensible race- and gender-based programs, such as narrowly tailored eligibility requirements, contract goal setting, and flexible policies and procedures. The City also provides many race- and gender-neutral measures to reduce barriers and support small businesses. However, significant challenges remain. These include developing certification standards that more accurately reflect the challenges of doing business in a large, complex urban industry environment; more targeted assistance for midlevel and more sophisticated M/WBEs; programs to promote access to capital and surety bonds; refreshed mentor-protégé, SBI and MBI programs; more narrowly tailored contract goal setting; assurances of prompt payment by the City to prime contractors and from prime contractors to subcontractors; increased monitoring of prime contractors' compliance with program requirements; faster contract closeout and substitution reviews; and an office that can respond to complaints and advocate for M/WBEs. Further, additional efforts to help firms to form would support the objective of removing barriers to full and fair competition.

IV. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN THE CITY OF CHICAGO'S CONSTRUCTION MARKET

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities and the City of Chicago's Minority and Woman-owned Business Enterprise ("M/WBE") program for construction contracts. This evidence is relevant to the question of whether despite the successful operations of the program, M/WBEs continue to face discriminatory barriers to their full and fair participation in City construction opportunities. Anecdotal evidence also sheds light on the likely efficacy of using only race- and gender-neutral remedies designed to benefit all small contractors to combat discrimination. As discussed in the Legal Chapter, this type of anecdotal data has been held by the courts to be relevant and probative of whether the City continues to have a need to use narrowly tailored M/WBE contract goals to remedy the effects of past and current discrimination and create a level playing field for contract opportunities for all firms.

The Supreme Court has held that anecdotal evidence can be persuasive because it "brought the cold [statistics] convincingly to life."¹⁶⁹ Evidence about discriminatory practices engaged in by prime contractors, agency personnel, and other actors relevant to business opportunities has been found relevant regarding barriers both to minority firms' business formation and to their success on governmental projects.¹⁷⁰ The courts have held that while anecdotal evidence is insufficient standing alone, "[p]ersonal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a [government's] institutional practices that exacerbate discriminatory market conditions are [sic] often particularly probative."¹⁷¹ "[W]e do not set out a categorical rule that every case must rise or fall entirely on the sufficiency of the numbers. To the contrary, anecdotal evidence might make the pivotal difference in some cases;

169. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

170. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1172 (10th Cir. 2000), cert. granted, 532 U.S. 941, then dismissed as improvidently granted, 534 U.S. 103 (2001).

171. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1120, 1530 (10th Cir. 1994).

indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”¹⁷²

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making, as opposed to judicial proceedings. In finding the State of North Carolina’s Historically Underutilized Business program to be constitutional, the court of appeals opined that “[p]laintiff offers no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not—indeed cannot—be verified because it is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perception.”¹⁷³ Likewise, the Tenth Circuit held that “Denver was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.”¹⁷⁴

To explore this type of anecdotal evidence of possible discrimination against minorities and women in the City’s geographic and industry markets for construction and the effectiveness of its current race-conscious and race-neutral measures, we conducted twenty-two small group and individual business owner and stakeholder interviews, totaling one hundred and seventy-five participants. We also received written comments. We met with a broad cross section of construction business owners and representatives from the City’s geographic and industry markets. Firms ranged in size from large national businesses to established family-owned firms to new start-ups. We sought to explore their experiences in seeking and performing public and private sector prime contracts and subcontracts with the City of Chicago, other government agencies, and in the private sector. We also elicited recommendations for improvements to the City’s M/WBE Construction Program.

Many minority and woman owners reported that while some progress has been made in integrating their firms into public and private sector construction contracting activities through race- and gender-conscious contracting programs like the City’s, significant barriers on the basis of race or gender remain.

In addition to the group interviews, we conducted an electronic survey of construction firms in the City’s market area about their experiences in obtaining work, marketplace conditions and the City’s M/WBE program. Eighty-one M/WBEs working in construction responded to the survey. The results were similar to those of the interviews. Among minority- and woman-owned firms, almost half (46.9 percent) reported that

172. *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 926 (11th Cir. 1997).

173. *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 249 (4th Cir. 2010).

174. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

they still experience barriers to equal contracting opportunities; more than two fifths (43.2 percent) said their competency was questioned because of their race or gender; and almost 40 percent (38.3 percent) indicated they had experienced job-related sexual or racial harassment or stereotyping.

A. Business Owner Interviews

We conducted twenty-two small group and individual business owner and stakeholder interviews, totaling one hundred and seventy-five participants. We sought to explore M/WBEs' experiences in seeking and performing City and private sector construction prime contracts. We also interviewed larger general contractors, who have performed work for the City, about their experiences with the City's M/WBE construction program and asked for their suggestions for how the City might move forward in its inclusion efforts. Lastly, we elicited recommendations for effective measures to reduce barriers and create equal opportunities.

The following are summaries of the issues discussed. Quotations are indented and may have been shortened for readability. The statements are representative of the views expressed over the many sessions and by numerous participants.

Appendix E contains anecdotal information from the recent disparity studies conducted by Colette Holt & Associates for various Illinois governments. Although not dispositive, these reports corroborate the barriers faced by minorities and women in the Chicago area construction marketplace.

1. Discriminatory Attitudes and Negative Perceptions of Competence

Many minority and woman owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications, professionalism and capabilities. While sometimes subtle,¹⁷⁵ these biases about M/WBEs' lack of competence infect all aspects of their attempts to obtain contracts and to be treated equally in performing contract work. Minorities and women repeatedly discussed their struggles with pernicious biases and attitudes about their capabilities in the construction industry. There can be a stigma to being an M/WBE because the assumption is that minority or woman firms are less qualified.

I had to perform at a higher standard than the other groups, just to prove that I'm worthy of doing their work.... You're never worthy enough because they stigmatize you because you're a minority.... It's having to go out there every day and perform

175. See, e.g., <http://www.sciencedirect.com/science/article/pii/S0191308509000239>.

above and beyond. And they still don't like to give recognition for it, but they'll give you another job. Because they'd mark it down and say, "This person can get the work done. He can complete and fill what we need in our field."

So, we're having to deal with perception issues that we aren't capable. We have to be four times as good. We can never make a mistake. Just [the] summer before last ... [s]omeone pretty much said to us, "Look what happens when we let you people in." And that was year before last. And I was sitting at the table with my White vice president, blonde hair, blue eyes, and he was like, "Did he just say what I think he just said?" "Yeah, absolutely. He did. And since you work for a minority firm, he's talking about you too."... That's our everyday reality. We were talking about perceptions of competency, it's a real thing. And if you can't get your first time or your first opportunity, how in the world am I ever going to show you I've done it five times in the last three years?

I have to fight and push them to let them understand that I'm not an exception to the rule. I am, we are, the rule. There are plenty of other contractors here. And so, to kind of get them out of that culture, like, okay, well we got our one person here.

I think it is a double-edged sword, because if you market yourself as a WBE first, I feel like the expectations are lower for your performance.

I also feel like sometimes the WBE can be a scarlet letter. It's like, "Oh, well, then we should get a discount for hiring you."

It's just not about just a Black person, it's an intersectionality issue as well. So, it's two-fold in the construction industry for me. So, you're battling more than just one thing. So, it's race, it's sex.

It's a great opportunity to build your business, but you can't build your business outside of this box... And it's that stereotype, right? That as the MBE you've got capital issues, you need handholding, can't bond, and all these other things that they come up with to keep us in that box.

Female owners of long-established firms often said they had learned to ignore biased comments and behaviors.

I just laugh at this stage. I just prove them wrong with the work that we do and the finishes we have, and we get a lot of callback for future work.

They just give me all of these types of titles, but a lot of times, I don't really pay attention until you actually say something to me because I'm pretty much a straightforward woman. I have learned they're going to assume a lot of things about you, but you can't really get caught up with that. Because sometimes, it's a mindset.

There's an issue with disrespect.... I've had truck drivers call me sweetie. And I said, "I appreciate that you feel that way about me, but it's not very professional. And I would appreciate you don't do it again." And so, I've learned the confidence over the years to just not put up with it and to also train my staff not to put up with it.

2. Racial Harassment

A few owners had witnessed harassment on the basis of race.

Last year ... an African-American foreman of mine [was on the job]. And I made a mistake by putting him on a job by his house, because everybody knows that you can't give a guy a job where he could go home for lunch. But I gave him the job and the superintendent on the job said that everything here is N rigged. And you know what N-word I'm using. And he's standing there. He told me later, he's like, I haven't heard that, you know, in forever. And fortunately, the general contractor was standing there. He called up his HR people and they came down on this guy. But after that, it was just a passive aggressive owner after that.... And of course, I still haven't been paid for it, but usually it's a little more subtle, that kind of nonsense they pull on you, but this was pretty openly hostile and something I haven't seen in a long time.

The [White] guys on the job, don't even like my guys being on the job with them. Let alone on a job where they know that there's no minority requirements. I mean, it goes beyond just the ownership level. Even when crews have to work on the same project together, there's battles. There's been several instances where, I've had to take a guy off the job, and they've had to take a guy off the job. At least I drew my line in the sand, "Well, if you want me to take my guy off, you need to take your

guy off because it's both of them. Because they can't get along because it's this whole racial [thing] going on the job." So, we'll agree that way because they don't want me to call the City and say that we have a discrimination issue on the job. But we definitely don't get invited on anything where there's not a participation goal.

3. Gender Bias, Hostile Work Environments and Harassment

Many female interviewees had experienced sex discrimination, ranging from gender bias to hostile work environments to outright sexual harassment. Sexist attitudes were reported to still be common.

The stuff that happens in front of everybody is covert. It's the assuming that you're not important. Assuming that you don't know anything. Assuming that you're the project engineer, who's just brand new.

I think like [male name] said, it's every day. So, you just sort of, it is what it is. But I have noticed when I am in a meeting, if it's just me, you have no choice but to talk to me. But if it's me and a man, they will tend to defer.... [I'm a Black woman civil engineer but] there is still that need to sometimes justify or explain she's here for a purpose. She's got the same background.

Half of the buildings that I've worked for, they think that the pumper truck driver is my husband because they can't wrap their heads around that a woman owns the company or knows the technical aspects of the job and would hold the license. The other half thinks I'm married to my field manager because those are the guys, they see the most often, it's the pumper truck driver and the field manager, so they automatically assume that they're the real owner and they're propping me up. I'm not related to any of them.

I've worked as a subcontractor with a joint venture between a larger company, as well as a minority company. And I witnessed the larger company, exclude the female project engineer on tons of information. It's like, no matter how much you put her back into the conversation, they just kept excluding her.

Last week, I went to look at trucks to buy a new truck. And I brought a mechanic with me, just to make sure that everything was okay.... The sales guy wouldn't answer me directly, he would talk to the mechanic, and it was kind of as if I wasn't even

there.... So, I just went someplace else and purchased elsewhere, which I get it all the time.

I sat on an executive board ... the president of the board said, "Meeting's adjourned, but we have to wait for [name] to clean the table off and wash the dishes." I'm like, okay. Now this is a big shot guy, big guy. I'm like, "Yeah, I'll get right on there. Don't worry about it." and I just got up and walked out the door. But then when they started with the nude beach and the topless pool, I was asked if I was going to go to the pool topless, and I said, "Well, the only way I'm going to go is if you go bottomless." I knew their wives. I said, "Your wives sound like saints. They're going to go and sit with you at these places?" Two of the guys up and said I was absolutely right, and then the rest of them just shut up.

Many women reported they suffer from hostile work environments.

We get a lot of males pushing back on the women.

It seems like I just am perceived to be a threat to basically anybody.... It's just always this lonely space.

You're mansplained away. You're just invisible. They say they want to work with you, but like you said, I think [name], that there's hostility. There's lack of trust.

This is very cultural and definitely our line of work is hostile towards us from one way or another. I haven't had any sexual harassment so far, but I can tell you that from my clients, and even my painters, I get that look. You know, that you're a lady, what are you doing in the painting business? It has been hard. But I think, like I said, it's cultural because it's not only this work that we do, but in general. Whenever we go, we get some sort of mistreatment. They don't trust us completely. They don't think that we know what we're doing.

When I worked for [large prime contractor], they had this big, huge outing, and I was the only female project manager in the history of the company at the time. And they said, "Well, we know you'd be a little uncomfortable, so we got you your own room, so you don't have to stay in rooms for the ski outing in [location]." Okay, great. I got my own room and the first night everybody went out to have drinks at the bars after skiing, which is great.... One of the guys that was there decided to disappear with some yoga instructor he met on the slopes and

go have sex in her yoga studio. Everybody was talking about it at the bar the whole time I was there. I was like, whatever, it's not my business. That's uncomfortable in itself, but when he came back with her from their little yoga studio jaunt, he walked beeline straight up me to tell me, "Hey, you're not going to say anything to my wife, right?" I was like, "Dude. Leave it alone. I don't need that." The whole trip was just garbage because it was just men cheating on their wives and then coming up to me and being like, "You're going to be cool, right?" That's why they don't [want] me, the only woman, there, because I might blow their story.

And I had a little bit of push and tug with a couple of my own guys and brought them in and told them, "You don't treat me like this. You're not going to treat anyone who I bring into this organization". And [a young woman apprentice] gets a lot of heckling from the guys, the drywallers and the carpenters on these jobs. And when I show my face out there, they all shut up because they're going to [be in trouble]... Then I told her she has to command respect in that. Take it and if I have to go to the general contractor, I said, "try and handle it in the field. If you can't, then I'm going to go to the general contractor and we're going to have a lot of problems here." But that's some of the stuff we are facing out there too, in the workplace. Still today, 25 years. And it hasn't ended.

We would have our Christmas luncheon at that Hilton Hotel at the airport, where you go through the phone booth to get to that back room. I get the invitation "go through the phone booth" and I'm like, what? I've had never been there in my life. So, okay, I'll go to the phone booth. I walk in and it's all women, ages 50 and above, that are dressed in Playboy bunny outfits. They're older than sin, and these guys are drooling at the table. I'm like, this is sick. This is really sick. I told them all, too.

Sexual harassment remains a problem for women in the construction industry.

I was propositioned at a hotel room by my boss, the owner of the company. He was like, "Hey, you're coming in, right?" When I said, no, he was like, "Really? What exactly are you trying to say here?" And then he showed up half naked at my hotel room and was banging down my door to get in and come and have sex.

4. Exclusion from Industry Networks

Relationships are key to obtaining work from the City, as well as from prime vendors, as subcontractors, subconsultants or suppliers. Many minorities and women reported that there still exists a “good old boys” network that makes it difficult for them to fairly obtain contract opportunities. They are often excluded from the industry networks necessary for success.

It's eliminating you from a meeting. It's not inviting you to outings when you could be making relationships with people. It's leaving you out of things. I cannot tell you how many times I've been told, "[name], it wasn't intentional." That's the exact point. It needs to be intentional. If you want to invite a young project engineer boy, man, person, college grad, to become involved with the company and get him to start gaining relationships with new people and in that next generation, how do you do that? You invite him. It might be a strip club, or it might be a casino. It's generally not going to get your nails done. We're all clear on that. But the whole point is, we just don't get invited to these things because number one, they decide that we wouldn't want to go. I golf. I golfed in college. I golfed in high school. Nobody, despite working for 22 years in my industry knows that I golf, despite how many times I've told them that I golf. When I go and golf, they're blown away because they're like, "Holy shit, that's right down the middle of fairway." The whole point is people make assumptions about us women. You wouldn't want to go. You wouldn't feel comfortable. Or they make assumptions about the people that are on these outings. They wouldn't feel comfortable with you there. Because the reality is in a lot of these outings, these men are doing things that they shouldn't be doing.

After the golfing thing, my banker, I was with one bank for over 10 years, and they had golf outings all the time. I didn't get an invitation once. Several years later, I'd met a gentleman that also used them who was also a subcontractor, and he was like, "Yeah, go to them every year." And I was like, "Wow. I had no idea that they even existed." And they were specific for contractors.

I've witnessed them walk away and then talk about it, so the part of the connections or making deals on the golf course does not apply when it comes [women]... At least not in my experience and I probably dealt with three summers worth of

several golf outings that in my opinion were just a total waste of time. You just get [to watch] these men [get] drunk.

It's this thing where we want to be there, but we don't want to be there. I don't want to miss out on the opportunity to meet new developers and have new relationships, and that's how you do it, frankly, is on the ski slopes, out on the golf course, having a lunch with someone. I've worked 20 years with people and never met them in person. But I can tell you my male counterparts, no way. They're out having fun socializing. It's a different world.

Focused networking and intentional efforts to include M/WBEs paid dividends.

I've gone to a lot of women's networking events. I was a member of the [Federation of Women Contractors], a couple other networking things that are women driven, and that's the only place that I filled that gap, because women might have the same feelings as me, but I've always felt like I don't fit in.... I've always worked really well with men, but I find that the project management staff, all men, would be sitting there talking about sports stats. Their water cooler talk was not super interesting to me, so I didn't fit in there.

I belong to some contractors' association for mechanical contractors, actually, and I would say 5-10 years ago, I would never go to the meeting because it was always the same thing. It's just a good old boys club. It was a bad situation. Checked out of that 100 percent. Then, they hired a woman Executive Director, and don't you know that whole organization has come full circle. Now we have a woman's group. We have women's luncheons.... As long as they're promoting women in their companies themselves, young women into the business right out of college, and they're building a woman's network within the companies, those things are going to change. But I see that it's a long process.

If I was going to counsel anyone on starting a business, the first thing I would tell them is to join their trade association for their particular ethnicity or female, male, whatever. I mean, you really need to have that behind you.

5. Barriers to Access to Capital and Surety Bonding

In addition to discriminatory attitudes, hostile environments and harassment, many M/WBEs experienced barriers to obtaining working capital.

There's a lot of opportunities out there, but unfortunately, I cannot even go near them because of the funding.

Working capital, for me, is one of the issues. And then I guess, if we have to become union again, we'll do what we have to do, but working capital is the most important.

Our hurdle would be working capital. Once we get working capital, we will be able to become union, and that's where we will get our workforce from.

[H]elping us with other resources of how to get working capital [is critical], because without working capital, you really can't do too much. The big jobs are costly, they're expensive. And with no working capital, you don't get any, you're not interested in going after big jobs anymore.... I've tried several of the big banks and they're just not willing [to lend to small contractors].

We were approached by a prime electrical contractor. And they basically wanted us to fulfill a part of their MBE on their contract. But I was going to have to produce five union electricians for six months. And so, my payroll would have been \$75,000 a month, you know, being a union shop. So, we tried to gain that capital to perform this project. Because we had no problem performing it, it was just a [sic] working capital that we needed.... And eventually we couldn't acquire that capital. And so, the contract just, it passed us by.... If there's a working capital program to help small businesses, that would really help us grow leaps and bounds.

Unequal access to surety bonds can also limit the growth of M/WBEs.

When I started my company, it was mine, but I was married at the time. And we had received a letter that said we were bonded.... But then once my bond company found out that I was no longer married, even though it was my company, they would not bond me.

Now many of our subs are being told on some of these projects that if it's above 250 [thousand dollars], they've got to bring a bond. And bonding has been the barrier along with access to capital or lack of expertise.

Getting payment and performance bonds, getting approved for that is one [barrier].

Some of these bonding companies that requires credit scores and history, how do you have a history if you never get to work? So, I think we need to evaluate the bonding or have a city backed bonding company that's in place, that would help with the shortfalls in terms of a pilot.

6. Obtaining Work on Public Sector Projects on An Equal Basis

There was almost universal agreement that the City's M/WBE program remains necessary to reduce these types of barriers to equal contracting opportunities. Most minorities and women reported that without the requirement that prime contractors make good faith efforts to meet M/WBE contract goals, they would receive little or no work. While they found it is easier to obtain subcontracts than prime contracts on public projects because of affirmative action goals, it is still difficult to get work, receive fair treatment, and to be paid on time. Many believed that majority-owned prime firms use them only if forced to do so.

The program has been critical for our growth [as an MBE]. I think, without the program, there's not a doubt in my head that we would be who we are today. I think the program gets you in the door. The program gives you opportunities earlier on in your career. The program opens up doors for you.

If there is no program from City of Chicago, we could not have survived, so this program is really helpful to us.

If they really don't have to use us, they will come up all type of excuses say why they don't want to use us.

The program is still much needed. As we all know, it takes a long time to bid these jobs. Man hours which converged to dollars. And I've had two contractors while I've walked in, I've made phone calls prior to COVID try to stop by and talk about the upcoming bid. And to my surprise, both were exactly the same. They said, "[Name], we're all set on the MBE for this job. And I say, well, I'm still a contractor. I still put a lot of time and money into this bid. I have some serious questions and I need to bid this job and I want it to be successful." "But we're all set. We're good."

They never ask if there's no requirement.

As a WBE, the only time that we have negotiating power before the subcontract is awarded, when our general is sending us a subcontract, is when they know that they have to use us

because they wrote our name in their letter of intent paperwork that they submitted to their group. And so that gives us, if we know that, which we always try to find out, were we the one that they named, then that gives you a little bit of negotiating room with them, even on items that are outside of their own subcontract where they're trying to get you to do something that the client requires of them.

I think the program is important because I feel like all of my opportunities have come from having a WBE and having to set the goals. I think if I didn't have that I wouldn't have the relationships and the work that I currently have.

Probably 75 percent of our work is because we're a WBE.

I'm a minority- and woman-owned business. And definitely for me, it's been great. I mean, it's been hard at the same time, but it also opened the door for me to meet people, even though sometimes I don't get those contracts, but it still is attractive for them because they need that participation. So, definitely, I think is that it's a great program. And we need to change some things, yes. But without the program, I don't think I will have not even 25 percent of the work that I do if I don't have those certifications. So, it's definitely important.

The only way you'll give me the job is if you have to have that 25 percent or 10 percent.

Several participants believe that many prime contractors do not support the objectives of the program.

Most of the G[eneral] C[ontractor]s out there that are non-minorities would rather this program go away.

It is a checkbox. I got to meet that goal, and that's it.

Some M/WBEs had good experiences with prime contractors who genuinely want to help smaller contractors.

We're having a very good experience with [name]. I'll say their name because it's been a very positive experience where they really seem authentic. The person running the program over there really seems authentic and helpful and asking questions and following up and staying engaged with me. Where that is extremely rare. That is one out of 20 that'll reach out to us.

I have very good experiences, can't complain.

7. Obtaining Work on Private Sector Projects on An Equal Basis

Despite being used on public contracts, many M/WBEs were almost locked out of the market for larger, private sector jobs in the Chicago area. While some developers that rely on City incentives such as tax increment financing or other government benefits have committed to meeting the annual aspirational M/WBE goal set by the City, the great majority of private sector financed projects are out of reach for minorities and women.

We've got to talk about that private sector project goals and make certain that these contractors adhere to the guidelines. Otherwise, we're going to see \$65, \$80B fly through this community and we're still on food stamps.

The majority of my work is public work. I do not have a lot of private work. Recently I've even stopped pushing that as much. I'll bring it as, like, "by the way, we're a WBE on top of that", holding it back and then saying, "okay, you can check off this mark", if it's a private job, because I'm trying to get more private work.

The biggest problem, I think, in Chicago, is access to networks [for private sector jobs].... If a contractor like myself gains access to one building downtown, it would grow my company leaps and bounds.

B. Anecdotal Survey of Chicago Area Construction Firms

To supplement the in-person interviews, we also conducted an anecdotal, electronic survey of construction firms on our Master M/W/DBE Directory; prime firms on the contract data file; firms identified through our outreach efforts; and written comments provided by firms. The objective was to extend the opportunity to firm owners and representatives to relate their experiences, supplemental to their inputs that are captured during the in-person interviews. The survey was comprised of up to fifty-six closed- and open-ended questions and replicated the topics discussed in the business owner interviews. Questions focused on doing business in the City's market area, specifically barriers and negative perceptions, access to networks and information, experiences in obtaining work and capacity development, as well as the City's construction program.

The survey was emailed to 1,370 firm representatives and owners, four times from September 28 to November 9, 2020. The survey was also distributed by several key industry and woman and minority construction organizations in December 2020 and January 2021. Telephone follow-up was conducted to encourage firms

to complete the survey and stimulate responses. The response period closed on January 31, 2021.

One-hundred and ninety-nine gross responses were received. After accounting for incomplete and non-relevant responses, usable responses equaled 115 for a net response rate of 8.4 percent. Eighty-one minority- and woman-owned construction firms completed the survey for a 5.9 percent net response rate. A total of 34 publicly held and non-M/WBE construction firms completed the survey, representing a 2.5 percent net response rate.

1. Respondents' Profiles

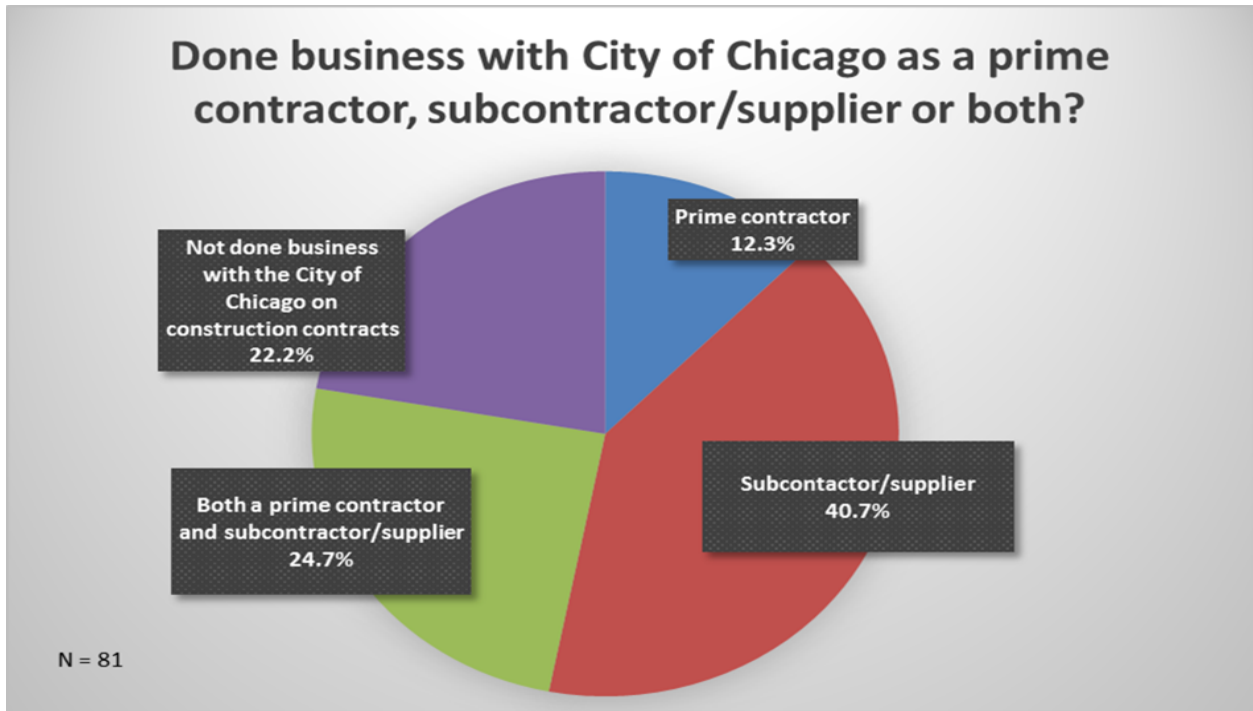
The race and gender distribution of M/WBE survey respondents is below.

Table 4-1: Distribution of Race and Gender of Survey Respondents

| Firm Ownership Group | Total | Pct. |
|---|------------|---------------|
| African American | 30 | 26.1% |
| Hispanic | 19 | 16.5% |
| Asian-Pacific/Subcontinent Asian American | 8 | 7.0% |
| Native American/Alaska Native | 0 | 0.0% |
| Non-Minority Women | 24 | 20.9% |
| M/W/DBE Total | 81 | 70.4% |
| Publicly Held, Non-W/M/DBE Total | 34 | 29.6% |
| Respondents Total | 115 | 100.0% |

Table 4-1: Among M/WBEs, 12.3 percent of the firms had worked on Chicago construction projects only as a prime contractor or consultant; 40.7 percent had worked only as a subcontractor; 24.7 percent had worked as both a prime contractor, consultant or concessionaire, and as a subcontractor or subconsultant; and 22.2 percent had not done business on any City construction contracts. Over three quarters (79.3 percent) of minority- and woman-owned firms responding were certified with the City or Cook County, Illinois.

Chart 4-1. Respondent Contractor Status with the City of Chicago



2. Discriminatory Barriers and Perceptions

Chart 4-2: Over 50 percent (53.1 percent) of the respondents reported that they experienced barriers to contracting opportunities based on their race and/or gender.

Chart 4-2 Barriers to Contracting Opportunities Based on Race and Gender

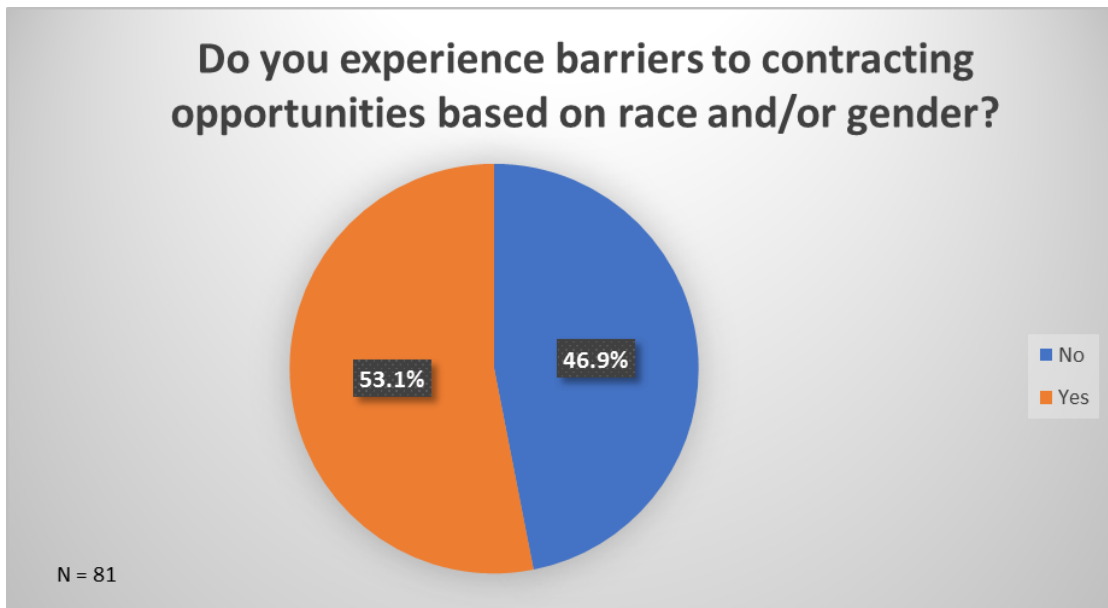


Chart 4-3: More than 40 percent (43.2 percent) answered yes to the question "Is your competency questioned based on your race and/or gender?"

Chart 4-3. Negative Perception of Competency Based on Race or Gender

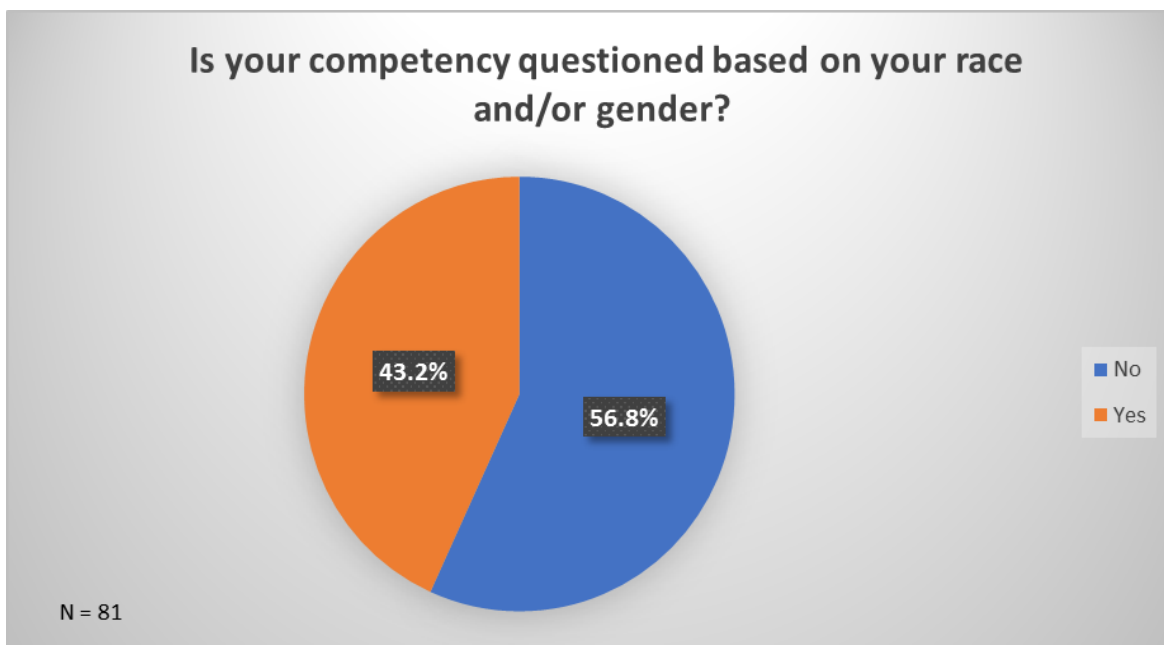


Chart 4-4: Almost 40 percent (38.3 percent) indicated that they experience job-related sexual or racial harassment or stereotyping.

Chart 4-4. Industry-Related Sexual or Racial Harassment or Stereotyping

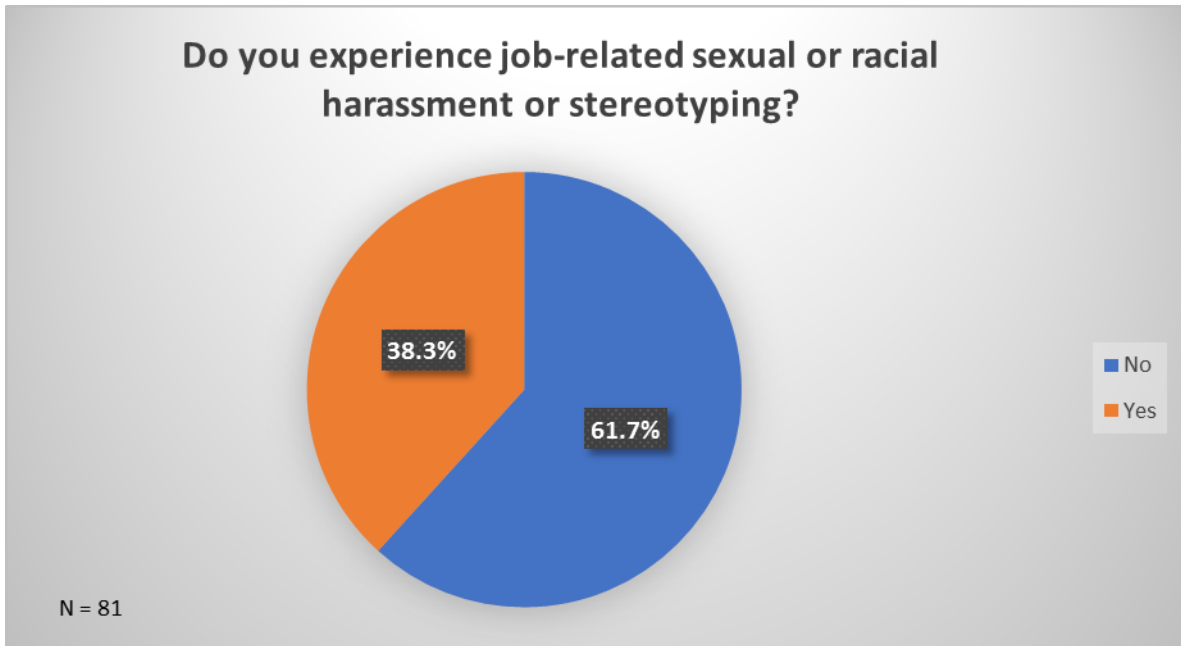
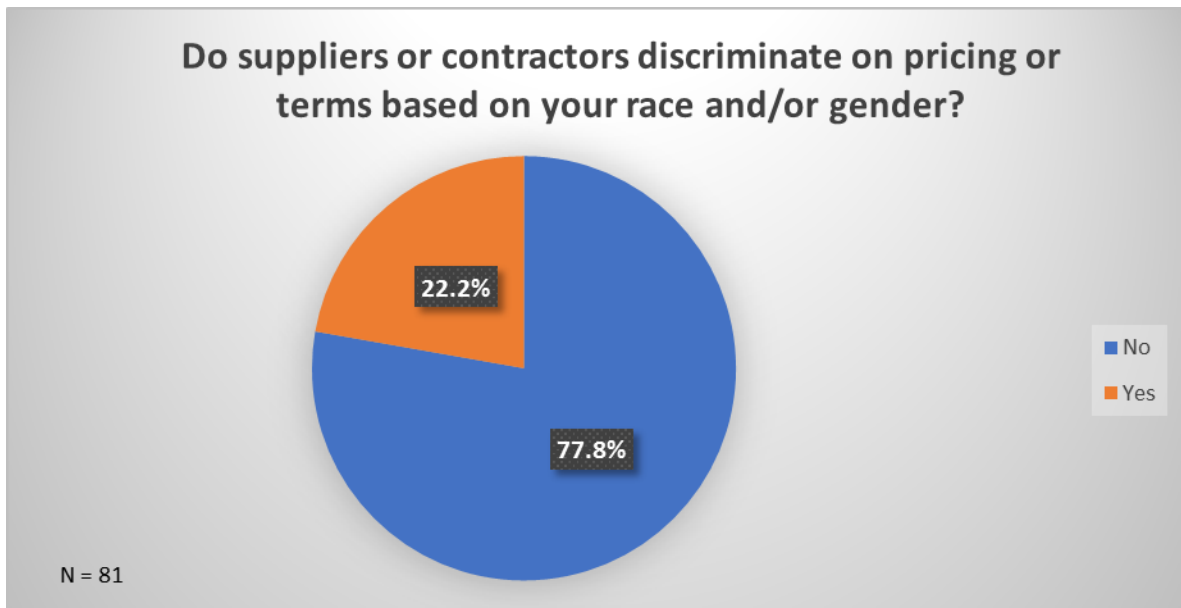


Chart 4-5: Almost a quarter (22.2 percent) stated they experience discrimination from suppliers or subcontractors because of their race and/or gender.

Chart 4-5. Supplier Pricing and Terms Discrimination Based on Race and Gender



3. Access to Formal/Informal Business and Professional Networks

Chart 4-6: Over a quarter (27.2 percent) of M/WBE respondents reported that they did not have the same access to the same information as non-certified firms in their industry.

Chart 4-6. Access to the Same Information as Non-Certified Firms

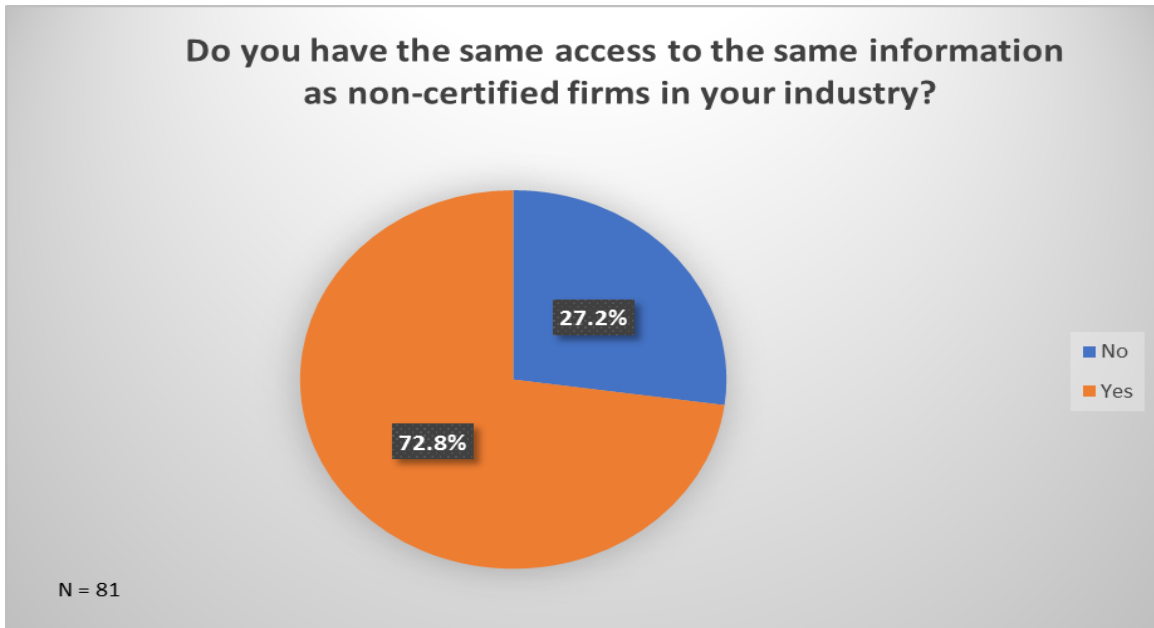
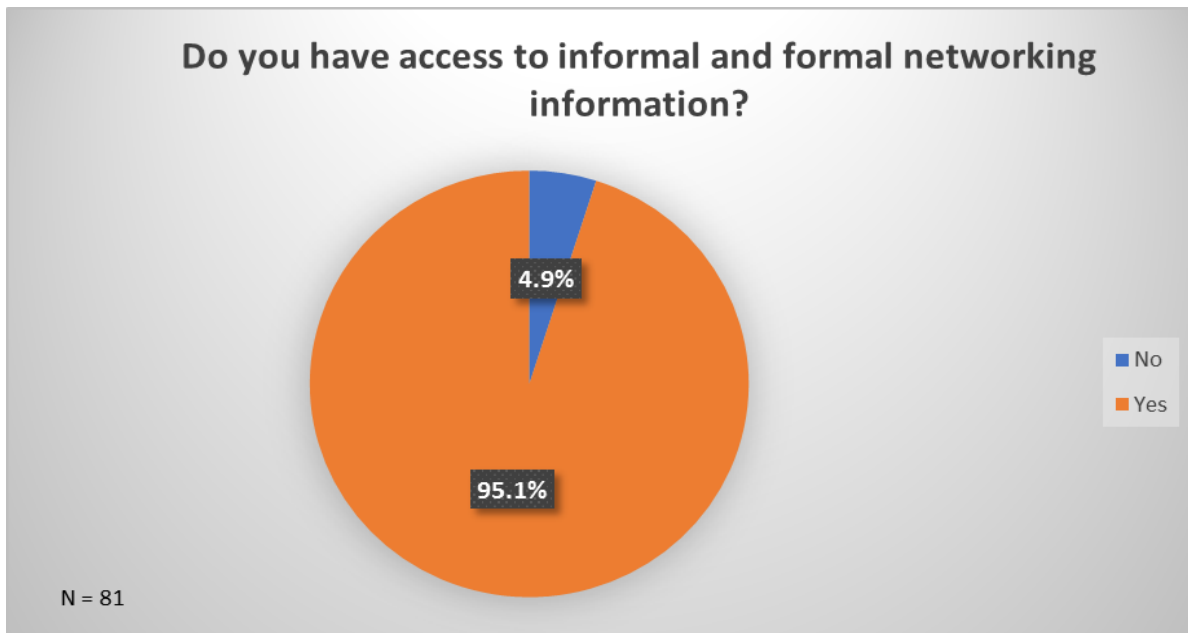


Chart 4-7: Over ninety-five percent of M/WBE respondents indicated that they have access to informal and formal networking information.

Chart 4-7. Access to Informal and Formal Networking Information



4. Access to Financial Supports

Chart 4-8: Among M/WBEs, almost 20 percent (19.8 percent) reported experiencing barriers to obtaining insurance and almost a third (32.1 percent) reported barriers to obtaining surety bonding services.

Chart 4-8. Barriers to Obtaining Insurance and Bonding

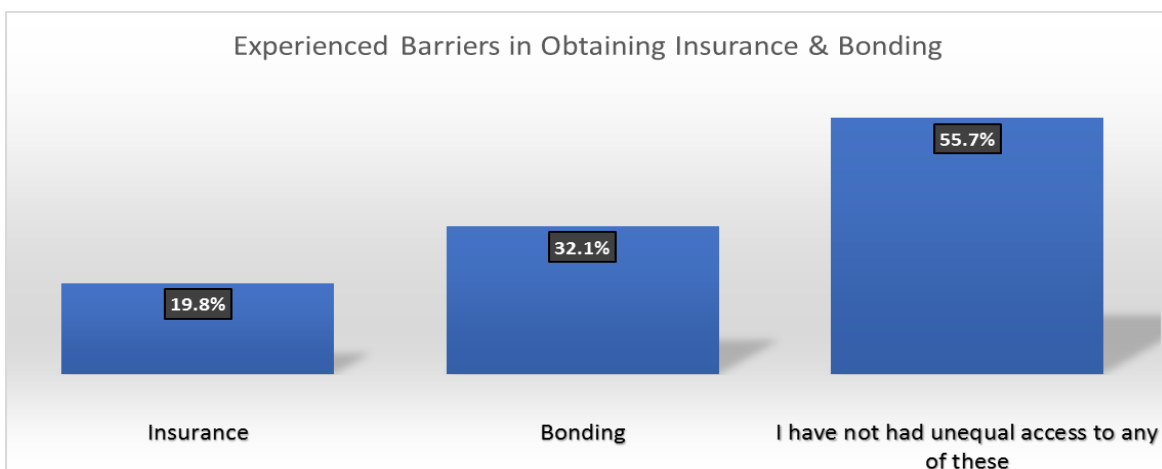
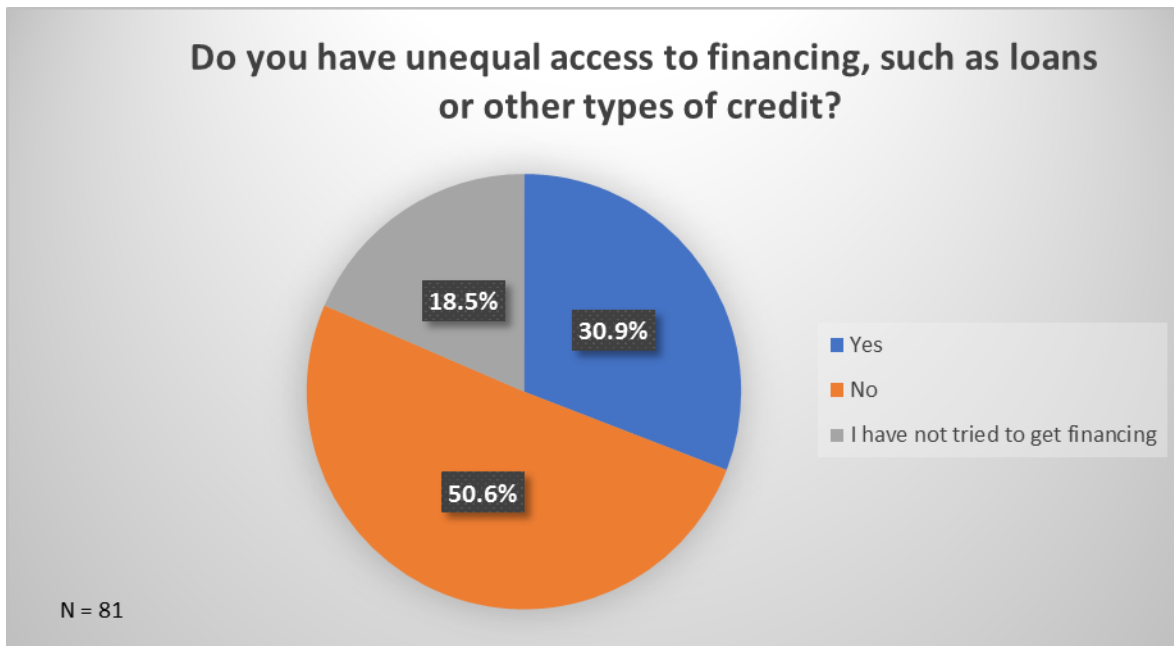


Chart 4-9: Over 30 percent (30.9 percent) said they had unequal access to loans and other types of credit.

Chart 4-9. Unequal Access to Loans and Other Types of Credit



5. Obtaining Work on an Equal Basis

Chart 4-10: Over 80 percent (81.5 percent) reported that they are solicited for City or government projects with M/WBE goals.

Chart 4-10. Solicitation for City or Government Construction Projects with M/WBE Goals



Chart 4-11: In contrast, a little over sixty percent (63 percent) of M/WBE respondents reported they are solicited for private projects and projects without goals.

Chart 4-11. Solicitation for Private Projects and Projects Without Goals



6. Capacity Utilization and Payment on an Equal Basis

Chart 4-12: Over 68 percent said their firm's contract size was either well below (37.8 percent) or slightly below (30.5 percent) the amount they are qualified to perform.

Chart 4-12. Firm Contract Size vs. Contract Amounts Qualified to Perform



Chart 4-13: Of the contractors who reported doing work for the City, 100 percent said that the City did not pay promptly. Prime contractors were reported to pay more promptly, but the number is still low. A little over seventy-six percent of those doing work for prime contractors said prime contractors do not pay promptly.

Chart 4-13. Prompt Payment within 30 Days

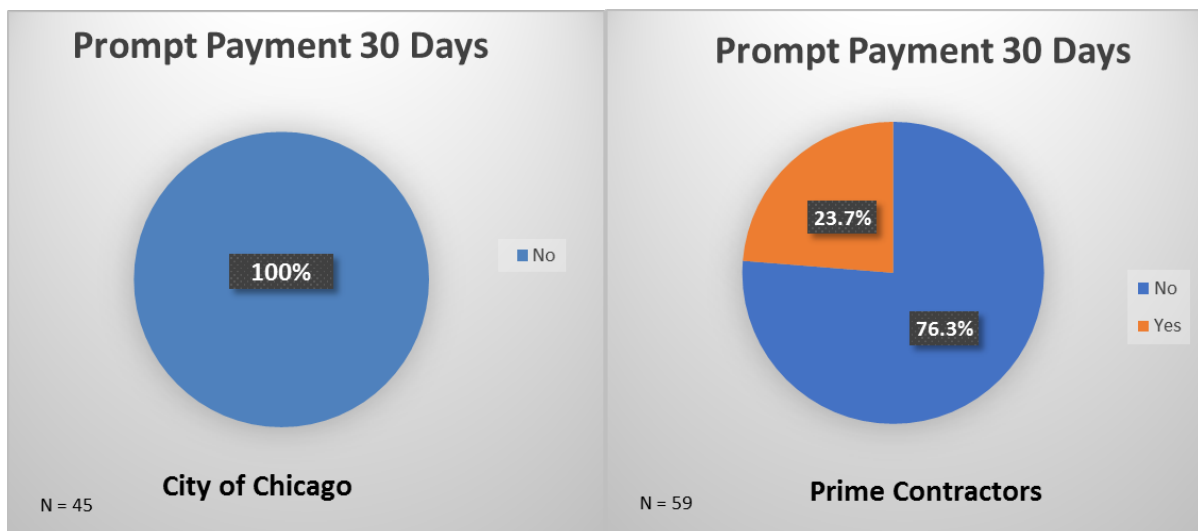
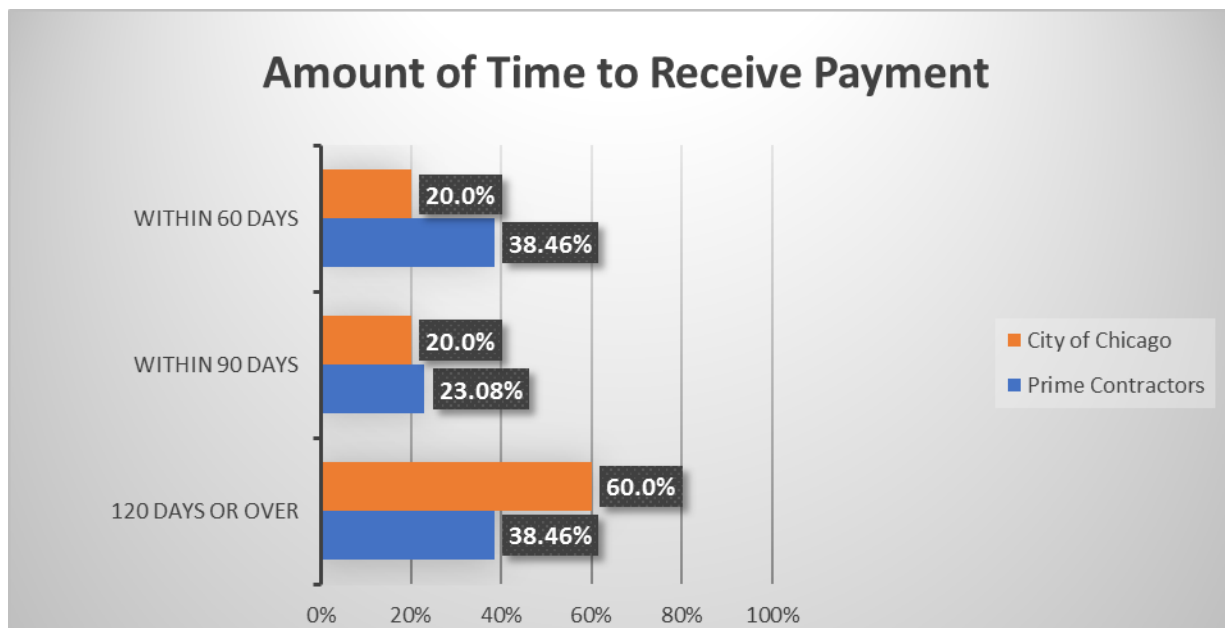


Chart 4-14: Only 20 percent of M/WBEs performing work for the City reported receiving payment within 60 days; 20 percent were paid within 90 days; and 60 percent were not paid until 120 days or more. Prime vendors were reported to pay a little faster. Almost 40 percent said prime vendors paid within 60 days; 23.08 percent paid within 90 days; and 38.46 percent paid within 120 days or more.

Chart 4-14. Amount of Time to Receive Payment



7. Capacity Development and Participation Incentives

Chart 4-15: Over a third (35.8 percent) of the respondents reported participating in at least one type of M/WBE business support or development activity; 64.2 percent indicated they had not participated in any of these programs.

- 13.6 percent had participated in financing or loan programs.
- 7.4 percent had accessed bonding support programs.
- 3.7 percent had received support services such as assistance with marketing, estimating, information technology.
- 18.5 percent had joint ventured with another firm.
- 8.6 percent had participated in a mentor-protégé program or relationship outside of the City's program.

Chart 4-15. Participation in Supportive Services

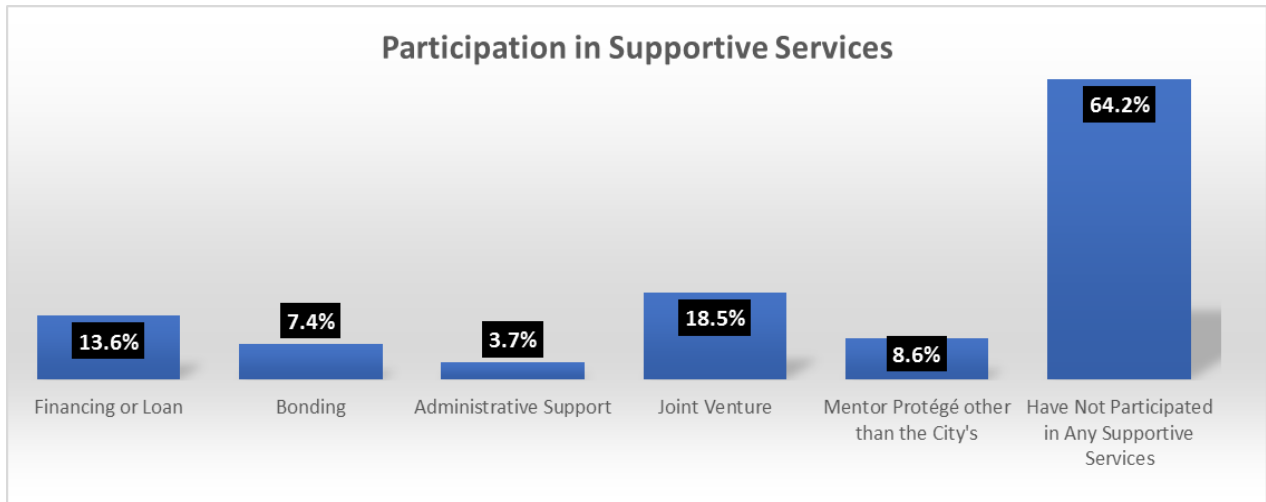
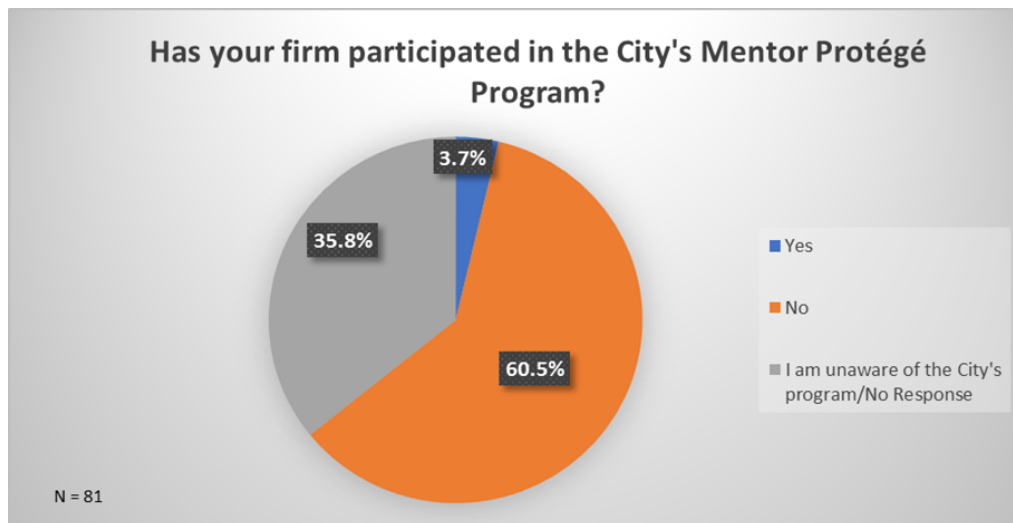


Chart 4-16: Only 3.7 percent of M/WBE respondents indicated they had participated in the City's Mentor Protégé Program.

Chart 4-16. Participation in the City's Mentor Protégé Program.



Charts 4-17 and 4-18: Relatively few M/WBE respondents had participated in the City's SBI or MBI construction program initiatives. Only 12 percent had participated in the SBI program and only 8 percent had participated in the MBI program. A large portion of respondents reported they had never heard of either program.

Chart 4-17. Participation in the City's Small Sized Business Initiative (SBI)

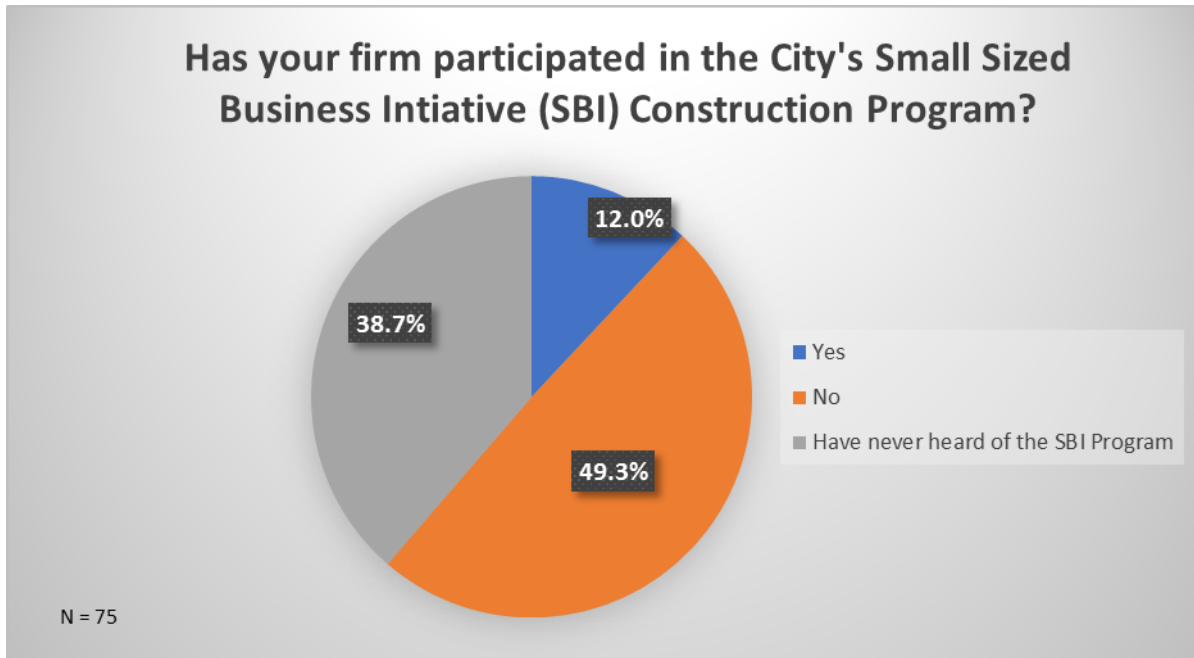
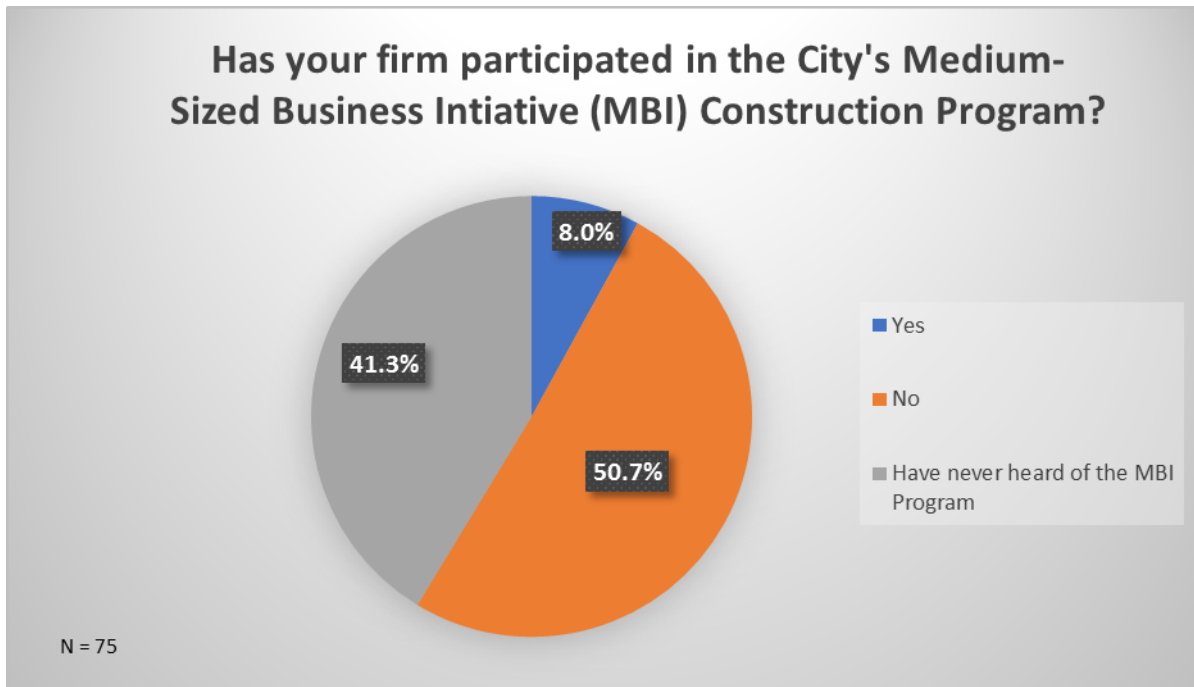


Chart 4-18. Participation in the City's Medium-Sized Business Initiative (MBI)



C. Written Survey Responses

The survey also included open-ended response questions. Open-ended survey responses were consistent with information provided in the business owner interviews and close-ended questions. Responses to these questions have been categorized and are presented below.

1. Negative perceptions of competency

Many minority and woman firms indicated they continue to experience race and gender discrimination. They reported negative attitudes concerning competency, skill, and qualifications that reduced their ability to obtain contracts.

Everyday. Just recently, a particular landlord refused to allow our firm to install glass when we were at the site ready to perform. We believe it had to do with race or gender because there was no other reason why we shouldn't have been able to complete the job. They indicated they wanted to use their preferred contractor after seeing the race of our president. Many stories.

I believe racial harassment sometimes narrows my chance of getting work in the Construction Industry.

[“]Oh, another one of those minority guys. We will be here forever.[“]

Based on my Hispanic race and being a female, I am often discriminated on twice as much.

I don't think things have changed that much from 30 years ago, I just think that majority contractors have gotten better at hiding it. But there are some generals that can't even do that.

Misassumptions of abilities, bonding, receipt of information, basic consideration.

I have heard "we can either have quality OR we can have diversification". This sums it up.

As a Black contractor, there are assumptions made about our quality, capacity, etc., none of which are true. Fear of a large Black contractor in Chicago is REAL.

I am competing in a market whereby architects, suppliers, union reps, union employees are predominately (White Males), non-minorities at all levels.

It's well known throughout the trade industries, that we are stereotyped whether we are minority or woman owned.

Some people can't let go of some things from the past. Some think we can't do the work and will cause problems throughout the project.

We are always second guessed. Contracts are used against us. We are held to a different standard then [sic] non-MBE subs.

The construction industry is not equal for black business in Chicago.

We are always second guessed.

About two months ago in [a] Scope Review on an 800,000-dollar job [that] we are more than qualified to perform, the Engineering firm repetitively [sic] questioned our ability in front of the Developer and GC. About a month ago when pursuing a project at the Old Post Office we had to jump through hoops to prove we could financially afford to do the project. We were the only MBE/WBE on the project and the only company that had to prove our financial standing.

After over 25 years in the business, I am sometimes told that I don't have enough experience.

As M/WBE companies we have to pass test[s] every day. So, every day we have to be ready to be tested.

I am always questioned about my abilities. I have been accused of not knowing about the project when I know everything including all drawings and specs. I am always belittled and undermined.

I've had clients talk down to me and act as if I needed them to give me work. As we've grown our portfolio and started to focus on clients that are true partners, some have been surprised that we walk away from opportunities that clearly are one-sided.

Most white firms just do not believe we have completed larger projects, and/or survived getting through all the barriers that have been placed in our way.

[We are perceived as] not able to perform the jobs.

Not any longer, since I've been doing this for over 30 years, but earlier in my career I did. I had contractors surprised that we

had equipment on site or that I was a licensed professional engineer.

Because I am a female Hispanic electrical contractor a lot [sic] consider my company to be incapable of the work we do.

We are often second guessed. Our work is held to a higher standard than our non-MBE competitors.

We do not get fair treatment compared [to] non-minority contractors.

I was asked to prepare a bid for a grocery store that was already built. Please note that the strongest part of our resume is building grocery stores.

2. Access to networks

The construction industry was often perceived to be a closed network.

When low bidder and 2nd place is part of the good old boys' network, they find a reason not to award.

I have bid on contracts well within my range, but white GCs are only going to select contractors that they know, new contractors do not stand a chance.

It's still an old boys club. We are already one of few in the area who do our kind of work but getting in with new folks is almost impossible, made worse by COVID restrictions on gatherings.

The non-diverse have their boys club and are first to be offered projects.

It is very difficult to establish relationships with primes. MBE work is automatically looked at as subpar and we are held to a higher standard.

Many times, the bidding process is just a formality. The contractors already know who they are going to be awarded to.

People generally do work with people they are familiar with. I believe there is still a good ole boy system. Not as bad as it used to be, but I still believe it exists.

Some primes have direct relationships with clients.

No, we are not part of the old boys' network, so we miss out on fraternization between the client and vendors.

We are not part of that network. We are not social friends with the primes.

Do not seem to have as much access as a non-certified firm.

One M/WBE firm, however, noted that barriers were broken down over time.

Use [sic] to experience these barriers. But after 28 years in business our longevity, performance on our contracts and attention to details we don't experience those barriers anymore. Took 15 years to prove ourselves to primes.

3. Gender discrimination

Many woman business owners related instances of overt and subtle stereotyping and sexism. Second guessing and negative assumptions about the capabilities of woman-owned businesses are still common.

Construction is still male populated, there is no disputing this fact. After 20 years in the industry, it is evident that men prefer to work with other men in construction, regardless of the man's race or ethnicity.

Stereotyping-yes. Often there is the assumption that there is a man, or husband that controls the business. Have had male engineers straight laugh in my face when I've said I'm the one who owns the company.

My experience has been putting it mildly, denial of employment, physical assault, veiled, and blatant sexual comments.

People often assume that since I am a female that I don't know the construction business.

I am a female Hispanic. I have been ask[ed] if my company has its own tools.

When I was younger, I would be put in uncomfortable situations that were hard for me to say no because they could give me work.

Yes, there are countless times in my career that I was harassed sexually, as well as discriminated against for my gender. To this day people are still surprised when they learn I started my company, as they explain they assumed it was given to me by my father for one reason or the other.

I have seen my competency questioned often due to my gender more than my race.

Men often don't want to listen to a woman.

Multiple times [I] have had people call in, ask my opinion, and not five minutes later call and ask the same question of a man.

People that don't know me ask to speak to my husband instead of me regarding business matters.

I have been mistaken for many different roles within my company. Oddly enough, no one 'mistakes' me for the owner (that is unless they already know of me). I have had people tell me point blank (after we have met) that they thought I was a front at first and that there was no way I was running this company, and how now after we met their opinion changed and that they were wrong. Their only basis for their initial assumption was that I was a younger female.

4. Unequal access to materials and supplies

M/WBEs reported that suppliers often charge their firms higher pricing and offer more unfavorable terms than to their non-M/WBE counterparts.

I have had some suppliers ask the general contractor that I am working for [that they] want to get joint checks because they are concerned because I am a W/DBE. I tell them [and the] general that I will not do joint checks and I get a different supplier even if it costs me more.

On projects where we were working with a large electrical contractor, pricing for material was higher than what the prime was receiving.

Prices are usually high because we are an MBE.

Terms [are] different, access to products [is] different, quality of products [is] different.

The suppliers believe that you need their product and will escalate the pricing, but if you're a front you can get the majority contractor standard below cost pricing.

They discriminate on order size and credit risk.

We believe they give our competitors better pricing.

We constantly deal with manufacturer and distributors essentially price fixing for the non-diverse competition. I have this documented in email communication[s] many a time [sic] with suppliers and manufacturers.

We do not get [a] fair price for material.

Suppliers tend to favor the larger non-minority firms with the new and improved methods of doing business as well as provide preferred pricing information.

When we try and push into the work with our expertise and competitive price the Manufacturer's distributors try to hinder our competitiveness by selling to us at a non-competitive price or even worse not allowing us to install their products.

It's also humiliating watching them laugh at you because they can do it, refusing to give us competitive pricing just to keep us away from a chance to get work.

5. Access to public sector opportunities

As with the interviews, many M/WBEs felt that prime bidders often use them only to meet affirmative action goals or make only *pro forma* efforts to be inclusive.

GC's or Primes don't seriously consider our value as a self-performer. They only want to meet their goals.

There are companies in Chicago that will only hire me when they need WBE participation, even though we complete every project for them on time, on budget and in compliance. I still only get a shot when they need participation.

Construction is business as usual in Chicago. A lot of developers and G.C. [sic] do nothing but push paper for diversity instead of trying to achieve real, meaningful, and impactful diversity on their projects. 75% of these outreach events are nothing more than smoke and mirrors.

Bidding jobs in the City of Chicago, the bids are awarded based on award criteria. These award criteria are applied to your bid amount. Firms can "game" the award criteria and figure on paying a penalty, while not being the lowest responsive bidder on a project.

I am not privy to direct cases, but perhaps there are structural barriers to preclude MBEs like myself. Firms that do not value diversity but just [keep] trying to skirt the requirements [of] being involved with public projects are the majority and do not help with the ultimate goal.

I have been impressed with the City's outreach and involvement with MBE/WBE firms, however, I feel like the larger GCs are not really that interested in breaking up work packages for the smaller subs.

I don't believe everything is as transparent as it's billed to be. I don't believe primes are being held to making good faith efforts or there wouldn't be a single city contract with our specialty in it that we didn't get information about. And I know that there are such jobs.

Certain [that] most opportunities are done in back rooms or skirt legal requirements by announcing in small publications or advertised unfairly.

Needed information often gained by who you know.

Often times, the majority firms know WAY more about projects while bidding. They know when they are being let, the details that we don't know, it's difficult.

There was almost universal agreement among M/WBEs that the construction program remains critical to reducing barriers and creating equal contracting opportunities. Many respondents said being certified afforded them opportunities that would not have otherwise been open to them.

We only get calls because we are [a] black minority firm and do not get considered to work on projects that are privately funded.

Being certified with the WBE/MBE program has allowed me to be able to get work through the city of Chicago.

Thirty years ago, when I took over after my father's sudden death, the program gave me greater access to Prime contractors and prime contracts. The skills I learned have helped me prepare for the time when I graduated. I have lost business since graduation, but that is due to reduced opportunities.

The MBE program is essential and should be expanded.

By being certified with City of Chicago as an MBE and a DBE I get to work as a subcontractor on many city projects. Without these certifications, I would not get many contracts.

Gives me work on larger projects that I would not have the opportunity to work on without the program.

We wouldn't be where we are today if it wasn't for the program. It truly creates opportunities that would never happen without it.

I am very thankful for the program. Without it, we would not be able to realize our dreams at becoming a successful general contractor in Chicago.

Unless there is a participation requirement, I feel we would not get the opportunities to bid on and get contracts.

Yes, it is essential that the City's MBE/WBE program continues. Without this program I am truly convenience [sic] that minority firms in construction will not succeed.

It does allow for opportunities with the city if you have a favorable amount of experience.

It gets me in some of the rooms and to some of the tables.

It has given us opportunity to bid and work on a number of projects that we would not have been considered on otherwise. Because of this, we have gained new clients who use us on non-goal projects. It has also put me in touch with the community of WBE's that exists in Chicagoland.

It has helped me tremendously by opening doors to my firm to show our potential.

It has opened many doors for new work through projects requiring the use of a WBE firm.

It [the program] has opened some doors.

It helped develop our capacity and allowed larger primes to hire our firm to help meet diversity goals.

It helps in getting subcontracts from Contractors.

It opens doors to opportunities.

It's ensured we've had access to project opportunities and thus we have been able to build a portfolio and gain greater opportunities beyond MBE work.

It's the only way I have gotten access to prime contractors, what jobs they are bidding, etc.

On account of being MBE/WBE with the City of Chicago I have the opportunity of bidding on more projects.

We have an opportunity to participate in the bidding process of several projects which I do not believe we would be able to participate if not for MBE requirements.

Yes [the program helped my business].

Yes, [the program helped] when we were an MBE.

Yes, by having requirements on contracts that we would otherwise not be able to bid on as a prime contractor.

Yes, it is essential that the City's MBE/WBE program continues.

Yes, we have gotten a large amount of work because of our WBE certification.

Yes. As an MBE/WBE I am able to network with companies that does not have the certification [sic].

Allowed me access to projects that I might not have had access too as a female contractor.

Some WBE respondents suggested a higher goal for WBEs.

WBEs need a larger seat at the table. A number of prime contractors and prime vendors have told me that the WBE participation is easy to get. That they can usually fulfill their requirements through suppliers. It's the MBE participation that is difficult for them to achieve due to the larger requirement.

WBE should not be limit [sic] to only 5% while MBE is 25% in this world it should be equal and a 30% of either MBE/WBE.

Stop making us jump through hoops and filling out forms and attending outreach events. Make the actions more meaningful to getting business. Put people that understand construction in charge of the certifying. RAISE the WBE goal. Stop making it political. Look at each trade and find a better size standard.

Stronger support of WBEs [is needed].

A few minority and woman respondents reported that the program has not provided much benefit, particularly with helping their businesses grow.

It has not helped our business the system is broken and is no help to contractor. All the city agency and they personal [sic] work around the WBE/MBE programs.

The program should reach out to new firms with bid opportunities and network more for them to get on contracts with firms that have grown. The program would benefit from someone taking a look at who the companies are that are certified but have not had a chance to do any business with the city. I think everyone who takes the time to get certified should have the chance to become a prime or sub on a contract. More rotation is needed.

It definitely helped in my early years to 'put food on the table' but it was not set-up yet to help small business[es] grow.

Not one way at ALL!! Currently work is being bid every week, and everyone keeps saying can you get cheaper than the next guy!!??!!!

Some felt that there is a further bias against small firms, which especially impacts M/WBEs. Some suggested “unbundling” contracts to make them smaller in order to increase access to contracting opportunities.

Making smaller size contracts to bid on.

Smaller contracts [would help our business].

To be able to participate in larger projects going on that are broken down to sizes that small businesses can get bonded for and can support.

Mentor-protégé programs and joint ventures were seen as important approaches to help M/WBEs compete for larger contracts.

It's really a great and very real opportunity for small diverse business to scale and grow.

We have been able to find our sweet spot, hone our strategy and hit our goals. I'm committed to pay it forward with my lessons learned to help other small businesses do the same. There are a few more programs that the City could do better at, including the Mentor Protege Program, allowing Joint Ventures between small business to be MBE, and continuing to offer

small business set-aside where the large business cannot compete.

A more robust Mentor Protege Program and allowing JV's to be certified between two small businesses [would be helpful].

Just really consider the JVs for small business and a stronger Mentor Protege Program.

Being in connection with large GCs to participate in mentor protege programs.

[The Illinois Tollway's] a fantastic program. Yeah. And I was approached by a Hispanic trucking firm that they had, I think, one truck. And we've, last couple of years, been able to grow their business. And I've worked with them on everything from accounting software to changing their bank and their line of credit and making introductions and trying to get them some additional work. And I believe in the program, but it's a two-to-three-year commitment in order to try to see some success. And I recommend it. I think it's a good thing to do.

[Joint ventures] definitely work in regards to helping grow the capacity of our JV partner. They're beneficial to us and that we get, MBEWBE credit at a prime level. They've been overall positive experience. I think the paperwork involved is a little cumbersome.

Non-M/WBE and prime firms reported mixed experiences with mentor-protégé programs.

Our experience with the Tollway was very good.

Very positive.

Our internal programs work well as long as the owner supports the effort and resources required to implement.

Very poor. Anti-competitive. Exposes us to risk through subcontract ventures.

Many MBE firms are pass-through companies that do not benefit members of the community.

Large hassle.

Doing mentor protege for one project, I don't know, necessarily helps that subcontractor afterwards, unless they're getting steady work in kind of that same manner. But we would do that

anyway, if we saw someone struggling. Personally, I just think if we solve the fundamental [payment] problems, the rest of it comes along.

As far as joint ventures and mentor-protege programs, we've done them. They're hard to have success, I can't point to success stories.

A few M/WBEs reported that prime contractors sometimes try to use them as “front” or “pass throughs” to give the false appearance of meeting goals.

Recently I had a company solicit my business for a WBE required project. They tried to tell me what subcontractor to use and what mark-up to put on it. I was disgusted that this company looked at me as a pass through. I straight-out refused. I have not worked this hard for games to be played on my behalf.

If you're not a front company, you simply do not get any projects.

If you are not a front company, it's hard to break the glass ceiling of just being a stand up, hardworking, self-performing MBE/V/BEPD Contractor.

Always denied because I do not have backing from a majority company that wants to use minorities [sic] as a pass through.

6. Access to private sector or “no goals” contracts

Private sector or “no goals” contracts were difficult to obtain.

We only get calls because we are [a] black minority firm and do not get considered to work on projects that are privately funded.

Minority companies are not participating on projects such as these.

Private and negotiated work is limited to nonexistent.

We have a difficult time getting work. We are always second guessed even as experts in our field. On non-M/DBE goal projects we are overlooked.

Once, I mentioned to a contractor at on [sic] outreach that my company brings diversity, he told me we don't need diversity.

The private market in which most of our work occurs, has long standing relationships that we struggle to overcome.

Being [an] MBE has a stigma attached to it, where you can be part of a project if it [is] required vs. if you have the capabilities and resources. Sometimes we're only looked at if there are diversity requirements.

I've had clients admit they only use us for MBE participation, and one even threatened to stop "wasting my time pursuing projects with diversity goals" ... they may quit "feeding" us work as if our MBE status was the only reason, they hired us.

Well one obvious barrier is we can do very large rebar jobs for IDOT, ISTHA, multiple jobs for agencies with goals. We can't get a private job (like a high rise downtown) to save [our] life - unless we made a major mistake on our bid and put a price on it that no one would want.

Without the certification we would not [have] had access to any opportunities. It seems they only want to work with you if you have the certification.

If you work primarily a subcontractor, you can get lost because unfortunately some general contractors, not all, but some general contractors have kind of two lists. Here's my list of subcontractors on jobs that have goals. And here's my list of subcontractors and jobs that don't. And it's hard to move from one list to the other.... I think there are contractors out there who would rather not have a diverse subcontractor group. Not all. I think there's a lot of contractors who are always looking to diversify the number of people that they're working with.

7. Impact of City policies and procedures

Slow payments by the City and prime contractors in general were reported as a major obstacle by many M/WBE respondents. In particular, slow payments placed a large burden on these firms by forcing them to float the money for the project or job.

Being able to get paid faster or maybe paid up front for materials on jobs so we do not have to finance the job for over 120 days.

CASH FLOW IS EVERYTHING. If no matter what M/WBE's got paid every thirty days that would increase our chances to GROW.

Help us when we have jobs! We can never get paid fairly or promptly. Never any help. Seems like this program is a sham.

Financing projects for months and years at a time really hurts small businesses.

Pay applications and change order process as it pertains to work completed can essentially drive many small businesses out of business.

Slow Pay, because most black construction companies do not have a line of credit and larger firms low bid projects to keep black contractors from competing.

Because I cannot pay suppliers until I am paid, I often have to pay higher rates.

Waiting 90-120 days to get paid is a real killer and a reason we would avoid doing city work as a prime.

Most banks will not give construction companies lines of credit because of the market of slow pay in [the] Chicago region, and if you do the slow pay will put you in a position to lose your credit line with the bank.

The prime contractors pay within 30 days of being paid by the City, but usually we have to wait over 120 days for payment and then sometimes more than 6 months for final payment because the Prime is not paid by the City within 30 days.

A few M/WBEs felt that prime contractors should have to pay subcontractors regardless of whether the prime firm had been paid by the City.

The big primes and construction management companies have the ability to pay M/WBE's every thirty days. It should be in [sic] the primes and C[onstruction] M[anager]'s to make that happen. They can wait, we can't and more often than not we are out of business.

Prime contractors should have to pay their subs within 30 days of invoice.

Suggestions to address these issues included changes to City policies and processes.

I believe that prompt payment and change order adjudication must be expedited. The city needs to review the GCs subcontracts and mandate fair and equitable treatment for MBEs. The fact that MBEs have to bond work, which is a personal guarantee, or execute change order work before the owner approves the pricing and money [the MBE] is held hostage for months [and] makes prosecuting [sic] MBE work very difficult. For example, if the GCs paperwork is not correct no one get[s] paid. If another vendor's waivers are not collected or certified payroll is not updated, no one gets paid. That is not right.

City contracts require payment within 7-14 days of payment by City so Prime contractor payment question should be modified.

Would be great if WBE's could get paid up front for materials so we do not have to finance jobs for over 120 days. It would help the smaller WBE company like mine if we only had to cover our labor and not have to also cover material costs while we wait for payment sometimes over 120 days and then the final payment over 6 months.

Most of our delays with payment are due to contract extras. The process is too slow and smaller contractors end up financing the projects for an extended amount of time. This makes up most of the delay in getting paid. Also, they need better online transparency of pay estimates and payment dates similar to IDOT's website. If we work on a contract for the Department of Water Management, we have no way to know when a GC is getting paid.

Some certified firms complained that the process to become recertified took too long and was unnecessarily burdensome

One of the issues has been the fact that every five years you basically have to resubmit everything like as if you're a whole new MWBE which, I think it's ridiculous to have to do that, particularly for companies that have been in business for a very long time. And once again, they're asking for the original checks, come on.... If they just require some of the more or some of the established companies to just perhaps submit some recent financials that should be satisfactory, particularly if somebody is a DBE, they've kind of already gone through all that process. They know that they're below the thresholds. I don't know why they would make those people go back through it again.

8. Industry barriers to opportunities

Lack of access to capital and financial support services, particularly credit and bonding, was cited as a major impediment in taking on more work and the ability of M/WBE firms to successfully compete.

Overall, my business would grow greatly if I had access to business credit, prime contracting opportunities and the ability to network more with companies in my industry.

[A] decent lender that would understand construction and work with me.

Access to capital and bonding as well as more favorable payment terms.

[Access to] capital [is necessary].

I would like to see more opportunities in financial resources and equal race and gender in the construction industry.

Financially, these contracts are beyond my company's capacity.

Getting financing is a nightmare.

Getting financing was difficult.

I have been asked to provide excessive documentation when applying for loans.

I have unequal access to financing and loans. These types of credit lines most of the time, I do not qualify.

It is difficult to get credit especially when public bodies are the end users because of the slow pay of public work.

It was like pulling teeth to obtain the proper credit line even though I have the financials to back it up. I just had to shop banks to find the best relationship.

[We] have to jump through SIGNIFICANT hoops to get the same level of financing. For example, I KNOW that my majority counterparts do not personally guarantee their loans. yet I'm forced to by EVERY bank.

Very hard to get financing or L[etter] O[f] C[redit] through the banking system.

We have run into issues getting larger lines of credit because the work that requires WBE participation also usually pays slowly or over 120 days.

Access to bonding and financing. Prompt payment from the City agencies.

Because of our inability to access capital at reasonable rates, we've struggled to secure bonding and even now are being told we need to front 20% collateral on the bond amount while also getting every owner to indemnify.

Bonding and financing are the 2 largest barriers to overcome. Slow payment from the City exacerbates the problem.

[Obtaining financing is another] roadblock.

Insurance companies always want a cash bond instead of a non-cash bond which makes it hard for me as most of the time I can[not] afford cash bonds.

Some insurance companies charge more, and work comp forces my firm into a pool because other work comp do [sic] not want to supply work comp. Bonding is unequal because you have to have darn near perfect credit, and plenty of collateral to get bonding.

Bonding is very difficult to get especially as an MBE with limitation on outside investors and size limits.

Bonding requirements limited the amount [sic] of contracts I could accept.

Everyone has access... you are required to pay more/differently.

It was very difficult to get bonding and when we did initially it was much more expensive, and the bonding company made us use "funds control" when added to the price and made us look bad.

Sometimes the capital or collateral bonding companies request is ridiculous. Or they want you to pay over 5% for a bond. We've had to pay interest rates up to 40% APR because banks wouldn't lend to us. I can't fully claim it's because of my racial status, but I suspect it certainly hasn't helped us.

We've dug a deep hole of negative retained earnings because we paid \$2.5M in interest over just 3.5 years.

Some M/WBE respondents suggested that the City needs to provide more assistance with bonding, financing and insurance is necessary to create access to opportunities.

Access to financing and more bidding resources.

Banking for sure!!!

Access to information and capital.

Provide more access to information and capital.

[Provide access to] LINES OF CREDIT.

Please note we also cannot get outside Equity financing and maintain MBE status

D. Conclusion

Consistent with other evidence reported in this Study, the interviews and the survey results strongly suggest that minorities and women continue to suffer discriminatory barriers to full and fair access to construction contracts and associated subcontracts in the City of Chicago's market area. Many minority- and woman-owned businesses reported reduced opportunities to obtain contracts, less access to formal and informal networks, very limited opportunities on no-goals and private sector contracts, and much greater difficulties in securing financial support relative to non-M/WBEs in their industries. Their survey comments reflected experiences of biased perceptions and negative stereotypes about their capabilities and professionalism. A large number indicated they were working well below their capacity. Slow payment by both the City and primes was cited as a major obstacle because it forced firms to cash flow jobs using their limited financial resources. Most reported that the program has been critical to obtaining business and overcoming these barriers. Some suggested that more emphasis could be placed on supportive services, such as bonding, the mentor-protégé program and providing assistance with creating partnership opportunities, to help overcome the obstacles they still face in obtaining contracts on equal basis.

Anecdotal evidence may "vividly complement" statistical evidence of discrimination. Though not sufficient in and of itself, anecdotal evidence can serve as an essential tool for a governmental entity to successfully defend an M/WBE program. While not definitive proof that the City needs to continue to implement race- and gender-conscious remedies for these impediments, the results of the qualitative data are the types of evidence that, especially when considered in conjunction with other evidence assembled, are relevant and probative of the City's evidentiary basis to consider the use of race- and gender-conscious measures on its construction contracts to ensure a level playing field for its contracts.

V. ANALYSIS OF DISPARITIES IN THE CHICAGO AREA CONSTRUCTION ECONOMY

A. Introduction

The late Nobel Prize Laureate Kenneth Arrow, in his seminal paper on the economic analysis of discrimination, observed:

Racial discrimination pervades every aspect of a society in which it is found. It is found above all in attitudes of both races, but also in social relations, in intermarriage, in residential location, and frequently in legal barriers. It is also found in levels of economic accomplishment; this is income, wages, prices paid, and credit extended.¹⁷⁶

To build on this insight, this Chapter explores the data and literature relevant to how discrimination in the Chicago area construction market and throughout the wider construction economy affects the ability of minorities and women to fairly and fully engage in City of Chicago contract opportunities.¹⁷⁷ While the City's M/WBE construction program has been very successful in eliminating barriers to the participation of minority- and woman-owned businesses, this palliative approach may be obscuring the continued presence of race- and gender-based barriers to their full and fair participation outside of government remedial contracting affirmative action programs. If negative disparities are not found in the agency's own contracting activities, it is possible that the success of the program may mask the continued "market failure" of discrimination absent the City's remedial intervention to correct that failure.¹⁷⁸

The courts have recognized that a local government may take steps "to eradicate the effects of private discrimination within its own legislative jurisdiction" if the

176. Arrow, Kenneth J., "What Has Economics to Say about Racial Discrimination?" *Journal of Economic Perspectives*, 12, 2, (1998), 91-100.

177. See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs and the appropriate use of evidence of economy-wide disparities

178. *Id.*, 298 F.Supp.2d at 737-738 (the "market failure was demonstrated in several ways. One was anecdotal evidence.... Another was a Metra survey.... A third is the dramatic decline in the use of M/WBEs when an affirmative action program is terminated, and the paucity of use of such firms when no affirmative action program was ever initiated."... Alternative explanations for why M/WBEs are mostly shut out of non-goals work were not creditable when they were not solicited for private work, the City and other public entity goals were "almost invariably exceeded, [and] that capacity is relatively elastic.").

evil of private discrimination effects its marketplace such that the agency will “become a ‘passive participant’ in a system of racial exclusion” if it fails to act.¹⁷⁹ Therefore in this Chapter, we explore the outcomes of the overall Chicago area and Illinois construction marketplace to determine whether the system of racial and gender exclusion still reduces opportunities such that the City would function as a passive participant without the continued interposition of its M/WBE program.¹⁸⁰

We examined current market conditions through several approaches. First, we analyzed the rates at which M/WBEs in the Chicago metropolitan area form construction firms and their earnings from those firms. Next, we examined the outcomes of the firms that do form by comparing the number of employees, payroll size, sales and industry of minority- and woman-owned firms to other firms. Third, we summarized reports and academic literature on barriers to equal access to commercial credit. Finally, we summarized the literature on barriers to equal access to human capital. These types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in discrimination without some type of affirmative interventions.

This type of court-approved analysis is especially important for an agency such as the City of Chicago, which has been implementing a program for many years. Chicago’s remedial market interventions through the use of M/WBE contract goals may ameliorate the disparate impacts of marketplace discrimination in the agency’s own contracting activities. The courts have repeatedly held that analysis of disparities in the rate of M/WBE formation in the government’s markets as compared to similar non-M/WBEs, disparities in M/WBE earnings, and barriers to access to capital markets are highly relevant to a determination of whether market outcomes, independent of a government program, are affected by race or gender ownership status.¹⁸¹ Similar analyses supported the successful legal defense of the Illinois Tollway’s and the and the Illinois Department of Transportation’s Disadvantaged Business Enterprise (DBE) Programs from constitutional challenge.¹⁸² These data were also one element in the trial court’s holding that the City of Chicago had met its burden to demonstrate its continuing “compelling interest” in addressing discrimination in the constructing industry.

In general, we found that minorities and women continue to face barriers to equal business opportunities in the marketplace for City of Chicago construction con-

179. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-492 (1989).

180. *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 738 (N.D. Ill. 2003) (“the vestiges of past discrimination linger on to skew the marketplace and adversely impact M/WBEs disproportionately as more recent entrants to the industry... [T]he City has a compelling interest in preventing its tax dollars from perpetuating a market so flawed by past discrimination that it restricts existing M/WBEs from unfettered competition in that market.”).

181. See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs and the appropriate use of evidence of economy-wide disparities.

tracts. We found disparities for minorities and women in wages, business earnings, business formation rates and business receipts in the construction industry in Chicago's marketplace.¹⁸³ We used two Census Bureau data sets to reach this conclusion: the American Community Survey and the American Business Survey. We also looked at findings from government reports and academic research. The results of these analyses support the conclusion that discrimination continues to impede the success of minority and female construction company owners and their firms, such that the City of Chicago might function as a passive participation in that discrimination absent its successful M/WBE program.

B. Disparate Treatment in the Chicago Area Construction Marketplace: Evidence from the Census Bureau's 2015 - 2019 American Community Survey

To explore the question whether non-Whites and White women face disparate treatment achieving entrepreneurial success in the City's marketplace outside of Chicago contracts, we examined the U.S. Bureau of the Census' *American Community Survey Public Use Microdata Sample* ("ACS or PUMS"). This dataset allows us to examine disparities using individual entrepreneurs as the basic unit of analysis.¹⁸⁴ We used the six-county Chicago metropolitan area as the geographic unit of analysis.¹⁸⁵

The ACS is an annual survey of one percent of the population and the PUMS provides detailed information at the individual level. In order to obtain robust results from our analysis, we used the file that combines the most recent data available

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182. *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 840 F.3d 942 (7th Cir. 2016) (upholding the Illinois Tollway's program for state funded contracts modeled after Part 26 and based on CHA's expert testimony, including about disparities in the overall Illinois construction industry); *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 2015 WL 1396376 at * 21 (N.D. Ill.) ("Colette Holt [& Associates'] updated census analysis controlled for variables such as education, age, and occupation and still found lower earnings and rates of business formation among women and minorities as compared to White men); *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at *64 (Sept. 8, 2005) (disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination); see also *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-1169 (10th Cir. 2000), cert. granted then dismissed as improvidently granted, 532 U.S. 941 (2001) (private discriminatory barriers to the formation and success of MBEs are strongly linked to government contracting outcomes).
 183. Possible disparities in wages are important to explore because of the relationship between wages and business formation. Research by Alicia Robb and others indicates non-White firms rely on their own financing to start businesses compared to White firms, who rely more heavily on financing provided by financial institutions. To the extent non-Whites face discrimination in the labor market, they would have reduced capacity to self-finance their entrepreneurial efforts and, hence, impact business formation. See, for example, Robb's "Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms" (2013).
 184. Data from 2015 - 2019 American Community Survey are the most recent for a five-year period.
 185. The 6 counties were Cook; DuPage; Kane; Lake (IL); McHenry; and Will

for years 2015 through 2019.¹⁸⁶ With this rich data set, our analysis can establish with greater certainty any causal links between race, gender and economic outcomes.

Beyond the issue of bias in the incomes generated in the private sector, exploration of disparities in business earnings and formation is important because one of the determinants of business formation is the pool of financial capital at the disposal of the prospective entrepreneur. The size of this pool is related to the income level of the individual either because the income level impacts the amount of personal savings that can be used for start-up capital, or the income level affects one's ability to borrow funds. Consequently, if particular demographic groups receive lower wages and salaries, then they would have access to a smaller pool of financial capital, thus reducing the likelihood of business formation.

The Census Bureau classifies Whites, Blacks, Native Americans, and Asians as racial groupings. CHA developed a fifth grouping, "Other", to capture individuals who are not a member of the above four racial categories. In addition, Hispanics are an ethnic category whose members could be of any race, *e.g.*, Hispanics could be White or Black. In order to avoid double counting – *i.e.*, an individual could be counted once as Hispanic and once as White – CHA developed non-Hispanic subset racial categories: non-Hispanic Whites; non-Hispanic Blacks; non-Hispanic Native Americans; non-Hispanic Asians; and non-Hispanic Others. When those five groups are added to the Hispanic group, the entire population is counted and there is no double-counting. (When Whites are disaggregated into White men and White women, those groupings are non-Hispanic White men and non-Hispanic White women). For ease of exposition, the groups in this report are referred to as Black, Native American, Asian, Other, White women, and White men, while the actual content is the non-Hispanic subset of these racial groups.

Often, the general public sees clear associations between race, gender, and economic outcomes and assumes this association reflects a tight causal connection. However, economic outcomes are determined by a broad set of factors including, and extending beyond, race and gender. To provide a simple example, two people who differ by race or gender may receive different wages. This difference may simply reflect that the individuals work in different industries. If this underlying difference is not known, one might assert the wage differential is the result of race or gender difference. To better understand the impact of race or gender on wages, it is important to compare individuals of different races or genders who work in the same industry. Of course, wages are determined by a broad set of factors beyond race, gender, and industry. With the ACS PUMS, we have the ability to include a

186. Initially, the Census Bureau contacted approximately 3.5M households. For the analysis reported in this Chapter, we examined over 175,000 observations. For more information about the ACS PUMS, see <https://www.census.gov/programs-surveys/acs/>.

wide range of additional variables such as age, education, occupation, and state of residence in the analysis.

We employed a multiple regression statistical technique to process this data. This methodology allowed us to perform two analyses: an estimation of how variations in certain characteristics (called independent variables) will impact the level of some particular outcome (called a dependent variable), and a determination of how confident we are that the estimated variation is statistically different from zero. We have provided a more detailed explanation of this technique in Appendix A.

With respect to the first result of regression analysis, we examined how variations in the race, gender, and industry of individuals impact the wages and other economic outcomes received by individuals. The technique allows us to determine the effect of changes in one variable, assuming that the other determining variables are the same. That is, we can compare individuals of different races, but of the same gender and in the same industry; or we compare individuals of different genders, but of the same race and the same industry; or we can compare individuals in different industries, but of the same race and gender. We are determining the impact of changes in one variable (*e.g.*, race, gender or industry) on another variable (wages), controlling for the movement of any other independent variables.

With respect to the second result of regression analysis, this technique also allows us to determine the statistical significance of the relationship between the dependent variable and independent variable. For example, a relationship between gender and wages might exist but be found statistically indistinguishable from zero. In such an example, we would not be confident whether there is any relationship between the two variables. The regression analysis allows us to say with varying degrees of statistical confidence that a relationship is different from zero. If the estimated relationship is statistically significant at the 0.05 level, that indicates that we are 95 percent confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.01 level, that indicates that we are 99 percent confident that the relationship is different from zero; if the estimated relationship is statistically significant at the 0.001 level, that indicates that we are 99.9 percent confident that the relationship is different from zero.¹⁸⁷

In the following presentation of results for the construction industry, each subsection first reports data on the share of a demographic group that forms a business (business formation rates); the probabilities that a demographic group will form a business relative to White men (business formation probabilities); the differences in wages received by a demographic group relative to White men (wage

187. Most social scientists do not endorse utilizing a confidence level of less than 95 percent. Appendix C explains more about statistical significance.

differentials); and the differences in business earnings received by a demographic group relative to White men (business earnings differentials).

1. Business Formation Rates in the Chicago Metropolitan Area^{188,189}

One method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. We developed these business formation rates using data from the U.S. Bureau of the Census' American Community Survey for the Chicago Metropolitan Area.¹⁹⁰ Table 5-1 presents these results. The Table indicates that White men have higher business formation rates compared to non-Whites and White women.

**Table 5-1: Business Formation Rates
Construction, 2015 - 2019**

| Demographic Group | Business Formation Rates |
|-------------------|--------------------------|
| Black | 9.6% |
| Hispanic | 5.7% |
| Native American | ----- |
| Asian | 19.6% |
| Other | ----- |
| White Women | 12.4% |
| Non-White Male | 7.7% |
| White Male | 18.1% |

Source: Colette Holt & Associates calculations from the American Community Survey

The above business formation rates only look at the proportion of individuals in construction who form businesses. However, this propensity to be self-employed is influenced by a number of factors and thus, racial differences in business formation rates might actually be a function of other factors such as age and education. To control for these other factors, this analysis employs a probit regression analysis to examine the probability of forming a business after controlling for important factors beyond race and gender. Appendix B provides more information on the probit regression procedure.

188. The following counties were defined as the Chicago Metropolitan Area: Cook; DuPage; Kane; Lake (IL); McHenry; and Will.

189. Business formation rates represents the share of the population that are self-employed.

190. There were too few observations among Native Americans and Other in this sector to make reliable estimates. Therefore, the values for these groups will listed as "-----".

Table 5-2 presents the results of this analysis. This table indicates that Black, Hispanics, and White women are less likely to form businesses compared to similarly situated White men. In particular, Blacks are 8.4 percent less likely to form a business compared to White men after other key explanatory variables are controlled. For Hispanics and White women, the differentials are 11.1 percent and 6.6 percent, respectively. These three coefficients are statistically significant at the 0.001 level. The coefficient for Asians is positive (2.4 percent) but it is not statistically significant. These differences support the inference that M/WBEs suffer major barriers to equal access to entrepreneurial opportunities in the overall Chicago metropolitan area economy.

**Table 5-2: Business Formation Probabilities Relative to White Males
Construction, 2015 - 2019**

| Demographic Group | Probability of Forming a Business Relative to White Men |
|-------------------|---|
| Black | -8.4%*** |
| Hispanic | -11.1%*** |
| Native American | ----- |
| Asian | 2.4% |
| Other | ----- |
| White Women | -6.6%*** |

Source: Colette Holt & Associates calculations from the American Community Survey
*** Indicates statistical significance at the 0.001 level

2. Differences in Wages and Salary Incomes in the Chicago Area Construction Industry

While the focus of this analysis is discrimination in business opportunities, it is important to understand the impact of race and gender on wage and salary incomes. This is because wage and salary income can be a determinant of business formation either via a person’s creditworthiness or the ability to self-finance. Multiple regression statistical techniques allowed us to examine the impact of race and gender on wage and salary income while controlling for other factors, such as education, age, and occupation.¹⁹¹

Using these techniques and data from the Census Bureau’s American Community Survey, we found that Blacks, Hispanics, Asians, and White women

191. See Appendix A for a detailed explanation of multiple regression statistical analysis.

received lower wages than White men. Table 5-3 presents this data. The difference ranges from 24.2 percent for Hispanics to 46.1 percent for Blacks. For all four groups, the results were statistically significant at the 0.001 level.

**Table 5-3: Wage Differentials for Selected Groups Relative to White Men
Construction, 2015 - 2019**

| Demographic Group | Wages Relative to White Men (% Change) |
|-------------------|--|
| Black | -46.1%*** |
| Hispanic | -24.2%*** |
| Native American | ----- |
| Asian | -39.9%*** |
| Other | ----- |
| White Women | -43.4%*** |

Source: Colette Holt & Associates calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

These disparities in business formation rates as illustrated in Table 5-3 were applied to the weighted availability of each racial and ethnic group, White women and non-M/WBEs in Chapter VI to develop estimates of “expected” availability, that is, the availability that would be expected if these disparities in business formation did not exist.¹⁹²

3. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-Whites and White women construction entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5-4 presents these findings. Blacks and White women earned less than White men and the results were significant at the 0.01 level. The results for Hispanics and Asians were not statistically significant.

192. Please see Table 6-11 in Chapter VI for these results.

**Table 5-4: Business Earnings Differentials for Selected Groups
Relative to White Men, Construction, 2015 - 2019**

| Demographic Group | Earnings Relative to White Men (% Change) |
|-------------------|---|
| Black | -109.0%** ^a |
| Hispanic | -30.3% |
| Native American | ----- |
| Asian | 55.9% |
| Other | ----- |
| White Women | -184.0%** |

a. The proper way to interpret a coefficient that is less than negative 100 percent (e.g., the value of the coefficient for Black and White Women in Table 5-4), is the percentage amount non-M/WBEs earn that is more than the group in question. In this case, non-M/W/DBEs earn 109 percent more than Blacks and 184 percent more than White women.

Source: Colette Holt & Associates calculations from the American Community Survey
 ** Indicates statistical significance at the 0.01 level

4. Conclusion

Table 5-1 shows that differentials exist between the business formation rates by non-Whites and White women and White males across industry sectors. Table 5-2 presents the results of a further analysis, which indicated that even after considering potential mitigating factors, the differential still exists. Tables 5-3 and 5-4 present data indicating differentials in wages and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that overall marketplace barriers to business success continue to affect the entrepreneurial success of non-Whites and White women entrepreneurs.

C. Disparate Treatment in the Chicago Area Construction Marketplace: Evidence from the Census Bureau’s 2017 Annual Business Survey

In 2017, the Census Bureau stopped administering the Survey of Business Owner (“SBO”). It replaced the SBO (and the Annual Survey of Entrepreneurs and the Business R&D and Innovation for Microbusinesses survey) with the Annual Busi-

ness Survey (“ABS”) and the Nonemployer Statistics by Demographics (“NES-D”) ¹⁹³. In 2017, the ABS surveyed about 850,000 employer firms (firms with paid employees) and collected data on a variety of variables documenting ownership characteristics including race, ethnicity, and gender. It also collected data on the firms’ business activity, with variables marking the firms’ number of employees, payroll size, and sales.¹⁹⁴

With this data, we grouped the firms into the following ownership categories:^{195,196}

- Hispanics
- Non-Hispanic Blacks
- Non-Hispanic Native Americans
- Non-Hispanic Asians
- Non-Hispanic White women
- Non-Hispanic
- White men
- Firms equally owned by non-Whites and Whites
- Firms equally owned by men and women
- Firms that were either publicly-owned or where the ownership could not be classified

For purposes of this analysis, the first four groups were aggregated to form a non-White category. Since our interest is the treatment of non-White-owned firms and White woman-owned firms, the last five groups were aggregated to form one category. To ensure this aggregated group is described accurately, we label this group “not non-White/non-White women”. While this label is cumbersome, it is important to be clear that this group includes firms whose ownership extends beyond White men, such as firms that are not classifiable or that are publicly traded and thus have no racial ownership.

193. In 2017, the Census Bureau stopped administering the Survey of Business Owner (“SBO”). It replaced the SBO (and the Annual Survey of Entrepreneurs and the Business R&D and Innovation for Microbusinesses survey) with the Annual Business Survey (“ABS”) and the Nonemployer Statistics by Demographics (“NES-D”). While the SBO surveyed employer firms – firm with paid employees - and nonemployer firms – firms without paid employees, the ABS surveys employer firms and the NES-D surveys nonemployer firms.

194. For more information on the Annual Business Survey see <https://www.census.gov/programs-surveys/abs/about.html>

195. Race and gender labels reflect the categories used by the Census Bureau.

196. For expository purposes, the adjective “non-Hispanic” will not be used in this Chapter; the reader should assume that any racial group referenced does not include members of that group who identify ethnically as Hispanic.

Because the set of contracts we analyzed from the City of Chicago was from the construction sector, we limited our analysis of ABS data to this sector. However, the nature of the ABS data – a sample of all businesses, not the entire universe of all businesses – required some adjustments. In particular, we had to define the construction sector at the 2-digit North American Industry Classification System (“NAICS”) code level (NAICS Code 23), and therefore our sector definitions do not exactly correspond to the definitions used to analyze the City of Chicago’s contract data in Chapter VI, where we are able to determine sectors at the 6-digit NAICS code level. At a more detailed level, the number of firms sampled in particular demographic and sector cells may be so small that the Census Bureau does not report the information, either to avoid disclosing data on businesses that can be identified or because the small sample size generates unreliable estimates of the universe. We therefore report 2-digit data.

For a baseline analysis, we examined Construction in the State of Illinois. Illinois was chosen as the base geographic unit of analysis because the ABS does not contain enough observations at the metropolitan level to provide results without violating agreed upon confidentiality with survey respondents. Table 5-5 presents data on the percentage share that each group had of the total of each of the following four business outcomes:

- The number of all employer firms
- The sales and receipts of all employer firms
- The number of paid employees
- The annual payroll of employer firms

Panel A of Table 5-5 presents data for the four basic non-White racial groups¹⁹⁷:

- Black
- Hispanic
- Native American¹⁹⁸
- Asian

Panel B of Table 5-5 presents data for three types of firm ownership:

- Non-White
- White women

197. Unlike the ACS, which provided enough racial options to allow us to construct a category of “Other”, the ABS did not provide the variables to allow us to construct this category. Survey respondents must identify as one of the four groups.

198. As was the case with the analysis of the ACS, there were too few Native American firms in the ABS to make reliable estimates.

- Not non-White/Not White Women¹⁹⁹

Categories in the second panel are mutually exclusive. Hence, firms that are non-White and equally owned by men and women are classified as non-White and firms that are equally owned by non-Whites and Whites and equally owned by men and women are classified as equally owned by non-Whites and Whites.

**Table 5-5: Demographic Distribution of Sales and Payroll Data—Aggregated Groups
Construction, 2017**

| | Share of Number of Employer Firms | Share of Sales & Receipts - Employer Firms | Share of Number of Paid Employees | Share of Annual payroll |
|---|-----------------------------------|--|-----------------------------------|-------------------------|
| Panel A: Distribution of Non-White Firms | | | | |
| Black | 0.9% | 0.7% | 0.8% | 0.9% |
| Hispanic | 6.6% | 2.4% | 3.6% | 2.9% |
| Asian | 1.2% | 0.5% | 0.7% | 0.6% |
| Native American | ----- | ----- | ----- | ----- |
| Total Non-White | 8.8% | 3.6% | 5.2% | 4.5% |
| Panel B: Distribution of All Firms | | | | |
| Non-White | 8.8% | 3.6% | 5.2% | 4.5% |
| White Women | 10.1% | 7.1% | 10.7% | 9.9% |
| Not Non-White/Not White Women | 81.1% | 89.3% | 84.1% | 85.7% |
| Total | 100.0% | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates calculations from Annual Business Survey

Since the central issue is the possible disparate treatment of non-White and White women firms, we calculated three disparity ratios to examine if a group’s share of the number of firms corresponds to its share of sales, employees, and payroll. Table 5-6 presents these data as indicators of firm utilization. Below are the three ratios we calculated:

- The share of sales and receipts share for all employer firms over the share of total number of all employer firms.
- The share of employees over the share of total number of employer firms.

199. Again, while a cumbersome nomenclature, it is important to remain clear that this category includes firms other than those identified as owned by White men.

- The share of annual payroll over the share of total number of employer firms.

For example, the disparity ratio of sales and receipts share for employer firms over the share of total number of employer firms for Black firms is 69.5 percent (as shown in Table 5-6). This is derived by taking the Black share of sales and receipts for employer firms (0.7 percent) and dividing it by the Black share of total number of employer firms (0.9 percent) that are presented in Table 5-5.²⁰⁰ If Black-owned firms earned a share of sales equal to their share of total firms, the disparity would have been 100 percent. An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission’s “80 percent rule” that a ratio less than 80 percent presents a *prima facie* case of discrimination.²⁰¹ Of the 15 ratios for non-White firms – the 3 ratios times the 5 different non-White categories (Black; Hispanic; Asian; non-White; White Women), 11 are below this threshold.

Since 11 out of 15 non-White ratios have values less than 80 percent – and hence, meet the EEOC rule– these ABS data reinforce the conclusions drawn from the anecdotal interviews and analysis of the City's contract data that non-White and Woman firms face obstacles to achieving success in the business world.

**Table 5-6: Disparity Ratios of Firm Utilization Measures
Construction, 2017**

| | Ratio of Sales Share to Number of Employer Firms Share | Ratio of Employees Share to Number of Employer Firms Share | Ratio of Payroll Share to Number of Employer Firms Share |
|---|--|--|--|
| Panel A: Distribution of Non-White Firms | | | |
| Black | 69.5% | 85.0% | 94.3% |
| Hispanic | 36.4% | 54.8% | 43.5% |
| Asian | 44.1% | 60.5% | 51.3% |
| Native American | ----- | ----- | ----- |
| Total Non-White | 41.4% | 59.4% | 50.7% |
| Panel B: Disparity Ratios for All Firms | | | |
| Non-White | 41.4% | 59.4% | 50.7% |

200. The impact of presenting rounded figures in tables causes a distinction between the actual number and a number calculated using presented rounded figures. With the example in the paragraph, 0.7 divided by 0.9 is not 69.7 percent. But 0.7 and 0.9 are the rounded presentation of the actual numbers: 0.65250835449502 and 0.939158840342997. Dividing these two numbers results in 69.7 percent.

201. 29 C.F.R. § 1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

| | Ratio of Sales Share to Number of Employer Firms Share | Ratio of Employees Share to Number of Employer Firms Share | Ratio of Payroll Share to Number of Employer Firms Share |
|-------------------------------|--|--|--|
| White Women | 70.7% | 106.6% | 98.2% |
| Not Non-White/Not White Women | 110.0% | 103.6% | 105.6% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates recalculations from Annual Business Survey

Conclusion

Table 5-1 shows that differentials exist between the business formation rates by non-Whites and White women and White males across industry sectors. Table 5-2 presents the results of a further analysis, which indicated that even after considering potential mitigating factors, the differential still exists. Tables 5-3 and 5-4 present data indicating differentials in wages and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-Whites and White women entrepreneurs.

D. Evidence of Disparities in Access to Business Capital

As presented in Chapter IV, many participants in the anecdotal data collection agreed that access to working capital is critical to the success of their businesses. The interviews with business owners conducted as part of this Study confirmed that small construction firms, especially minority- and woman-owned firms, had difficulties obtaining needed working capital to perform on City contracts and sub-contracts, as well as expand the capacities of their firms. As discussed above, discrimination may even prevent firms from forming in the first place. This is important because these types of market barriers suggest that the City could be a passive participant in a market constrained by discrimination.

There is an extensive body of federal agency reports and scholarly work on the relationship between personal wealth and successful entrepreneurship. There is a general consensus that disparities in personal wealth translate into disparities in business creation and ownership.²⁰²

202. See, e.g., Evans, David S. and Jovanovic, Boyan, "An Estimated Model of Entrepreneurial Choice under Liquidity Constraints," *Journal of Political Economy*, (1989); Evans, David S. and Leighton, Linda "Some empirical aspects of entrepreneurship," *American Economic Review*, (1989).

1. Federal Reserve Board Small Business Credit Surveys²⁰³

The Development Office of the 12 Reserve Banks of the Federal Reserve System have conducted Small Business Credit Surveys (“SBCS”) to develop data on small business performance and financing needs, decisions, and outcomes.

a. 2021 Small Business Credit Survey

The 2021 Small Business Credit Survey²⁰⁴ reached more than 15,000 small businesses,⁵ gathering insights about the COVID-19 pandemic’s impact on small businesses, as well as business performance and credit conditions. The Survey yielded 9,693 responses from a nationwide convenience sample of small employer firms with 1–499 full-or part-time employees (hereafter “firms”) across all 50 states and the District of Columbia. The survey was fielded in September and October 2020, approximately six months after the onset of the pandemic. The timing of the survey is important to the interpretation of the results. At the time of the survey, the Paycheck Protection Program (PPP) authorized by the CARES Act had recently closed, and prospects for additional stimulus funding were uncertain. Additionally, many government-mandated business closures had been lifted as the number of new COVID-19 cases plateaued in advance of a significant increase in cases by the year’s end.

The 2020 survey findings highlight the magnitude of the pandemic’s impact on small businesses and the challenges they anticipate as they navigate changes in the business environment. Few firms avoided the negative impacts of the pandemic. Furthermore, the findings reveal disparities in experiences and outcomes across firm and owner demographics, including race and ethnicity, industry, and firm size.

Overall, firms’ financial conditions decline sharply and those owned by people of color reported grater challenges. The most important anticipated challenge differed by race and ethnicity of the owners. Among the findings for employer firms relevant to discriminatory barriers were the following

For Black-owned firms, credit availability was the top expected challenge, while Asian-owned firms disproportionately cited weak demand.

The share of firms in fair or poor financial conditions varied by race: 79 percent of Asian-owned firms, 77 percent of Black-owned firms, 66 percent of Hispanic-owned firms and 54 percent of White-owned firms reported this result.

203. This survey offers baseline data on the financing and credit positions of small firms before the onset of the pandemic. See [fedsmallbusiness.org](https://www.fedsmallbusiness.org).

204. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report>.

The share of firms that received all the financing sought to address the impacts of the pandemic varied by race: 40 percent of White-owned firm received all the funding sought, but only 31 percent of Asian-owned firms, 20 percent of Hispanic-owned firms and 13 percent of Black-owned firms achieved this outcome.

Demand for product or services was the top expected challenge for Asian-owned firms, while credit availability was the primary concern for Black-owned firms.

b. 2018 Small Business Credit Survey

The 2018 Small Business Credit Survey²⁰⁵ focused on minority-owned firms. The analysis was divided into two types: employer firms, and nonemployer firms.

i. Employer firms

Queries were submitted to businesses with fewer than 500 employees in the third and fourth quarters of 2018. Of the 7,656 firms in the unweighted sample, 5 percent were Asian, 10 percent were Black, 6 percent were Hispanic, and 79 percent were White. Data were then weighted by number of employees, age, industry, geographic location (census division and urban or rural location), and minority status to ensure that the data is representative of the nation’s small employer firm demographics.²⁰⁶

Among the findings for employer firms relevant to discriminatory barriers were the following:

- Not controlling for other firm characteristics, fewer minority-owned firms were profitable compared to non-minority-owned firms during the past two years.²⁰⁷ On average, minority-owned firms and non-minority-owned firms were about as likely to be growing in terms of number of employees and revenues.²⁰⁸
- Black-owned firms reported more credit availability challenges or difficulties obtaining funds for expansion—even among firms with revenues of more than \$1M. For example, 62 percent of Black-

205. Small Business Credit Survey (“SBCS”), <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

206. *Id.* at 22. Samples for SBCS are not selected randomly. To control for potential biases, the sample data are weighted so that the weighted distribution of firms in the SBCS matches the distribution of the small firm population in the United States by number of employees, age industry, geographic location, gender of owner, and race or ethnicity of owners.

207. *Id.* at 3.

208. *Id.* at 4.

owned firms reported that obtaining funds for expansion was a challenge, compared to 31 percent of White-owned firms.²⁰⁹

- Black-owned firms were more likely to report relying on personal funds of owner(s) when they experience financial challenges to fund their business. At the same time, White- and Asian-owned firms reported higher debt levels than Black- and Hispanic-owned firms.²¹⁰
- Black-owned firms reported more attempts to access credit than White-owned firms but sought lower amounts of financing. 40 percent of Black-owned firms did not apply because they were discouraged, compared to 14 percent of White-owned firms.²¹¹
- Low credit score and lack of collateral are the top reported reasons for denial of Black- and Hispanic-owned firms.²¹²

ii. Nonemployer firms²¹³

Queries were submitted to nonemployer firms in the third and fourth quarters of 2018. Of the 4,365 firms in the unweighted sample, 5 percent were Asian, 24 percent were Black, 7 percent were Hispanic, and 64 percent were White. Data were then weighted by age, industry, geographic location (census division and urban or rural location), and minority status.²¹⁴

Among the findings for nonemployer firms relevant to discriminatory barriers were the following:

- Black-owned firms were more likely to operate at a loss than other firms.²¹⁵
- Black-owned firms reported greater financial challenges, such as obtaining funds for expansion, accessing credit and making operating expenses than other businesses.²¹⁶
- Black- and Hispanics-owned firms submitted more credit applications than White-owned firms.²¹⁷

209. *Id.* at 5.

210. *Id.* at 6.

211. *Id.* at 9.

212. *Id.* at 15.

213. *Id.* at 18

214. *Id.* at 18

215. *Id.*

216. *Id.* at 19.

217. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

c. 2016 Small Business Credit Surveys

The 2016 Small Business Credit Survey²¹⁸ obtained 7,916 responses from employer firms with race/ethnicity information and 4,365 nonemployer firms in the 50 states and the District of Columbia. Results were reported with four race/ethnicity categories: White, Black or African American, Hispanic, and Asian or Pacific Islander.²¹⁹ It also reported results from woman-owned small employer firms, defined as firms where 51 percent or more of the business is owned by women, and compared their experiences with male-owned small employer firms.

i. The 2016 Report on Minority-Owned Businesses²²⁰

The Report on Minority-Owned Businesses provided results for White-, Black- or African American-, Hispanic-, and Asian- or Pacific Islander-owned firms.

Demographics²²¹

The SBCS found that Black-, Asian-, and Hispanic-owned firms tended to be younger and smaller in terms of revenue size, and they were concentrated in different industries. Black-owned firms were concentrated most in the healthcare and education industry sectors (24 percent). Asian-owned firms were most concentrated in professional services and real estate (28 percent). Hispanic-owned firms were most concentrated in nonmanufacturing goods production and associated services industry, including building trades and construction (27 percent). White-owned firms were more evenly distributed across several industries but operated most commonly in the professional industry services and real estate industries (19 percent), and nonmanufacturing goods production and associated services industry (18 percent).²²²

Profitability Performance Index²²³

After controlling for other firm characteristics, the SBCS found that fewer minority-owned firms were profitable compared to non-minority-owned firms during the prior two years. This gap proved most pronounced between White- (57 percent) and Black-owned firms (42

218. *Id.* at 20.

219. When the respondent sample size by race for a survey proved too small, results were communicated in terms of minority vis-à-vis non-minority firms.

220. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

221. 2016 SBCS, at 2.

222. *Id.* Forty-two percent of Black-owned firms, 21 percent of Asian-owned firms, and 24 percent of Hispanic-owned firms were smaller than \$100K in revenue size compared with 17 percent of White-owned firms.

223. *Id.* at 3-4.

percent). On average, however, minority-owned firms and non-minority-owned firms were nearly as likely to be growing in terms of number of employees and revenues.

*Financial and Debt Challenges/Demands*²²⁴

The number one reason for financing was to expand the business or pursue a new opportunity. Eighty-five percent of applicants sought a loan or line of credit. Black-owned firms reported more attempts to access credit than White-owned firms but sought lower amounts of financing.

Black-, Hispanic-, and Asian-owned firms applied to large banks for financing more than they applied to any other sources of funds. Having an existing relationship with a lender was deemed more important to White-owned firms when choosing where to apply compared to Black-, Hispanic- and Asian-owned firms.

The SBCS also found that small Black-owned firms reported more credit availability challenges or difficulties for expansion than White-owned firms, even among firms with revenues in excess of \$1M. Black-owned firm application rates for new funding were 10 percentage points higher than White-owned firms; however, their approval rates were 19 percentage points lower. A similar but less pronounced gap existed between Hispanic- and Asian-owned firms compared with White-owned firms. Of those approved for financing, only 40 percent of minority-owned firms received the entire amount sought compared to 68 percent of non-minority-owned firms, even among firms with comparably good credit scores.

Relative to financing approval, the SBCS found stark differences in loan approvals between minority-owned and White-owned firms. When controlling for other firm characteristics, approval rates from 2015 to 2016 increased for minority-owned firms and stayed roughly the same for non-minority-owned firms. Hispanic- and Black-owned firms reported the highest approval rates at online lenders.²²⁵

Low credit score and lack of collateral were the top reported reasons for denial of Black- and Hispanic-owned firms. Satisfaction levels were lowest at online lenders for both minority- and non-minority-owned firms. A lack of transparency was cited as one of the top reasons for dissatisfaction for minority applicants and borrowers.

224. *Id.* at 8-9; 11-12; 13; 15.

225. The share of minority-owned firms receiving at least some financing was lower across all financing products, compared with non-minority.

Forty percent of nonapplicant Black-owned firms reported not applying for financing because they were discouraged (expected not to be approved), compared with 14 percent of White-owned firms and 21 percent of Hispanic-and Asian-owned firms. The use of personal funds was the most common action taken in response to financial challenges, with 86 percent of Black-owned firms, 77 percent of Asian-owned firms, 76 percent of White-owned firms, and 74 percent of Hispanic-owned firms using this as its source.

A greater share of Black-owned firms (36 percent) and of Hispanic-owned firms (33 percent) reported existing debt in the past 12 months of less than \$100,000, compared with 21 percent of White-owned firms and 14 percent of Asian-owned firms. Black-owned firms applied for credit at a higher rate and tended to submit more applications, compared with 31 percent of White-owned firms. Black-, Hispanic-, and Asian-owned firms applied for higher-cost products and were more likely to apply to online lenders compared with White-owned firms.

*Business Location Impact*²²⁶

Controlling for other firm characteristics, minority-owned firms located in low-income minority zip codes reported better credit outcomes at large banks, compared with minority-owned firms in other zip codes. By contrast, at small banks, minority-owned firms located in low- and moderate-income minority zip codes experiences lower approval rates than minority-owned firms located in other zip codes.

*Non-Employer Firms*²²⁷

Non-employer firms reported seeking financing at lower rates and experienced lower approval rates than employer firms, with Black-owned non-employer firms and Hispanic-owned non-employer firms experiencing the most difficulty. White-owned non-employer firms experienced the highest approval rates for new financing, while Black-owned non-employer firms experienced the lowest approval rates for new financing.

ii. The 2016 Report on Women-Owned Businesses²²⁸

The Report on Women-Owned Businesses provides results from woman-owned small employer firms where 51 percent or more of the

226. *Id.* at 17.

227. *Id.* at 21.

228. <https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-WomenOwnedFirms-2016.pdf>

business is owned by women and on data that compared the experience of these firms compared with male-owned small employer firms.

*Firm Characteristics: Woman-Owned Firms Start Small and Remain Small and Concentrate in Less Capital-Intensive Industries*²²⁹

The SBCS found that 20 percent of small employer firms are woman-owned, compared to 65 percent male-owned and 15 percent equally owned. Woman-owned firms generally had smaller revenues and fewer employees than male-owned small employer firms. These firms tended to be younger than male-owned firms.

Woman-owned firms were concentrated in less capital-intensive industries. Two out of five woman-owned firms operated in the healthcare and education or professional services and real estate industries. Male-owned firms were concentrated in professional services, real estate, and non-manufacturing goods production and associated services²³⁰.

*Profitability Challenges and Credit Risk Disparities*²³¹

Woman-owned firms were less likely to be profitable than male-owned firms. These firms were more likely to report being medium or high credit risk compared to male-owned firms. Notably, gender differences by credit risk were driven by woman-owned startups. Among firms older than five years, credit risk was indistinguishable by the owner's gender.

*Financial Challenges During the Prior Twelve Months*²³²

Woman-owned firms were more likely to report experiencing financial challenges in the prior twelve months: 64 percent compared to 58 percent of male-owned firms. They most frequently used personal funds to fill gaps and make up deficiencies. Similar to male-owned firms, woman-owned firms frequently funded operations through retained earnings. Ninety percent of woman-owned firms relied upon the owner's personal credit score to obtain financing.

229. 2016 SBCS, at 1-5

230. Non-manufacturing goods production and associated services refers to firms engaged in Agriculture, Forestry, Fishing, and Hunting; Mining, Quarrying, and Oil and Gas Extraction; Utilities; Construction; Wholesale Trade; Transportation and Warehousing (NAICS codes: 11, 21, 22, 23, 42, 48-49).

231. *Id.* at 6-7.

232. *Id.* at 8.

*Debt Differences*²³³

Sixty-eight percent of woman-owned firms had outstanding debt, similar to male-owned firms. However, woman-owned firms tended to have smaller amounts of debt, even when controlled for the revenue size of the firm.

*Demands for Financing*²³⁴

Forty-three percent of woman-owned firms applied for financing. Similar to male-owned firms, woman-owned firms most frequently applied for loans and lines of credit. Both woman- and male-owned firms were most successful at small banks. Both reported that the most common reason for financing was business expansion. Woman-owned applicants tended to seek smaller amounts of financing even when their revenue size was comparable.

Overall, woman-owned firms were less likely to receive all financing applied for compared to male-owned firms. Woman-owned firms received a higher approval rate for U.S. Small Business Administration loans compared to male-owned firms. Low-credit woman-owned firms were less likely to be approved for business loans than their male counterparts with similar credit (68 percent compared to 78 percent).

*Firms That Did Not Apply for Financing*²³⁵

Woman-owned firms reported being discouraged from applying for financing for fear of being turned down at a greater rate: 22 percent compared to 15 percent. Woman-owned firms cited low credits scores more frequently than male-owned firms as their chief obstacle in securing credit. By contrast, male-owned businesses were more likely to cite performance issues.

*Lender Satisfaction*²³⁶

Woman-owned firms were most consistently dissatisfied by lenders' lack of transparency and by long waits for credit decisions. However, they were notably more satisfied with their borrowing experiences at small banks rather than large ones.

233. *Id.* at 10.

234. *Id.*, at 16.

235. *Id.* at 14.

236. *Id.* at 26.

2. Minority Business Development Agency Report²³⁷

The 2010 Minority Business Development Agency (“MBDA”) Report, “Disparities in Capital Access Between Minority and Non-Minority Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs”, summarizes results from the Kauffman Firm Survey, data from the U.S. Small Business Administration’s Certified Development Company/504 Guaranteed Loan Program and additional extensive research on the effects of discrimination on opportunities for minority-owned firms. The report found that

Low levels of wealth and liquidity constraints create a substantial barrier to entry for minority entrepreneurs because the owner’s wealth can be invested directly in the business, used as collateral to obtain business loans or used to acquire other businesses.²³⁸

It also found, “the largest single factor explaining racial disparities in business creation rates are differences in asset levels.”²³⁹

Some additional key findings of the Report include:

- *Denial of Loan Applications.* Forty-two percent of loan application from minority firms were denied compared to 16 percent of loan applications from non-minority-owned firms.²⁴⁰
- *Receiving Loans.* Forty-one percent of all minority-owned firms received loans compared to 52 percent of all non-minority-owned firms. MBEs are less likely to receive loans than non-minority-owned firms regardless of firm size.²⁴¹
- *Size of Loans.* The size of the loans received by minority-owned firms averaged \$149,000. For non-minority-owned firms, loan size averaged \$310,000.
- *Cost of Loans.* Interest rates for loans received by minority-owned firms averaged 7.8 percent. On average, non-minority-owned firms paid 6.4 percent in interest.²⁴²

237. Robert W. Fairlie and Alicia Robb, *Disparities in Capital Access Between Minority and non-Minority Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, Minority Business Development Agency, U.S. Department of Commerce, 2010 (“MBDA Report” (<https://archive.mbda.gov/sites/mbda.gov/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf>))

238. *Id.* at 17.

239. *Id.* at 22.

240. *Id.* at 5.

241. *Id.*

242. *Id.*

- *Equity Investment.* The equity investments received by minority-owned firms were 43 percent of the equity investments received by non-minority-owned firms even when controlling for detailed business and owner characteristics. The differences are large and statistically significant. The average amount of new equity investments in minority-owned firms receiving equity is 43 percent of the average of new equity investments in non-minority-owned firms. The differences were even larger for loans received by high sales firms.²⁴³

3. Survey of Small Business Finances

The Federal Reserve Board and the U.S. Small Business Administration have conducted surveys of discrimination in the small business credit market for 1993, 1998 and 2003.²⁴⁴ These Surveys of Small Business Finances are based on a large representative sample of firms with fewer than 500 employees. The main finding from these Surveys is that MBEs experience higher loan denial probabilities and pay higher interest rates than White-owned businesses, even after controlling for differences in credit worthiness and other factors. Blacks, Hispanics and Asians were more likely to be denied credit than Whites, even after controlling for firm characteristics like credit history, credit score and wealth. Blacks and Hispanics were also more likely to pay higher interest rates on the loans they did receive.²⁴⁵

4. Other Reports

- Dr. Timothy Bates found venture capital funds focusing on investing in minority firms provide returns that are comparable to mainstream venture capital firms.²⁴⁶
- According to the analysis of the data from the Kauffman Firm Survey, minority-owned firms' investments into their firms were about 18 percent lower in the first year of operations compared to those of non-minority-owned firms. This disparity grew in the subsequent three years of operations, where minorities' investments into their firms were about 36 percent lower compared to those of non-minority-owned firms.²⁴⁷

243. *Id.*

244. <https://www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm>. These surveys have been discontinued. They are referenced to provide some historical context.

245. See Blanchflower, D. G., Levine, P. and Zimmerman, D., "Discrimination In The Small Business Credit Market," *Review of Economics and Statistics*, (2003); Cavalluzzo, K. S. and Cavalluzzo, L. C. ("Market structure and discrimination, the case of small businesses," *Journal of Money, Credit, and Banking*, (1998),

246. See Bates, T., "Venture Capital Investment in Minority Business," *Journal of Money Credit and Banking* 40, 2-3 (2008).

247. Fairlie, R.W. and Robb, A, *Race and Entrepreneurial Success: Black-, Asian- and White-Owned Businesses in the United States*, (Cambridge: MIT Press, 2008).

- Another study by Fairlie and Robb found minority entrepreneurs face challenges (including lower family wealth and difficulty penetrating financial markets and networks) directly related to race that limit their ability to secure financing for their businesses.²⁴⁸

E. Evidence of Disparities in Access to Human Capital

There is a strong intergenerational correlation with business ownership. The probability of self-employment is significantly higher among the children of the self-employed. This was evident in the large number of non-M/WBEs in our interview groups who were second or even higher generation firms doing business in the market area. This generational lack of self-employment capital disadvantages minorities, whose earlier generations were denied business ownership through either *de jure* segregation or *de facto* exclusion.

There is evidence that current racial patterns of self-employment are in part determined by racial patterns of self-employment in the previous generation.²⁴⁹ Black men have been found to face a “triple disadvantage”: they are less likely than White men to: 1. Have self-employed fathers; 2. Become self-employed if their fathers were not self-employed; and 3. To follow their fathers into self-employment.²⁵⁰

Intergenerational links are also critical to the success of the businesses that do form.²⁵¹ Working in a family business leads to more successful firms by new owners. One study found that only 12.6 percent of Black business owners had prior work experiences in a family business as compared to 23.3 percent of White business owners.²⁵² This creates a cycle of low rates of minority ownership and worse outcomes being passed from one generation to the next, with the corresponding perpetuation of advantages to White-owned firms.

Similarly, unequal access to business networks reinforces exclusionary patterns. The composition and size of business networks are associated with self-employment rates.²⁵³ The U.S. Department of Commerce has reported that the ability to

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248. Fairlie, R.W. and Robb, A., *Race and Entrepreneurial Success: Black-, Asian- and White-Owned Businesses in the United States*, (Cambridge: MIT Press, 2008).
249. Fairlie, R.W., “The Absence of the African American Owned Business, An Analysis of the Dynamics of Self-Employment,” *Journal of Labor Economics*, Vol. 17, 1999, pp 80-108.
250. Hout, M. and Rosen, H. S., “Self-employment, Family Background, and Race,” *Journal of Human Resources*, Vol. 35, No. 4, 2000, pp. 670-692.
251. Fairlie, R.W. and Robb, A., “Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital,” *Journal of Labor Economics*, Vol. 24, No. 2, 2007, pp. 289-323.
252. *Id.*
253. Allen, W. D., “Social Networks and Self-Employment,” *Journal of Behavioral and Experimental Economics (formerly The Journal of Socio-Economics)*, Vol. 29, No. 5, 2000, pp. 487-501.

form strategic alliances with other firms is important for success.²⁵⁴ Minorities and women in our interviews reported that they felt excluded from the networks that help to create success in their industries.

F. Conclusion

The economy-wide data, taken as a whole, paint a picture of systemic and endemic inequalities in the ability of construction firms owned by minorities or women to have full and fair access to City of Chicago contracts and associated sub-contracts. This evidence supports the conclusion that absent some affirmative City measures, these inequities create disparate impacts on M/WBEs and may render Chicago a passive participant in overall construction industry market-wide discrimination.

254. "Increasing MBE Competitiveness through Strategic Alliances" (Minority Business Development Agency, 2008).

VI. UTILIZATION, AVAILABILITY AND DISPARITY ANALYSES FOR THE CITY OF CHICAGO

A. Contract Data Overview

This Study examined City of Chicago contract and procurement data dollars for 2015 through 2019. The Initial Contract Data File contained 1,226 contracts. These files did not have a complete set of variables needed to perform the quantitative analyses. Fields necessary for our analysis that were often missing were industry type; zip codes; NAICS codes of prime contractors and subcontractors; and non-certified subcontractor information, including payments, and race, gender. To address missing data, we contacted prime contractors to obtain consistent and accurate data on their subcontractors.

After contacting prime vendors and taking other steps to obtain a complete set of variables, the Final Contract Data File (“FCDF”) contained those 1,226, of which 148 were prime contracts and 1,078 were subcontracts. This reflects 88.9 percent of the contract dollars in the FCDF. The total net dollar value of prime contracts was \$964,940,460; the total net dollar value of subcontracts was \$582,825,865. The Final Contract Data File was used to determine the geographic and product markets for the analyses, and to estimate the utilization of Minority- and Woman-owned Business Enterprises (“M/WBEs”) on the City’s construction contracts. We then used the FCDF, in combination with other databases (as described below), to calculate M/WBE unweighted and weighted availability in the City’s construction marketplace.

B. Summary of Findings

The Contract Data File established that the City’s geographic market area for construction contracts is the Chicago area 6-county region. The utilization of M/WBEs on City prime contracts and associated subcontracts strongly suggests that the construction program has met the objective of removing overall barriers to participation on City projects on the basis of race and gender. In the aggregate across industry codes and for all groups presumed to be “socially disadvantaged” under the City’s ordinance, utilization by groups as prime contractors and subcontractors for the study period was 7.7 percent for Black-owned firms, 17.1 percent for His-

panic-owned businesses, 16.4 percent for Asian-owned businesses, 0.0 percent for Native American-owned businesses, 13.0 percent for White women and 45.9 percent for non-M/WBEs.

A closer look revealed additional patterns of the distribution of contracts across groups and industry codes, as well as for the distribution of dollars. These additional analyses shed light on whether these outcomes are the result of the cessation of discrimination or are an artifact of the operations of the program. In other words, is the overall success of the program in setting goals for M/WBE utilization masking differences in outcomes and opportunities when examined at a more granular level?

We provide detailed answers to these questions below. In summary, M/WBEs are much more reliant on subcontracts compared to non-M/WBEs. For Black, Hispanic, and White woman-owned firms, over 90 percent of their work is as subcontractors. In contrast, for non-M/WBEs, just under 73 percent of their work is as subcontractors. In addition, the results demonstrate that when examining the dollars received by M/WBEs, there is a small number of firms that receive a large share of the dollars in each NAICS code, and that amongst the various disaggregated racial, ethnic and gender groupings, this pattern continues. This suggests that while the City's program has had some meaningful success in breaking down barriers to provide significant opportunities to M/WBEs on certain subindustries, these dollars are highly concentrated amongst a small group of firms and that there is still not parity when comparing a group's share of contracts to its share of dollars.

C. The City of Chicago's Geographic Market for Construction Contracts

The federal courts require that a local government narrowly tailor its race- and gender-conscious contracting program elements to its geographic market area.²⁵⁵ This element of the analysis must be empirically established.²⁵⁶ Therefore, the first step in the study analysis was the determination of the geographic market for the City for its construction contracting activity.

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255. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (Richmond was specifically faulted for including minority contractors from across the country in its program based on the national evidence that supported the USDOT DBE program); 49 C.F.R. §26.45(c); <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise> (“D. Explain How You Determined Your Local Market Area.... your local market area is the area in which the substantial majority of the contractors and subcontractors with which you do business are located and the area in which you spend the substantial majority of your contracting dollars.”).
256. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (to confine data to strict geographic boundaries would ignore “economic reality”).

To determine the geographic market area, we applied the standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.²⁵⁷ Location was determined by ZIP code and aggregated into counties as the geographic unit.

We determined that the six counties in the Chicago Metropolitan Area (Cook; DuPage; Lake; Kane; Will; and McHenry) comprise the City’s geographic market for construction. These counties accounted for 97.5 percent of the total contract dollars in the Final Contract Data File. We therefore limited our analysis to firms with a location in these six counties.

D. The City of Chicago’s Utilization of M/WBEs on Construction Contracts in Its Geographic Market

Having determined the City’s construction geographic market area, the next step was to determine the dollar value of the City’s utilization of M/WBEs²⁵⁸ as measured by payments to prime firms and subcontractors and disaggregated by race and gender. As discussed in Chapter II, a defensible disparity study must determine empirically the industries that comprise the City of Chicago’s product or industry market. The accepted approach is to analyze those detailed industries, as defined by 6-digit North American Industry Classification System (“NAICS”) codes²⁵⁹ that make up at least 75 percent of the prime contract and subcontract payments for the study period.²⁶⁰

Tables 6-1 through 6-2 present data on the utilization of contract dollars. (Note the contract dollar shares in Table 6-1 are equivalent to the weight of spending in

257. National Academies of Sciences, Engineering, and Medicine 2010. *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14346> (“National Disparity Study Guidelines”), p. 49.

258. For our analysis, the term “M/WBE” includes firms that are certified by government agencies and minority- and woman-owned firms that are not certified. As discussed in Chapter II, the inclusion of all minority- and female-owned businesses in the pool casts the broad net approved by the courts and recommended by USDOT that supports the remedial nature of the programs. See *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007) (The “remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net.”).

259. www.census.gov/eos/www/naics.

260. National Academies of Sciences, Engineering, and Medicine 2010. *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14346> (“National Disparity Study Guidelines”).

each NAICS code. These data were used to calculate weighted availability²⁶¹ from unweighted availability, as discussed below).

Table 6-1: NAICS Code Distribution of Contract Dollars in the City’s Constrained Construction Product Market

| NAICS | NAICS Code Description | Total Contract Dollars | Pct Total Contract Dollars |
|--------|--|------------------------|----------------------------|
| 237110 | Water and Sewer Line and Related Structures Construction | \$652,546,560 | 43.2% |
| 237310 | Highway, Street, and Bridge Construction | \$293,671,744 | 19.5% |
| 238210 | Electrical Contractors and Other Wiring Installation Contractors | \$134,085,120 | 8.9% |
| 238220 | Plumbing, Heating, and Air-Conditioning Contractors | \$87,704,312 | 5.8% |
| 484220 | Specialized Freight (except Used Goods) Trucking, Local | \$73,302,368 | 4.9% |
| 236220 | Commercial and Institutional Building Construction | \$65,367,236 | 4.3% |
| 236210 | Industrial Building Construction | \$58,091,444 | 3.8% |
| 238910 | Site Preparation Contractors | \$37,901,208 | 2.5% |
| 238120 | Structural Steel and Precast Concrete Contractors | \$23,607,074 | 1.6% |
| 221310 | Water Supply and Irrigation Systems | \$23,029,172 | 1.5% |
| 238990 | All Other Specialty Trade Contractors | \$9,084,696 | 0.6% |
| 561730 | Landscaping Services | \$6,908,022 | 0.5% |
| 238140 | Masonry Contractors | \$4,960,217 | 0.3% |
| 238320 | Painting and Wall Covering Contractors | \$4,302,059 | 0.3% |
| 238160 | Roofing Contractors | \$4,186,560 | 0.3% |
| 238110 | Poured Concrete Foundation and Structure Contractors | \$3,754,301 | 0.2% |
| 541380 | Testing Laboratories | \$3,076,407 | 0.2% |
| 238350 | Finish Carpentry Contractors | \$2,719,353 | 0.2% |

261. See “Tips for Goal Setting in the Disadvantaged Business Enterprise Program” (“F. Wherever Possible, Use Weighting. Weighting can help ensure that your Step One Base Figure is as accurate as possible. While weighting is not required by the rule, it will make your goal calculation more accurate. For instance, if 90% of your contract dollars will be spent on heavy construction and 10% on trucking, you should weight your calculation of the relative availability of firms by the same percentages.”) (emphasis in the original), <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

| NAICS | NAICS Code Description | Total Contract Dollars | Pct Total Contract Dollars |
|--------------|--|------------------------|----------------------------|
| 561990 | All Other Support Services | \$2,199,977 | 0.1% |
| 238150 | Glass and Glazing Contractors | \$2,163,995 | 0.1% |
| 238290 | Other Building Equipment Contractors | \$2,017,470 | 0.1% |
| 238310 | Drywall and Insulation Contractors | \$1,964,257 | 0.1% |
| 238340 | Tile and Terrazzo Contractors | \$1,653,526 | 0.1% |
| 424720 | Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals) | \$1,642,878 | 0.1% |
| 562910 | Remediation Services | \$1,548,421 | 0.1% |
| 444190 | Other Building Material Dealers | \$1,528,102 | 0.1% |
| 541620 | Environmental Consulting Services | \$1,410,622 | 0.1% |
| 541330 | Engineering Services | \$1,327,116 | 0.1% |
| 238330 | Flooring Contractors | \$849,342 | 0.1% |
| 541370 | Surveying and Mapping (except Geophysical) Services | \$546,879 | 0.04% |
| 454310 | Fuel Dealers | \$533,322 | 0.04% |
| 561790 | Other Services to Buildings and Dwellings | \$341,260 | 0.02% |
| 561612 | Security Guards and Patrol Services | \$330,800 | 0.02% |
| 332313 | Plate Work Manufacturing | \$208,312 | 0.01% |
| 541420 | Industrial Design Services | \$154,963 | 0.01% |
| 541690 | Other Scientific and Technical Consulting Services | \$152,973 | 0.01% |
| 332991 | Ball and Roller Bearing Manufacturing | \$83,477 | 0.01% |
| 238390 | Other Building Finishing Contractors | \$57,140 | 0.004% |
| 333923 | Overhead Traveling Crane, Hoist, and Monorail System Manufacturing | \$16,801 | 0.001% |
| 321911 | Wood Window and Door Manufacturing | \$4,515 | 0.0003% |
| 561720 | Janitorial Services | \$2,545 | 0.0002% |
| 325520 | Adhesive Manufacturing | \$900 | 0.0001% |
| Total | | \$1,509,037,449 | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

**Table 6-2: Distribution of Contract Dollars by Race and Gender
(total dollars)**

| NAICS | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|--------|--------------|--------------|---------------|-----------------|---------------|--------------|---------------|---------------|
| 221310 | \$0 | \$1,137,782 | \$0 | \$0 | \$1,137,782 | \$0 | \$21,891,390 | \$23,029,172 |
| 236210 | \$8,808,103 | \$0 | \$0 | \$0 | \$8,808,103 | \$0 | \$49,283,342 | \$58,091,445 |
| 236220 | \$1,613,611 | \$0 | \$778,437 | \$0 | \$2,392,048 | \$0 | \$62,975,187 | \$65,367,235 |
| 237110 | \$7,923,806 | \$54,146,099 | \$161,250,923 | \$0 | \$223,320,828 | \$19,852,811 | \$409,372,938 | \$652,546,577 |
| 237310 | \$9,164,111 | \$94,689,143 | \$32,583,612 | \$0 | \$136,436,866 | \$94,357,447 | \$62,877,425 | \$293,671,739 |
| 238110 | \$0 | \$3,480,445 | \$0 | \$0 | \$3,480,445 | \$27,257 | \$246,600 | \$3,754,301 |
| 238120 | \$1,866,234 | \$4,620,631 | \$5,983,183 | \$0 | \$12,470,048 | \$4,830,958 | \$6,306,069 | \$23,607,074 |
| 238140 | \$2,425,691 | \$854,595 | \$0 | \$0 | \$3,280,286 | \$243,856 | \$1,436,075 | \$4,960,217 |
| 238150 | \$1,322,180 | \$0 | \$0 | \$0 | \$1,322,180 | \$0 | \$841,815 | \$2,163,995 |
| 238160 | \$363,052 | \$57,500 | \$538,984 | \$0 | \$959,536 | \$861,609 | \$2,365,415 | \$4,186,560 |
| 238210 | \$44,353,967 | \$10,170,371 | \$12,567,222 | \$0 | \$67,091,560 | \$26,048,684 | \$40,944,872 | \$134,085,117 |
| 238220 | \$20,816,804 | \$27,241,724 | \$4,135,772 | \$265,508 | \$52,459,808 | \$13,953,214 | \$21,291,289 | \$87,704,312 |
| 238290 | \$0 | \$0 | \$0 | \$0 | \$0 | \$61,430 | \$1,956,040 | \$2,017,470 |
| 238310 | \$429,507 | \$1,079,881 | \$0 | \$0 | \$1,509,388 | \$4,500 | \$450,369 | \$1,964,257 |
| 238320 | \$1,207,481 | \$752,839 | \$182,086 | \$0 | \$2,142,406 | \$1,952,361 | \$207,291 | \$4,302,059 |
| 238330 | \$0 | \$41,395 | \$0 | \$0 | \$41,395 | \$114,030 | \$693,918 | \$849,342 |
| 238340 | \$0 | \$0 | \$0 | \$0 | \$0 | \$432,184 | \$1,221,342 | \$1,653,526 |
| 238350 | \$179,451 | \$1,119,399 | \$0 | \$0 | \$1,298,850 | \$691,269 | \$729,234 | \$2,719,353 |
| 238390 | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 | \$57,140 | \$57,140 |
| 238910 | \$0 | \$9,928,108 | \$17,770,950 | \$0 | \$27,699,058 | \$7,933,371 | \$2,268,779 | \$37,901,208 |
| 238990 | \$280,241 | \$6,127,992 | \$16,904 | \$0 | \$6,425,137 | \$738,007 | \$1,921,552 | \$9,084,696 |

| NAICS | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|--------------|----------------------|----------------------|----------------------|------------------|----------------------|----------------------|----------------------|------------------------|
| 321911 | \$0 | \$0 | \$0 | \$0 | \$0 | \$4,515 | \$0 | \$4,515 |
| 325520 | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 | \$900 | \$900 |
| 332313 | \$0 | \$4,400 | \$0 | \$0 | \$4,400 | \$0 | \$203,912 | \$208,312 |
| 332991 | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 | \$83,476 | \$83,476 |
| 333923 | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 | \$16,801 | \$16,801 |
| 424720 | \$0 | \$261,401 | \$868,627 | \$0 | \$1,130,028 | \$512,850 | \$0 | \$1,642,878 |
| 444190 | \$269,428 | \$0 | \$0 | \$0 | \$269,428 | \$1,258,674 | \$0 | \$1,528,102 |
| 454310 | \$0 | \$11,515 | \$0 | \$0 | \$11,515 | \$521,807 | \$0 | \$533,322 |
| 484220 | \$12,052,339 | \$38,607,425 | \$7,408,617 | \$0 | \$58,068,381 | \$15,233,983 | \$0 | \$73,302,365 |
| 541330 | \$0 | \$27,460 | \$1,247,156 | \$0 | \$1,274,616 | \$0 | \$52,500 | \$1,327,116 |
| 541370 | \$4,000 | \$0 | \$51,940 | \$0 | \$55,940 | \$250,543 | \$240,396 | \$546,878 |
| 541380 | \$0 | \$0 | \$1,513,354 | \$0 | \$1,513,354 | \$1,519,048 | \$44,005 | \$3,076,407 |
| 541420 | \$82,182 | \$0 | \$47,328 | \$0 | \$129,510 | \$25,452 | \$0 | \$154,963 |
| 541620 | \$353,596 | \$26,600 | \$0 | \$0 | \$380,196 | \$50,645 | \$979,781 | \$1,410,622 |
| 541690 | \$80,725 | \$0 | \$0 | \$0 | \$80,725 | \$0 | \$72,248 | \$152,973 |
| 561612 | \$330,800 | \$0 | \$0 | \$0 | \$330,800 | \$0 | \$0 | \$330,800 |
| 561720 | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 | \$2,545 | \$2,545 |
| 561730 | \$46,051 | \$2,210,348 | \$8,150 | \$0 | \$2,264,549 | \$4,021,699 | \$621,773 | \$6,908,021 |
| 561790 | \$0 | \$0 | \$0 | \$0 | \$0 | \$323,774 | \$17,486 | \$341,260 |
| 561990 | \$1,247,473 | \$605,115 | \$0 | \$0 | \$1,852,588 | \$99,874 | \$247,515 | \$2,199,976 |
| 562910 | \$1,137,770 | \$397,153 | \$0 | \$0 | \$1,534,923 | \$0 | \$13,498 | \$1,548,421 |
| Total | \$116,358,604 | \$257,599,320 | \$246,953,246 | \$265,508 | \$621,176,678 | \$195,925,854 | \$691,934,916 | \$1,509,037,449 |

Source: Colette Holt & Associates analysis of City of Chicago data

**Table 6-3: Distribution of Contract Dollars by Race and Gender
(share of total dollars)**

| NAICS | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|--------|-------|----------|-------|-----------------|-------|-------------|-----------|--------|
| 221310 | 0.0% | 4.9% | 0.0% | 0.0% | 4.9% | 0.0% | 95.1% | 100.0% |
| 236210 | 15.2% | 0.0% | 0.0% | 0.0% | 15.2% | 0.0% | 84.8% | 100.0% |
| 236220 | 2.5% | 0.0% | 1.2% | 0.0% | 3.7% | 0.0% | 96.3% | 100.0% |
| 237110 | 1.2% | 8.3% | 24.7% | 0.0% | 34.2% | 3.0% | 62.7% | 100.0% |
| 237310 | 3.1% | 32.2% | 11.1% | 0.0% | 46.5% | 32.1% | 21.4% | 100.0% |
| 238110 | 0.0% | 92.7% | 0.0% | 0.0% | 92.7% | 0.7% | 6.6% | 100.0% |
| 238120 | 7.9% | 19.6% | 25.3% | 0.0% | 52.8% | 20.5% | 26.7% | 100.0% |
| 238140 | 48.9% | 17.2% | 0.0% | 0.0% | 66.1% | 4.9% | 29.0% | 100.0% |
| 238150 | 61.1% | 0.0% | 0.0% | 0.0% | 61.1% | 0.0% | 38.9% | 100.0% |
| 238160 | 8.7% | 1.4% | 12.9% | 0.0% | 22.9% | 20.6% | 56.5% | 100.0% |
| 238210 | 33.1% | 7.6% | 9.4% | 0.0% | 50.0% | 19.4% | 30.5% | 100.0% |
| 238220 | 23.7% | 31.1% | 4.7% | 0.3% | 59.8% | 15.9% | 24.3% | 100.0% |
| 238290 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 3.0% | 97.0% | 100.0% |
| 238310 | 21.9% | 55.0% | 0.0% | 0.0% | 76.8% | 0.2% | 22.9% | 100.0% |
| 238320 | 28.1% | 17.5% | 4.2% | 0.0% | 49.8% | 45.4% | 4.8% | 100.0% |
| 238330 | 0.0% | 4.9% | 0.0% | 0.0% | 4.9% | 13.4% | 81.7% | 100.0% |
| 238340 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 26.1% | 73.9% | 100.0% |
| 238350 | 6.6% | 41.2% | 0.0% | 0.0% | 47.8% | 25.4% | 26.8% | 100.0% |
| 238390 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 238910 | 0.0% | 26.2% | 46.9% | 0.0% | 73.1% | 20.9% | 6.0% | 100.0% |
| 238990 | 3.1% | 67.5% | 0.2% | 0.0% | 70.7% | 8.1% | 21.2% | 100.0% |
| 321911 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 0.0% | 100.0% |
| 325520 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 332313 | 0.0% | 2.1% | 0.0% | 0.0% | 2.1% | 0.0% | 97.9% | 100.0% |
| 332991 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 333923 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 424720 | 0.0% | 15.9% | 52.9% | 0.0% | 68.8% | 31.2% | 0.0% | 100.0% |
| 444190 | 17.6% | 0.0% | 0.0% | 0.0% | 17.6% | 82.4% | 0.0% | 100.0% |

| NAICS | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|--------------|-------------|--------------|--------------|-----------------|--------------|--------------|--------------|---------------------------|
| 454310 | 0.0% | 2.2% | 0.0% | 0.0% | 2.2% | 97.8% | 0.0% | 100.0% |
| 484220 | 16.4% | 52.7% | 10.1% | 0.0% | 79.2% | 20.8% | 0.0% | 100.0% |
| 541330 | 0.0% | 2.1% | 94.0% | 0.0% | 96.0% | 0.0% | 4.0% | 100.0% |
| 541370 | 0.7% | 0.0% | 9.5% | 0.0% | 10.2% | 45.8% | 44.0% | 100.0% |
| 541380 | 0.0% | 0.0% | 49.2% | 0.0% | 49.2% | 49.4% | 1.4% | 100.0% |
| 541420 | 53.0% | 0.0% | 30.5% | 0.0% | 83.6% | 16.4% | 0.0% | 100.0% |
| 541620 | 25.1% | 1.9% | 0.0% | 0.0% | 27.0% | 3.6% | 69.5% | 100.0% |
| 541690 | 52.8% | 0.0% | 0.0% | 0.0% | 52.8% | 0.0% | 47.2% | 100.0% |
| 561612 | 100.0% | 0.0% | 0.0% | 0.0% | 100.0% | 0.0% | 0.0% | 100.0% |
| 561720 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 561730 | 0.7% | 32.0% | 0.1% | 0.0% | 32.8% | 58.2% | 9.0% | 100.0% |
| 561790 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 94.9% | 5.1% | 100.0% |
| 561990 | 56.7% | 27.5% | 0.0% | 0.0% | 84.2% | 4.5% | 11.3% | 100.0% |
| 562910 | 73.5% | 25.6% | 0.0% | 0.0% | 99.1% | 0.0% | 0.9% | 100.0% |
| Total | 7.7% | 17.1% | 16.4% | 0.0% | 41.2% | 13.0% | 45.9% | 100.0%^a |

a. For readability, we have presented the data rounded to one decimal point. It is important to understand that while the Table has Native American firms receiving 0.0 percent of the dollars, they actually received 0.02 percent of the dollars. In addition, the value for MBEs, White women and non-M/WBEs sum to 100.1 percent. The 0.1 percent is a function of rounding and should be ignored.

Source: Colette Holt & Associates analysis of City of Chicago data

E. Availability of M/WBEs for Construction Contracts in the City of Chicago's Geographic Market

Estimates of the availability of M/WBEs in the City's geographic market are a critical component of the analysis of possible barriers to equal opportunities to participate in the City's construction contracting activities. As discussed in Chapter II, the courts require that the availability estimates reflect the number of "ready, willing and able" firms that can perform on specific types of work involved in the agency's prime contracts and associated subcontracts; overall population in a jurisdiction or general categories like "construction" are legally irrelevant. General business population numbers, or firms that do not provide the specific services purchased by the City, cannot be included in the availability data.

To examine whether M/WBEs are receiving full opportunities on City contracts, these narrowly tailored availability estimates were compared to the utilization percentage of dollars received by M/WBEs. Availability estimates are also crucial for the City to set narrowly tailored contract goals on its construction contracts.

We applied the “custom census” approach with refinements to estimating availability, discussed in Chapter II. Using this framework, CHA utilized three databases to estimate availability:

1. The Final Contract Data File (described in Section A of this Chapter).
2. A Master M/WBE Directory compiled by CHA.
3. Dun & Bradstreet/Hoovers Database downloaded from the companies’ website.

First, we eliminated any duplicate entries in the Final Contract Data File from firms that received multiple contracts for work performed in the same NAICS codes. This list of unique firms comprised the first component of the study’s availability determination.

The Master M/WBE Directory combined the results of an exhaustive search for directories and other lists containing information about minority- and woman-owned businesses. We utilized the City of Chicago’s M/WBE certification list; Cook County’s M/WBE certification list; the Illinois Unified Certification Program for the Disadvantaged Business Enterprise Program; and the State of Illinois’ Business Enterprise Program certification list. Duplicates were eliminated. After compiling the Master M/W/DBE Directory, we limited the firms we used in our analysis to those operating within the City’s product market.

We next developed a custom database from Hoovers, a Dun & Bradstreet company for minority- and woman-owned and non-M/WBEs. Hoovers maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including location and detailed industry codes, and is the broadest publicly available data source for firm information. We purchased the information from Hoovers for the firms in the NAICS codes located in the City’s market area in order to form our custom Dun & Bradstreet/Hoovers Database. In the initial download, the data from Hoovers simply identify a firm as being minority-owned.²⁶² However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). We obtained this additional information from Hoovers by special request.

The Hoovers database is the most comprehensive list of minority-owned and woman-owned businesses available. It is developed from the efforts of a national firm whose business is collecting business information. Hoovers builds its database

262. The variable is labeled: “Is Minority Owned” and values for the variable can be either “yes” or “no”.

from over 250 sources, including information from government sources and various associations, and its own efforts. Hoovers conducts an audit of the preliminary database prior to the public release of the data. That audit must result in a minimum of 94 percent accuracy. Once published, Hoovers has an established protocol to regularly refresh its data. This protocol involves updating any third-party lists that were used and contacting a selection of firms via Hoover's own call centers. We are confident this approach is robust and will withstand legal scrutiny.

We merged these three databases to form an accurate estimate of firms available to work on City contracts. For an extended explanation of how unweighted and weighted availability are calculated, please see Appendix D.

Tables 6-4 through 6-6 present data on:

1. The unweighted availability percentages by race and gender and by NAICS codes for the City of Chicago's constrained construction product market. These results should be used by the City as the starting point to set narrowly tailored contract-specific goals;
2. The weights used to adjust the unweighted numbers;²⁶³ and
3. The final estimates of the weighted averages of the individual 6-digit level availability estimates in Chicago's market area.

We "weighted" the availability data for two reasons. First, the weighted availability represents the share of total possible contractors for each demographic group, weighted by the distribution of contract dollars across the NAICS codes in which the City spends its dollars. Weighting is necessary because the disparity ratio, discussed below, must be an "apples-to-apples" comparison. The numerator – the utilization rate – is measured in dollars *not* the number of firms. Therefore, the denominator – availability – must be measured in dollars, not the number of firms.

Second, weighting also reflects the importance of the availability of a demographic group in a particular NAICS code, that is, how important that NAICS code is to the City's overall contracting patterns. For example, in a hypothetical NAICS code 123456, the total available firms are 100 and 60 of these firms are M/WBEs; hence, M/WBE availability would be 60 percent. However, if the City only spends only 1 percent of its contract dollars in this NAICS code, then this high availability would be offset by the low level of spending in that NAICS code. In contrast, if the City spent 25 percent of its contract dollars in NAICS code 123456, then the same availability would carry a greater weight.

To calculate the weighted availability for each NAICS code, we first determined the unweighted availability for each demographic group in each NAICS code. In the previous example, the unweighted availability for M/WBEs in NAICS code 123456 is 60 percent. We then multiplied the unweighted availability by the share of City

263. These weights are equivalent to the share of contract dollars presented in the previous section.

spending in that NAICS code (this share is the *weight*). Using the previous example where City spending in NAICS code 123456 was one percent, the component of M/WBE weighted availability for NAICS code 123456 would be 0.006: 60 percent multiplied by one percent.

We performed this calculation for each NAICS code and then summed all of the individual components for each demographic group to determine the weighted availability for that group.

Table 6-4: Unweighted M/WBE Availability for City Construction Contracts

| NAICS | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|--------|-------|----------|-------|-----------------|-------|-------------|-----------|--------|
| 221310 | 0.0% | 3.7% | 0.0% | 0.0% | 3.7% | 3.2% | 93.0% | 100.0% |
| 236210 | 12.2% | 6.1% | 3.9% | 0.0% | 22.2% | 10.0% | 67.8% | 100.0% |
| 236220 | 6.0% | 4.9% | 2.2% | 0.7% | 13.7% | 6.4% | 79.9% | 100.0% |
| 237110 | 2.7% | 8.9% | 5.7% | 0.0% | 17.3% | 10.3% | 72.4% | 100.0% |
| 237310 | 6.0% | 11.0% | 4.0% | 0.3% | 21.3% | 9.9% | 68.8% | 100.0% |
| 238110 | 2.8% | 4.8% | 1.0% | 0.0% | 8.6% | 5.5% | 86.0% | 100.0% |
| 238120 | 10.3% | 20.7% | 2.8% | 0.0% | 33.8% | 18.6% | 47.6% | 100.0% |
| 238140 | 2.6% | 2.4% | 0.1% | 0.0% | 5.2% | 4.5% | 90.3% | 100.0% |
| 238150 | 4.5% | 4.0% | 0.0% | 0.0% | 8.5% | 4.0% | 87.5% | 100.0% |
| 238160 | 0.7% | 0.6% | 0.4% | 0.0% | 1.7% | 3.4% | 94.9% | 100.0% |
| 238210 | 2.0% | 2.1% | 0.6% | 0.1% | 4.9% | 7.1% | 87.9% | 100.0% |
| 238220 | 1.2% | 1.2% | 0.3% | 0.0% | 2.7% | 3.8% | 93.5% | 100.0% |
| 238290 | 7.4% | 5.0% | 0.8% | 0.0% | 13.2% | 14.9% | 71.9% | 100.0% |
| 238310 | 3.8% | 6.9% | 0.7% | 0.0% | 11.3% | 5.7% | 83.0% | 100.0% |
| 238320 | 1.5% | 1.4% | 0.3% | 0.0% | 3.2% | 3.5% | 93.3% | 100.0% |
| 238330 | 1.7% | 3.5% | 0.9% | 0.0% | 6.1% | 6.1% | 87.7% | 100.0% |
| 238340 | 1.8% | 1.4% | 0.0% | 0.0% | 3.2% | 4.8% | 91.9% | 100.0% |
| 238350 | 7.7% | 8.5% | 2.1% | 0.0% | 18.3% | 7.4% | 74.3% | 100.0% |
| 238390 | 3.6% | 3.6% | 0.7% | 0.0% | 7.9% | 6.1% | 86.0% | 100.0% |
| 238910 | 4.4% | 9.7% | 1.8% | 0.1% | 16.0% | 9.2% | 74.8% | 100.0% |
| 238990 | 1.4% | 1.7% | 0.5% | 0.1% | 3.7% | 3.4% | 92.9% | 100.0% |
| 321911 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 325520 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 2.3% | 97.7% | 100.0% |

| NAICS | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|--------------|-------------|-------------|-------------|-----------------|-------------|-------------|--------------|---------------|
| 332313 | 1.7% | 8.5% | 0.0% | 0.0% | 10.2% | 1.7% | 88.1% | 100.0% |
| 332991 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 333923 | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% |
| 424720 | 1.6% | 1.0% | 2.6% | 0.0% | 5.3% | 6.3% | 88.5% | 100.0% |
| 444190 | 1.4% | 1.1% | 0.0% | 0.0% | 2.5% | 7.9% | 89.7% | 100.0% |
| 454310 | 0.0% | 1.8% | 0.0% | 0.0% | 1.8% | 4.6% | 93.6% | 100.0% |
| 484220 | 9.1% | 20.2% | 5.6% | 0.0% | 34.9% | 17.2% | 47.8% | 100.0% |
| 541330 | 2.8% | 2.4% | 5.2% | 0.2% | 10.6% | 5.6% | 83.8% | 100.0% |
| 541370 | 2.5% | 3.4% | 5.5% | 0.0% | 11.4% | 10.1% | 78.5% | 100.0% |
| 541380 | 0.8% | 1.1% | 3.6% | 0.2% | 5.6% | 5.3% | 89.1% | 100.0% |
| 541420 | 7.2% | 1.2% | 2.4% | 0.0% | 10.8% | 16.9% | 72.3% | 100.0% |
| 541620 | 4.1% | 3.9% | 2.1% | 0.0% | 10.1% | 12.9% | 77.1% | 100.0% |
| 541690 | 4.8% | 2.3% | 2.3% | 0.2% | 9.6% | 9.5% | 80.9% | 100.0% |
| 561612 | 8.9% | 3.2% | 0.7% | 0.2% | 13.0% | 4.1% | 82.9% | 100.0% |
| 561720 | 2.4% | 0.8% | 0.2% | 0.0% | 3.5% | 8.8% | 87.7% | 100.0% |
| 561730 | 1.3% | 2.1% | 0.2% | 0.0% | 3.7% | 4.3% | 92.1% | 100.0% |
| 561790 | 1.3% | 0.5% | 0.1% | 0.0% | 1.9% | 3.7% | 94.4% | 100.0% |
| 561990 | 1.8% | 0.4% | 0.4% | 0.0% | 2.6% | 3.5% | 93.9% | 100.0% |
| 562910 | 11.5% | 15.6% | 1.6% | 0.0% | 28.7% | 12.3% | 59.0% | 100.0% |
| Total | 2.3% | 2.1% | 0.9% | 0.1% | 5.4% | 5.2% | 89.4% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data; Hoovers; CHA Master Directory

Table 6-5: Distribution of City Spending by NAICS Code (the Weights)

| NAICS | NAICS Code Description | WEIGHT (Pct Share of Total Sector Dollars) |
|--------|--|--|
| 221310 | Water Supply and Irrigation Systems | 1.5% |
| 236210 | Industrial Building Construction | 3.8% |
| 236220 | Commercial and Institutional Building Construction | 4.3% |
| 237110 | Water and Sewer Line and Related Structures Construction | 43.2% |
| 237310 | Highway, Street, and Bridge Construction | 19.5% |
| 238110 | Poured Concrete Foundation and Structure Contractors | 0.2% |

| NAICS | NAICS Code Description | WEIGHT (Pct Share of Total Sector Dollars) |
|--------|--|--|
| 238120 | Structural Steel and Precast Concrete Contractors | 1.6% |
| 238140 | Masonry Contractors | 0.3% |
| 238150 | Glass and Glazing Contractors | 0.1% |
| 238160 | Roofing Contractors | 0.3% |
| 238210 | Electrical Contractors and Other Wiring Installation Contractors | 8.9% |
| 238220 | Plumbing, Heating, and Air-Conditioning Contractors | 5.8% |
| 238290 | Other Building Equipment Contractors | 0.1% |
| 238310 | Drywall and Insulation Contractors | 0.1% |
| 238320 | Painting and Wall Covering Contractors | 0.3% |
| 238330 | Flooring Contractors | 0.1% |
| 238340 | Tile and Terrazzo Contractors | 0.1% |
| 238350 | Finish Carpentry Contractors | 0.2% |
| 238390 | Other Building Finishing Contractors | 0.0% |
| 238910 | Site Preparation Contractors | 2.5% |
| 238990 | All Other Specialty Trade Contractors | 0.6% |
| 321911 | Wood Window and Door Manufacturing | 0.0% |
| 325520 | Adhesive Manufacturing | 0.0% |
| 332313 | Plate Work Manufacturing | 0.0% |
| 332991 | Ball and Roller Bearing Manufacturing | 0.0% |
| 333923 | Overhead Traveling Crane, Hoist, and Monorail System Manufacturing | 0.0% |
| 424720 | Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals) | 0.1% |
| 444190 | Other Building Material Dealers | 0.1% |
| 454310 | Fuel Dealers | 0.0% |
| 484220 | Specialized Freight (except Used Goods) Trucking, Local | 4.9% |
| 541330 | Engineering Services | 0.1% |
| 541370 | Surveying and Mapping (except Geophysical) Services | 0.0% |
| 541380 | Testing Laboratories | 0.2% |
| 541420 | Industrial Design Services | 0.0% |

| NAICS | NAICS Code Description | WEIGHT (Pct Share of Total Sector Dollars) |
|--------------|--|--|
| 541620 | Environmental Consulting Services | 0.1% |
| 541690 | Other Scientific and Technical Consulting Services | 0.0% |
| 561612 | Security Guards and Patrol Services | 0.0% |
| 561720 | Janitorial Services | 0.0% |
| 561730 | Landscaping Services | 0.5% |
| 561790 | Other Services to Buildings and Dwellings | 0.0% |
| 561990 | All Other Support Services | 0.1% |
| 562910 | Remediation Services | 0.1% |
| Total | | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

We next determined the aggregated availability of M/WBEs, weighted by the City’s spending in its geographic and industry markets, to be 26.1 percent for the City’s contracts. Table 6-6 presents the total weighted availability data for each of the racial and gender categories. For further explanation of the role of unweighted and weighted availability and how these are calculated, please see Appendix D.

Table 6-6: Aggregated Weighted Availability

| Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|-------|----------|-------|-----------------|-------|-------------|-----------|--------|
| 4.1% | 8.4% | 3.9% | 0.1% | 16.6% | 9.5% | 73.9% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data; Hoovers; CHA Master Directory

Historical and contemporary discrimination is embedded in the availability estimates of how many firms could do business with the City. To the extent that past and/or present bias reduces the number of M/WBE firms that come into creation, this discrimination has lowered the pool of available firms. To take this into account, we developed a measure of “*expected availability*”: what might be the number of M/WBE firms in the absence of discrimination.²⁶⁴

The process to develop this measure was twofold:

- Obtain an estimate of how much M/WBE business formation is reduced simply because of the race and gender status of firm owners; and

264. This type of “expected” availability calculation was presented as part of the Illinois Department of Transportation’s evidence in its successful defense of its Disadvantaged Business Enterprise program. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868 at *40 (Sept. 8, 2005).

- Adjust the availability estimates generated earlier in this section (for clarity’s sake, we will now call that measure of availability, “current availability”) with the estimated impact of discrimination on M/WBE business formation.

To obtain the estimates of the impact of discrimination on M/WBE business formation, we used the coefficients derived from the probit regression procedure discussed in Chapter V. In review, the probit analysis allows us to determine how the race and gender status of a firm owner impacts the probability of members of that group forming a business once you control for factors such as education and age that affect business formation. Table 6-7 replicates the data presented in Table 5-2:

Table 6-7: Construction Business Formation Probabilities Relative to White Males, 2015 - 2019

| Demographic Group | Probability of Forming a Business Relative to White Men |
|-------------------|---|
| Black | -8.4% *** |
| Hispanic | -11.1% *** |
| Asian | 2.4% |
| Native American | ---- |
| White Women | -6.6% *** |

Source: Colette Holt & Associates calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

To convert the current availability into expected availability, using the ratios of the probabilities of forming a business, we increased the Black, Hispanic, and White Women current availability numbers by 8.4 percent, 11.1 percent, and 6.6 percent, respectively.²⁶⁵ Table 6-8 presents the weighted expected availability figures.

Table 6-8: Aggregated Weighted Expected Availability

| Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE | Total |
|-------|----------|-------|-----------------|-------|-------------|-----------|--------|
| 4.4% | 9.2% | 3.9% | 0.1% | 17.6% | 9.9% | 72.5% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data; Hoovers; CHA Master Directory

265. No change was made for the Native American and Asian numbers (the contract data does not have an Other ownership category). As mentioned in Chapter V, the Native American observations in the American Community Survey were too small to calculate a statistic; the Asian coefficient from the probit regression procedure was not statistically significant and therefore, not used.

F. Disparity Analysis of M/WBEs for City of Chicago Construction Contracts

As discussed in depth in Chapter II, strict constitutional scrutiny requires that a local government must establish that discrimination operates in its market area, through consideration of evidence of disparities, among other types of proof. To examine the City's compelling interest in remedying discrimination in its market area, we next calculated disparity ratios for total M/WBE utilization compared to the total weighted availability of M/WBEs, measured in dollars paid, on locally funded contracts.

A *disparity ratio* is the relationship between the utilization and weighted availability, determined above. Mathematically, this is represented by:

$$DR = U \div WA$$

Where DR is the disparity ratio; U is utilization rate; and WA is the weighted availability.

The courts have held that disparity results must be analyzed to determine whether the results are "significant". There are two distinct methods to measure a result's significance. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to or less than 80 percent of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.²⁶⁶ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical signifi-

266. See U.S. Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").

cance, the smaller the probability that it resulted from random chance alone.²⁶⁷ A more in-depth discussion of statistical significance is provided in Appendix C.

| Substantive and Statistical Significance | |
|---|---|
| ‡ | connotes these values are substantively significant. Courts have ruled the disparity ratio less or equal to 80% represent disparities that substantively significant. (See Footnote 266 for more information) |
| * | connotes these values are statistically significant at the 0.05 level (See Appendix C for more information) |
| ** | connotes these values are statistically significant at the 0.01 level (See Appendix C for more information) |
| *** | connotes these values are statistically significant at the 0.001 level (See Appendix C for more information) |

Table 6-9 presents the calculated disparity ratios for construction contracts for each demographic group.

**Table 6-9: Disparity Ratios by Demographic Group
(using “current availability” data)**

| | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE |
|-----------------|---------|-----------|-----------|-----------------|-----------|-------------|-----------|
| Disparity Ratio | 186.2%* | 202.6%*** | 415.1%*** | 16.8%‡ | 247.7%*** | 136.7%* | 62.1%‡*** |

Source: Colette Holt & Associates analysis of City of Chicago data

**** Indicates statistical significance at the 0.001 level*

** Indicates statistical significance at the 0.05 level*

‡ Indicates substantive significance

Table 6-10 presents the disparity ratio using the expected availability data. Compared to the disparity ratios which used the current availability data (see Table 6-7), the disparity ratio for Blacks, Hispanics and White women have fallen.

267. A chi-square test – examining if the utilization rate was different from the weighted availability - was used to determine the statistical significance of the disparity ratio.

**Table 6-10: Disparity Ratios by Demographic Group
(using “expected availability” data)**

| | Black | Hispanic | Asian | Native American | MBE | White Women | Non-M/WBE |
|-----------------|--------|-----------|-----------|-----------------|-----------|-------------|-----------|
| Disparity Ratio | 175.7% | 186.5%*** | 424.0%*** | 17.1%‡ | 235.2%*** | 130.9% | 63.2%***‡ |

Source: Colette Holt & Associates analysis of City of Chicago data

*** Indicates statistical significance at the 0.001 level

‡ Indicates these values are substantively significant

G. Further Analysis of M/WBE Utilization on City of Chicago Construction Contracts

1. Introduction

While the above analysis presents the standard disparity ratio analysis (*i.e.*, development of the City’s geographic and product market; analysis of who receives City contracts - utilization; analysis of who *could have* received City contracts - availability; the relationship of utilization and availability), it is important go beyond this data and give a more nuanced understanding of which groups received contracts in view of the high utilization of M/WBEs. In our experience, such findings warrant further analysis to examine what might be driving these results. This is important because while the participation on M/WBEs exceeds their availability, these outcomes may not be the result of the cessation of discrimination but rather an artifact of the operations of the program. Therefore, in this section, we provide three additional analyses:

- How do different groups relate to the program: do they get their work as prime contractors or subcontractors?
- How do different groups fare in the program: who get what share of the work?
- Is there a concentration effect: is the utilization of different groups concentrated among a few firms?

The tables in the next section provide detailed answers to these questions. In summary, M/WBEs are much more reliant on subcontracts compared to non-M/WBEs. For Black, Hispanic, and White woman-owned firms, over 90 percent of their work is as subcontractors. In contrast, for non-M/WBEs, just under 53 percent of their work is as subcontractors. In addition, the results demonstrate that when examining the dollars received by M/WBEs, there is a small number

of firms that receive a large share of the dollars in each NAICS code, and that amongst the various disaggregated racial, ethnic and gender groupings, this pattern continues. This suggests that while the City’s program has succeeded in providing significant opportunities to M/WBEs, these dollars are highly concentrated amongst a small group of firms.

The subsequent analysis is based on the seven NAICS codes which captured the majority of the City’s procurement activity. The top seven are:

- 237110 Water and Sewer Line and Related Structures Construction
- 237310 Highway, Street, and Bridge Construction
- 238210 Electrical Contractors and Other Wiring Installation Contractors
- 238220 Plumbing, Heating, and Air-Conditioning Contractors
- 484220 Specialized Freight (except Used Goods) Trucking, Local
- 236220 Commercial and Institutional Building Construction
- 236210 Industrial Building Construction

While the entire Contract Data Utilization File contains forty-two NAICS codes, as shown in Table 6-11, just seven of these codes captured 63.9 percent of all contracts and 90.4 percent of all contract dollars. (Tables 6-12 and 6-13 provide data on the distribution of contracts and contract dollars by prime contracts and subcontracts.) Therefore, the balance of this section provides an in-depth examination of contracting outcomes in these seven codes (“The Top 7”).

Table 6-11: Overview of the Distribution of the Number of Contracts and the Dollar Value of Contracts

| Panel A: The Number of Contracts | | |
|---|---------------------------------|---------------------------|
| Top 7 NAICS Codes | Remaining 35 NAICS Codes | All 42 NAICS Codes |
| 748 | 423 | 1,171 |
| 63.9% | 36.1% | 100.0% |
| Panel B: The Dollar Value of Contracts | | |
| Top 7 NAICS Codes | Remaining 35 NAICS Codes | All 42 NAICS Codes |
| \$1,364,768,788.69 | \$144,268,659.82 | \$1,509,037,448.51 |
| 90.4% | 9.6% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-12: Distribution of Prime Contracts, Subcontracts, and Total Contracts

| NAICS | Prime Contracts | Subcontracts | Total Contracts | % of Total Contracts |
|-----------------------------------|-----------------|--------------|-----------------|----------------------|
| Total of the Top 7 NAICS Codes | 132 | 616 | 748 | 63.9% |
| Total of the Other 35 NAICS Codes | 12 | 411 | 423 | 36.1% |
| Total of All 42 NAICS Codes | 144 | 1,027 | 1,171 | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-13: Distribution of Prime Contract Dollars, Subcontract Dollars, and Total Contract Dollars

| NAICS | Prime Contract Dollars | Subcontract Dollars | Total Contract Dollars | % of Total Contract Dollars |
|-----------------------------------|------------------------|---------------------|------------------------|-----------------------------|
| Total of the Top 7 NAICS Codes | \$906,553,957.12 | \$458,214,831.57 | \$1,364,768,788.69 | 90.4% |
| Total of the Other 35 NAICS Codes | \$35,029,941.11 | \$109,238,718.71 | \$144,268,659.82 | 9.6% |
| Total of All 42 NAICS Codes | \$941,583,898.23 | \$567,453,550.28 | \$1,509,037,448.51 | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

2. The Distribution of Contracts and Contract Dollars across the Top Seven NAICS Codes

To probe more deeply, we next focused on seven NAICS codes that capture 90.4 percent of all of the contract dollars. Table 6-14 lists these codes with some summary data. Of note, while these seven NAICS codes captured 90.4 percent of the contract dollars, they captured just 63.9 percent of the number of contracts.

**Table 6-14: Distribution of Contracts and Contract Dollars across the Top Seven NAICS Codes
(By Prime Contracts, Subcontracts, and Total Contracts)**

| NAICS | NAICS Code Label | Prime Contracts | Subcontracts | Total Contracts | % of Total Contracts |
|---|--|------------------|------------------|------------------|----------------------|
| Panel A: Top Seven NAICS Codes: Distribution of Total Contracts | | | | | |
| 237110 | Water and Sewer Line and Related Structures Construction | 62 | 42 | 104 | 8.9% |
| 237310 | Highway, Street, and Bridge Construction | 48 | 163 | 211 | 18.0% |
| 238210 | Electrical Contractors and Other Wiring Installation Contractors | 3 | 99 | 102 | 8.7% |
| 238220 | Plumbing, Heating, and Air-Conditioning Contractors | 2 | 81 | 83 | 7.1% |
| 484220 | Specialized Freight (except Used Goods) Trucking, Local | 0 | 227 | 227 | 19.4% |
| 236220 | Commercial and Institutional Building Construction | 6 | 3 | 9 | 0.8% |
| 236210 | Industrial Building Construction | 11 | 1 | 12 | 1.0% |
| Total of the Top 7 NAICS Codes | | 132 | 616 | 748 | 63.9% |
| Total of the Other 35 NAICS Codes | | 12 | 411 | 423 | 36.1% |
| Total of All 42 NAICS Codes | | 144 | 1,027 | 1,171 | 100.0% |
| Panel B: Top Seven NAICS Codes: Distribution of Total Contract Dollars | | | | | |
| 237110 | Water and Sewer Line and Related Structures Construction | \$563,742,362.25 | \$88,804,215.02 | \$652,546,577.27 | 43.2% |
| 237310 | Highway, Street, and Bridge Construction | \$197,760,514.13 | \$95,911,224.57 | \$293,671,738.70 | 19.5% |
| 238210 | Electrical Contractors and Other Wiring Installation Contractors | \$14,454,764.00 | \$119,630,352.84 | \$134,085,116.84 | 8.9% |

| NAICS | NAICS Code Label | Prime Contracts | Subcontracts | Total Contracts | % of Total Contracts |
|-----------------------------------|---|------------------|------------------|--------------------|----------------------|
| 238220 | Plumbing, Heating, and Air-Conditioning Contractors | \$8,916,248.50 | \$78,788,063.38 | \$87,704,311.88 | 5.8% |
| 484220 | Specialized Freight (except Used Goods) Trucking, Local | \$0.00 | \$73,302,364.70 | \$73,302,364.70 | 4.9% |
| 236220 | Commercial and Institutional Building Construction | \$63,753,623.62 | \$1,613,611.06 | \$65,367,234.68 | 4.3% |
| 236210 | Industrial Building Construction | \$57,926,444.62 | \$165,000.00 | \$58,091,444.62 | 3.8% |
| Total of the Top 7 NAICS Codes | | \$906,553,957.12 | \$458,214,831.57 | \$1,364,768,788.69 | 90.4% |
| Total of the Other 35 NAICS Codes | | \$35,029,941.11 | \$109,238,718.71 | \$144,268,659.82 | 9.6% |
| Total of All 42 NAICS Codes | | \$941,583,898.23 | \$567,453,550.28 | \$1,509,037,448.51 | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-15 presents the data on the number of contracts disaggregated by race and gender groups. For example, Black firms received 67 contracts: 3 were prime contracts and 64 were subcontracts (Panel A). The 3 prime contracts accounted for 4.5 percent of all of the contracts received by Black firms; the 64 subcontracts accounted for 95.5 percent of all contracts received by Black firms (Panel B)²⁶⁸. At the same time, these 3 prime contracts received by Black firms comprised 2.3 percent of all prime contracts let by the City and the 64 Black subcontracts comprised 10.4 percent of all subcontracts (Panel C).²⁶⁹ Also, while Black firms captured 9 percent of all contracts, they only captured 2.3 percent of prime contracts. Thus, Black firms were disproportionately utilized as subcontractors.

Key takeaways from Table 6-15:

- For Black, Hispanic, and White woman firms, over 90 percent of their contracts were subcontracts.
- For non-M/WBE firms, 53 percent of their contracts were subcontracts

268. For Panel B, read the data horizontally; the rows sum to 100 percent.
 269. For Panel C, read the data vertically; the columns sum to 100 percent.

- For Black, Hispanic, and White woman firms, their share of all prime contracts was less than their share of total contracts.
- For non-M/WBE firms, their share of all prime contracts was greater than their share of total contracts.
- For Black, Hispanic and White woman firms, their activity on City projects was disproportionately as subcontractors.

**Table 6-15: Distribution of Prime Contracts, Subcontracts, and Total Contracts
By Race**

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|--------------|---------------|
| Panel A: Top Seven NAICS Codes - The Number of Contracts | | | |
| Black | 3 | 64 | 67 |
| Hispanic | 6 | 260 | 266 |
| Asian | 45 | 84 | 129 |
| Native American | 0 | 1 | 1 |
| White Woman | 15 | 136 | 151 |
| Non-M/WBE | 63 | 71 | 134 |
| Total | 132 | 616 | 748 |
| Panel B: Top Seven NAICS Codes - Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 4.5% | 95.5% | 100.0% |
| Hispanic | 2.3% | 97.7% | 100.0% |
| Asian | 34.9% | 65.1% | 100.0% |
| Native American | 0.0% | 100.0% | 100.0% |
| White Woman | 9.9% | 90.1% | 100.0% |
| Non-M/WBE | 47.0% | 53.0% | 100.0% |
| Total | 17.6% | 82.4% | 100.0% |
| Panel C: Top Seven NAICS Codes - Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 2.3% | 10.4% | 9.0% |
| Hispanic | 4.5% | 42.2% | 35.6% |
| Asian | 34.1% | 13.6% | 17.2% |
| Native American | 0.0% | 0.2% | 0.1% |

| | Prime Contracts | Subcontracts | Total |
|--------------|-----------------|---------------|---------------|
| White Woman | 11.4% | 22.1% | 20.2% |
| Non-M/WBE | 47.7% | 11.5% | 17.9% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-16 replicates Table 6-15, using contract *dollars* as the data instead the *number* of contracts.

Key takeaways from Table 6-16:

- For Black and Hispanic firms, over 79 percent of their contract dollars came from subcontracts.
- For non-M/WBE firms, under 8 percent of their contract dollars came from subcontracts.
- For Black, Hispanic, and White woman firms, their share of all prime contract dollars was less than their share of total contract dollars.
- For non-M/WBE firms, their share of all prime contract dollars was greater than their share of total contract dollars.

**Table 6-16: Distribution of Prime Contract Dollars, Subcontract Dollars, and Total Contract Dollars
By Race**

| | Prime Contracts | Subcontracts | Total |
|--|-------------------------|-------------------------|---------------------------|
| Panel A: Top Seven NAICS Codes - The Dollar Value of Contracts | | | |
| Black | \$14,156,814.50 | \$90,575,927.14 | \$104,732,741.64 |
| Hispanic | \$48,028,676.50 | \$176,826,085.52 | \$224,854,762.02 |
| Asian | \$174,127,493.03 | \$44,597,090.53 | \$218,724,583.56 |
| Native American | \$0.00 | \$265,508.22 | \$265,508.22 |
| White Woman | \$71,729,989.88 | \$97,716,151.11 | \$169,446,140.99 |
| Non-M/WBE | \$598,510,983.22 | \$48,234,069.05 | \$646,745,052.27 |
| Total | \$906,553,957.13 | \$458,214,831.57 | \$1,364,768,788.70 |
| Panel B: Top Seven NAICS Codes - Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 13.5% | 86.5% | 100.0% |
| Hispanic | 21.4% | 78.6% | 100.0% |

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|---------------|---------------|
| Asian | 79.6% | 20.4% | 100.0% |
| Native American | 0.0% | 100.0% | 100.0% |
| White Woman | 42.3% | 57.7% | 100.0% |
| Non-M/WBE | 92.5% | 7.5% | 100.0% |
| Total | 66.4% | 33.6% | 100.0% |
| Panel C: Top Seven NAICS Codes - Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 1.6% | 19.8% | 7.7% |
| Hispanic | 5.3% | 38.6% | 16.5% |
| Asian | 19.2% | 9.7% | 16.0% |
| Native American | 0.0% | 0.1% | 0.0% |
| White Woman | 7.9% | 21.3% | 12.4% |
| Non-M/WBE | 66.0% | 10.5% | 47.4% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

The next step in the analysis was to examine each of these seven codes to see if M/WBE firm activity differs across those seven codes. Tables 6-17 through 6-23 present this NAICS code-specific data on the distribution of contracts and contract dollars.

Panels A through F of each table reproduce the data seen in the previous section: the number of contracts; the distribution of a group’s contracts between prime contracts and subcontracts; the distribution of prime contracts and subcontracts across groups; the total dollar values of the contracts; the distribution of a group’s contract dollars between prime contracts and subcontracts; the distribution of the dollar value of prime contracts and subcontracts across groups.

Panel G is new to this analysis. It represents the ratio of a group’s share of dollars over a group’s share of contracts.

$$\text{Ratio} = \text{Group Share of Dollars} / \text{Group Share of Contracts}$$

This ratio is important because a reasonable expectation of a fair outcome would be that the share of dollars equals the share of contracts. Parity exists if the ratio equals 100 percent: the group’s share of dollars is equal to the group’s share of contracts. If the ratio exceeds 100 percent, then the group has a disproportionately high share of dollars; if the ratio is less than 100 percent, then the group has a disproportionately low share of dollars. By way of

an example in NAICS Code 236210 (Table 6-19), the Black share of prime contract dollars is 14.9 percent (from Panel F) and the Black share of prime contracts is 18.2 percent (from Panel C). The ratio is 82.1 percent (from Panel G) and we would say Blacks have a disproportionately low share of contract dollars. A value of “0.0 percent” is presented if the group’s share of contracts (the ratio’s numerator) equals zero.

The balance of this section discusses Tables 6-17 through 6-23. It focuses on Panel G to examine the measure of disproportionality of results by race and gender. This addresses whether a group’s share of contracts is proportionate to its share of dollars. This is important because it takes more resources to perform more contracts for the same amount of revenue.

Table 6-17 provides the results of NAICS code 236210 (Industrial Building Construction), where the City spent 3.8 percent of its funds. Examining Panel G of Table 6-17, only Blacks and non-M/WBEs received any contracts in this NAICS code, so the other groups have values of “0.0 percent”.

Key Takeaways:

- Black firms received a disproportionately low share of prime contract dollars and total contract dollars because their values were 82.1 percent and 60.6 percent, respectively.
- Non-M/WBE firms received a disproportionately high share of prime contract dollars and total contract dollars because their values were 104.0 percent and 113.1 percent, respectively.

**Table 6-17: NAICS Code 236210 - Industrial Building Construction
(The City spends 3.8 percent of its dollars in this code)**

| | Prime Contracts | Subcontracts | Total |
|---|-----------------|--------------|-----------|
| Panel A: Number of Contracts | | | |
| Black | 2 | 1 | 3 |
| Hispanic | 0 | 0 | 0 |
| Asian | 0 | 0 | 0 |
| Native American | 0 | 0 | 0 |
| White Women | 0 | 0 | 0 |
| Non-M/WBE | 9 | 0 | 9 |
| Total | 11 | 1 | 12 |
| Panel B: Distribution of a Group's Contracts between Primes and Subs | | | |
| Black | 66.7% | 33.3% | 100.0% |

| | Prime Contracts | Subcontracts | Total |
|--|------------------------|---------------------|------------------------|
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 0.0% | 0.0% | 0.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 100.0% | 0.0% | 100.0% |
| Total | 91.7% | 8.3% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 18.2% | 100.0% | 25.0% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 0.0% | 0.0% | 0.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 81.8% | 0.0% | 75.0% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$8,643,103.00 | \$165,000.00 | \$8,808,103.00 |
| Hispanic | \$0.00 | \$0.00 | \$0.00 |
| Asian | \$0.00 | \$0.00 | \$0.00 |
| Native American | \$0.00 | \$0.00 | \$0.00 |
| White Women | \$0.00 | \$0.00 | \$0.00 |
| Non-M/WBE | \$49,283,341.62 | \$0.00 | \$49,283,341.62 |
| Total | \$57,926,444.62 | \$165,000.00 | \$58,091,444.62 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 98.1% | 1.9% | 100.0% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 0.0% | 0.0% | 0.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 100.0% | 0.0% | 100.0% |
| Total | 99.7% | 0.3% | 100.0% |

| | Prime Contracts | Subcontracts | Total |
|---|-----------------|---------------|---------------|
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 14.9% | 100.0% | 15.2% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 0.0% | 0.0% | 0.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 85.1% | 0.0% | 84.8% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 82.1% | 100.0% | 60.6% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 0.0% | 0.0% | 0.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 104.0% | 0.0% | 113.1% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-18 provides results for NAICS code 236220 (Commercial and Industrial Building Construction), where the City spent 4.3 percent of its funds. Examining Panel G, Black and Asian firms were the only non-M/WBE firms to receive contracts in this code.

Key Takeaways:

- Black and Asian firms received disproportionately low shares of contract dollars relative to their share of contracts. The values were 7.4 percent and 10.7 percent, respectively.
- The non-M/WBE firm ratio was 173.4 percent.

Table 6-18: NAICS Code 236220 - Commercial and Institutional Building Construction

(The City spends 4.3 percent of its dollars in this code)

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|----------------|----------------|
| Panel A: Number of Contracts | | | |
| Black | 0 | 3 | 3 |
| Hispanic | 0 | 0 | 0 |
| Asian | 1 | 0 | 1 |
| Native American | 0 | 0 | 0 |
| White Women | 0 | 0 | 0 |
| Non-M/WBE | 5 | 0 | 5 |
| Total | 6 | 3 | 9 |
| Panel B: Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 100.0% | 0.0% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 100.0% | 0.0% | 100.0% |
| Total | 66.7% | 33.3% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 0.0% | 100.0% | 33.3% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 16.7% | 0.0% | 11.1% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 83.3% | 0.0% | 55.6% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$0.00 | \$1,613,611.06 | \$1,613,611.06 |
| Hispanic | \$0.00 | \$0.00 | \$0.00 |
| Asian | \$778,436.75 | \$0.00 | \$778,436.75 |

| | Prime Contracts | Subcontracts | Total |
|---|------------------------|-----------------------|------------------------|
| Native American | \$0.00 | \$0.00 | \$0.00 |
| White Women | \$0.00 | \$0.00 | \$0.00 |
| Non-M/WBE | \$62,975,186.88 | \$0.00 | \$62,975,186.88 |
| Total | \$63,753,623.63 | \$1,613,611.06 | \$65,367,234.69 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 100.0% | 0.0% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 100.0% | 0.0% | 100.0% |
| Total | 97.5% | 2.5% | 100.0% |
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 0.0% | 100.0% | 2.5% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 1.2% | 0.0% | 1.2% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 98.8% | 0.0% | 96.3% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 0.0% | 100.0% | 7.4% |
| Hispanic | 0.0% | 0.0% | 0.0% |
| Asian | 7.3% | 0.0% | 10.7% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 0.0% | 0.0% |
| Non-M/WBE | 118.5% | 0.0% | 173.4% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-19 provides results for NAICS code 237110 (Water and Sewer Line and Related Structures Construction), where the City spent 43.2 percent of its

funds, the largest share for any code. Native Americans were the only M/WBE group not to receive any contracts in this sector.

Key Takeaways:

- Every M/WBE group that received contracts saw their share of contract dollars were less than their share of contracts. The ratios for Black, Hispanic, Asian, and White woman firms were 18 percent, 50.8 percent, 67.6 percent, and 31.6 percent, respectively.
- The non-M/WBE ratio was 203.9 percent.
- Black and Hispanic firms were *never* prime contractors.

Table 6-19: NAICS Code 237110 - Water and Sewer Line and Related Structures Construction

(The City spends 43.2 percent of its dollars in this code)

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|--------------|---------------|
| Panel A: Number of Contracts | | | |
| Black | 0 | 7 | 7 |
| Hispanic | 0 | 17 | 17 |
| Asian | 25 | 13 | 38 |
| Native American | 0 | 0 | 0 |
| White Women | 6 | 4 | 10 |
| Non-M/WBE | 31 | 1 | 32 |
| Total | 62 | 42 | 104 |
| Panel B: Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 100.0% | 100.0% |
| Asian | 65.8% | 34.2% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 60.0% | 40.0% | 100.0% |
| Non-M/WBE | 96.9% | 3.1% | 100.0% |
| Total | 59.6% | 40.4% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 0.0% | 16.7% | 6.7% |
| Hispanic | 0.0% | 40.5% | 16.3% |

| | Prime Contracts | Subcontracts | Total |
|--|-------------------------|------------------------|-------------------------|
| Asian | 40.3% | 31.0% | 36.5% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 9.7% | 9.5% | 9.6% |
| Non-M/WBE | 50.0% | 2.4% | 30.8% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$0.00 | \$7,923,805.66 | \$7,923,805.66 |
| Hispanic | \$0.00 | \$54,146,098.80 | \$54,146,098.80 |
| Asian | \$137,756,178.88 | \$23,494,744.56 | \$161,250,923.44 |
| Native American | \$0.00 | \$0.00 | \$0.00 |
| White Women | \$16,848,024.62 | \$3,004,786.84 | \$19,852,811.46 |
| Non-M/WBE | \$409,138,158.75 | \$234,779.16 | \$409,372,937.91 |
| Total | \$563,742,362.25 | \$88,804,215.02 | \$652,546,577.27 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 100.0% | 100.0% |
| Asian | 85.4% | 14.6% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 84.9% | 15.1% | 100.0% |
| Non-M/WBE | 99.9% | 0.1% | 100.0% |
| Total | 86.4% | 13.6% | 100.0% |
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 0.0% | 8.9% | 1.2% |
| Hispanic | 0.0% | 61.0% | 8.3% |
| Asian | 24.4% | 26.5% | 24.7% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 3.0% | 3.4% | 3.0% |
| Non-M/WBE | 72.6% | 0.3% | 62.7% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 0.0% | 53.5% | 18.0% |

| | Prime Contracts | Subcontracts | Total |
|-----------------|-----------------|---------------|---------------|
| Hispanic | 0.0% | 150.6% | 50.8% |
| Asian | 60.6% | 85.5% | 67.6% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 30.9% | 35.5% | 31.6% |
| Non-M/WBE | 145.2% | 11.1% | 203.9% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-20 provides results for NAICS code 237310 (Highway, Street, and Bridge Construction), where the City spent 19.5 percent of its funds. Once again, Native Americans were the only M/WBE group not to receive any contracts in this sector.

Key Takeaways:

- As with the previous code, the other M/WBE groups each received a disproportionately low share of contract dollars. The ratios for Black, Hispanic, Asian, and White woman firms were 59.9 percent, 77.3 percent, 97.5 percent, and 118.9 percent, respectively.
- The non-M/WBE ratio was 145.7 percent.

**Table 6-20: NAICS Code 237310 - Highway, Street, and Bridge Construction
(The City spends 19.5 percent of its dollars in this code)**

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|--------------|------------|
| Panel A: Number of Contracts | | | |
| Black | 1 | 10 | 11 |
| Hispanic | 5 | 83 | 88 |
| Asian | 18 | 6 | 24 |
| Native American | 0 | 0 | 0 |
| White Women | 9 | 48 | 57 |
| Non-M/WBE | 15 | 16 | 31 |
| Total | 48 | 163 | 211 |
| Panel B: Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 9.1% | 90.9% | 100.0% |
| Hispanic | 5.7% | 94.3% | 100.0% |

| | Prime Contracts | Subcontracts | Total |
|---|-------------------------|------------------------|-------------------------|
| Asian | 75.0% | 25.0% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 15.8% | 84.2% | 100.0% |
| Non-M/WBE | 48.4% | 51.6% | 100.0% |
| Total | 22.7% | 77.3% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 2.1% | 6.1% | 5.2% |
| Hispanic | 10.4% | 50.9% | 41.7% |
| Asian | 37.5% | 3.7% | 11.4% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 18.8% | 29.4% | 27.0% |
| Non-M/WBE | 31.3% | 9.8% | 14.7% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$5,513,711.50 | \$3,650,399.61 | \$9,164,111.11 |
| Hispanic | \$45,914,365.00 | \$48,774,777.91 | \$94,689,142.91 |
| Asian | \$30,816,431.41 | \$1,767,180.48 | \$32,583,611.89 |
| Native American | \$0.00 | \$0.00 | \$0.00 |
| White Women | \$54,881,965.26 | \$39,475,482.10 | \$94,357,447.36 |
| Non-M/WBE | \$60,634,040.97 | \$2,243,384.46 | \$62,877,425.43 |
| Total | \$197,760,514.14 | \$95,911,224.56 | \$293,671,738.70 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 60.2% | 39.8% | 100.0% |
| Hispanic | 48.5% | 51.5% | 100.0% |
| Asian | 94.6% | 5.4% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 58.2% | 41.8% | 100.0% |
| Non-M/WBE | 96.4% | 3.6% | 100.0% |
| Total | 67.3% | 32.7% | 100.0% |
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 2.8% | 3.8% | 3.1% |

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|---------------|---------------|
| Hispanic | 23.2% | 50.9% | 32.2% |
| Asian | 15.6% | 1.8% | 11.1% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 27.8% | 41.2% | 32.1% |
| Non-M/WBE | 30.7% | 2.3% | 21.4% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 133.8% | 62.0% | 59.9% |
| Hispanic | 222.9% | 99.9% | 77.3% |
| Asian | 41.6% | 50.1% | 97.5% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 148.0% | 139.8% | 118.9% |
| Non-M/WBE | 98.1% | 23.8% | 145.7% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-21 provides results for NAICS code 238210 (Electrical Contractors and Other Wiring Installation Contractors), where the City spent 8.9 percent of its funds. Again, Native Americans were the only M/WBE group not to receive any contracts in this sector.

Key takeaways:

- Hispanics and Asians received a disproportionately low share of contract dollars. The ratios were 29.8 percent, 56.2 percent, respectively.
- The non-M/WBE firm ratio was 111.2 percent.

Table 6-21: NAICS Code 238210 - Electrical Contractors and Other Wiring Installation Contractors
(The City spends 8.9 percent of its dollars in this code)

| | Prime Contracts | Subcontracts | Total |
|------------------------------|-----------------|--------------|-------|
| Panel A: Number of Contracts | | | |
| Black | 0 | 12 | 12 |
| Hispanic | 0 | 26 | 26 |
| Asian | 1 | 16 | 17 |

| | Prime Contracts | Subcontracts | Total |
|--|------------------------|-------------------------|-------------------------|
| Native American | 0 | 0 | 0 |
| White Women | 0 | 19 | 19 |
| Non-M/WBE | 2 | 26 | 28 |
| Total | 3 | 99 | 102 |
| Panel B: Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 100.0% | 100.0% |
| Asian | 5.9% | 94.1% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 100.0% | 100.0% |
| Non-M/WBE | 7.1% | 92.9% | 100.0% |
| Total | 2.9% | 97.1% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 0.0% | 12.1% | 11.8% |
| Hispanic | 0.0% | 26.3% | 25.5% |
| Asian | 33.3% | 16.2% | 16.7% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 19.2% | 18.6% |
| Non-M/WBE | 66.7% | 26.3% | 27.5% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$0.00 | \$44,353,967.46 | \$44,353,967.46 |
| Hispanic | \$0.00 | \$10,170,370.74 | \$10,170,370.74 |
| Asian | \$4,776,446.00 | \$7,790,776.48 | \$12,567,222.48 |
| Native American | \$0.00 | \$0.00 | \$0.00 |
| White Women | \$0.00 | \$26,048,684.33 | \$26,048,684.33 |
| Non-M/WBE | \$9,678,318.00 | \$31,266,553.83 | \$40,944,871.83 |
| Total | \$14,454,764.00 | \$119,630,352.84 | \$134,085,116.84 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 100.0% | 100.0% |

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|---------------|---------------|
| Asian | 38.0% | 62.0% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 100.0% | 100.0% |
| Non-M/WBE | 23.6% | 76.4% | 100.0% |
| Total | 10.8% | 89.2% | 100.0% |
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 0.0% | 37.1% | 33.1% |
| Hispanic | 0.0% | 8.5% | 7.6% |
| Asian | 33.0% | 6.5% | 9.4% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 21.8% | 19.4% |
| Non-M/WBE | 67.0% | 26.1% | 30.5% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 0.0% | 305.9% | 281.2% |
| Hispanic | 0.0% | 32.4% | 29.8% |
| Asian | 99.1% | 40.3% | 56.2% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 113.5% | 104.3% |
| Non-M/WBE | 100.4% | 99.5% | 111.2% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-22 provides results for NAICS code 238220 (Plumbing, Heating, and Air-Conditioning Contractors), where the City spent 5.8 percent of its funds.

Key takeaways:

- Native American and White woman firms received a disproportionately low share of contract dollars. The ratios were 30.1 percent, and 71.9 percent, respectively.
- The non-M/WBE firm ratio was 83.2 percent.

Table 6-22: NAICS Code 238220 - Plumbing, Heating, and Air-Conditioning Contractors

(The City spends 5.8 percent of its dollars in this code)

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|-----------------|-----------------|
| Panel A: Number of Contracts | | | |
| Black | 0 | 7 | 7 |
| Hispanic | 1 | 20 | 21 |
| Asian | 0 | 3 | 3 |
| Native American | 0 | 1 | 1 |
| White Women | 0 | 22 | 22 |
| Non-M/WBE | 1 | 28 | 29 |
| Total | 2 | 81 | 83 |
| Panel B: Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 4.8% | 95.2% | 100.0% |
| Asian | 0.0% | 100.0% | 100.0% |
| Native American | 0.0% | 100.0% | 100.0% |
| White Women | 0.0% | 100.0% | 100.0% |
| Non-M/WBE | 3.4% | 96.6% | 100.0% |
| Total | 2.4% | 97.6% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 0.0% | 8.6% | 8.4% |
| Hispanic | 50.0% | 24.7% | 25.3% |
| Asian | 0.0% | 3.7% | 3.6% |
| Native American | 0.0% | 1.2% | 1.2% |
| White Women | 0.0% | 27.2% | 26.5% |
| Non-M/WBE | 50.0% | 34.6% | 34.9% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$0.00 | \$20,816,804.38 | \$20,816,804.38 |
| Hispanic | \$2,114,311.50 | \$25,127,412.67 | \$27,241,724.17 |
| Asian | \$0.00 | \$4,135,772.03 | \$4,135,772.03 |

| | Prime Contracts | Subcontracts | Total |
|---|-----------------------|------------------------|------------------------|
| Native American | \$0.00 | \$265,508.22 | \$265,508.22 |
| White Women | \$0.00 | \$13,953,214.48 | \$13,953,214.48 |
| Non-M/WBE | \$6,801,937.00 | \$14,489,351.60 | \$21,291,288.60 |
| Total | \$8,916,248.50 | \$64,298,711.78 | \$73,214,960.28 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 7.8% | 92.2% | 100.0% |
| Asian | 0.0% | 100.0% | 100.0% |
| Native American | 0.0% | 100.0% | 100.0% |
| White Women | 0.0% | 100.0% | 100.0% |
| Non-M/WBE | 31.9% | 68.1% | 100.0% |
| Total | 12.2% | 87.8% | 100.0% |
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 0.0% | 32.4% | 28.4% |
| Hispanic | 23.7% | 39.1% | 37.2% |
| Asian | 0.0% | 6.4% | 5.6% |
| Native American | 0.0% | 0.4% | 0.4% |
| White Women | 0.0% | 21.7% | 19.1% |
| Non-M/WBE | 76.3% | 22.5% | 29.1% |
| Total | 100.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 0.0% | 374.6% | 337.1% |
| Hispanic | 47.4% | 158.3% | 147.1% |
| Asian | 0.0% | 173.7% | 156.3% |
| Native American | 0.0% | 33.4% | 30.1% |
| White Women | 0.0% | 79.9% | 71.9% |
| Non-M/WBE | 152.6% | 65.2% | 83.2% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

Table 6-23 provides results for NAICS code 484220 (Specialized Freight (except Used Goods) Trucking, Local), where the City spent 4.9 percent of its funds.

Key Takeaways:

- This code was distinct from the other six: despite the large number of contracts, non-M/WBEs did not receive any awards.
- Asian firms received a disproportionately low share of contract dollars. The ratio was 49.9 percent.

**Table 6-23: NAICS Code 484220 - Specialized Freight (except Used Goods)
Trucking, Local
(The City spends 4.9 percent of its dollars in this code)**

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|---------------|---------------|
| Panel A: Number of Contracts | | | |
| Black | 0 | 24 | 24 |
| Hispanic | 0 | 114 | 114 |
| Asian | 0 | 46 | 46 |
| Native American | 0 | 0 | 0 |
| White Women | 0 | 43 | 43 |
| Non-M/WBE | 0 | 0 | 0 |
| Total | 0 | 227 | 227 |
| Panel B: Distribution of a Group's Contract between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 100.0% | 100.0% |
| Asian | 0.0% | 100.0% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 100.0% | 100.0% |
| Non-M/WBE | 0.0% | 0.0% | 0.0% |
| Total | 0.0% | 100.0% | 100.0% |
| Panel C: Distribution of Prime Contracts and Subcontracts across Groups | | | |
| Black | 0.0% | 10.6% | 10.6% |
| Hispanic | 0.0% | 50.2% | 50.2% |
| Asian | 0.0% | 20.3% | 20.3% |
| Native American | 0.0% | 0.0% | 0.0% |

| | Prime Contracts | Subcontracts | Total |
|--|-----------------|------------------------|------------------------|
| White Women | 0.0% | 18.9% | 18.9% |
| Non-M/WBE | 0.0% | 0.0% | 0.0% |
| Total | 0.0% | 100.0% | 100.0% |
| Panel D: Contract Dollars | | | |
| Black | \$0.00 | \$12,052,338.96 | \$12,052,338.96 |
| Hispanic | \$0.00 | \$38,607,425.42 | \$38,607,425.42 |
| Asian | \$0.00 | \$7,408,616.97 | \$7,408,616.97 |
| Native American | \$0.00 | \$0.00 | \$0.00 |
| White Women | \$0.00 | \$15,233,983.35 | \$15,233,983.35 |
| Non-M/WBE | \$0.00 | \$0.00 | \$0.00 |
| Total | \$0.00 | \$73,302,364.70 | \$73,302,364.70 |
| Panel E: Distribution of a Group's Contract Dollars between Primes and Subs | | | |
| Black | 0.0% | 100.0% | 100.0% |
| Hispanic | 0.0% | 100.0% | 100.0% |
| Asian | 0.0% | 100.0% | 100.0% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 100.0% | 100.0% |
| Non-M/WBE | 0.0% | 0.0% | 0.0% |
| Total | 0.0% | 100.0% | 100.0% |
| Panel F: Distribution of Prime and Subcontract Dollars across Groups | | | |
| Black | 0.0% | 16.4% | 16.4% |
| Hispanic | 0.0% | 52.7% | 52.7% |
| Asian | 0.0% | 10.1% | 10.1% |
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 20.8% | 20.8% |
| Non-M/WBE | 0.0% | 0.0% | 0.0% |
| Total | 0.0% | 100.0% | 100.0% |
| Panel G: Ratio of a Group's Share of Dollars Over Its Share of Contracts | | | |
| Black | 0.0% | 155.5% | 155.5% |
| Hispanic | 0.0% | 104.9% | 104.9% |
| Asian | 0.0% | 49.9% | 49.9% |

| | Prime Contracts | Subcontracts | Total |
|-----------------|-----------------|---------------|---------------|
| Native American | 0.0% | 0.0% | 0.0% |
| White Women | 0.0% | 109.7% | 109.7% |
| Non-M/WBE | 0.0% | 0.0% | 0.0% |
| Total | 0.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

A key question asks are the share of contract dollars received by a group less than/greater than/equal to their share of contracts. A group might receive a certain share of total contracts but receive less than that share of contract dollars. Table 6-24 presents this data. Across the seven NAICS codes, the five M/WBE groups received contracts in 24 codes (out of 35) and non-M/WBEs received contracts in six codes (out of seven).²⁷⁰ The table presents the number of times (out of seven) the group received contracts; the distribution of the ratios for each group across the three possible outcomes: whether the ratio was less than 100 percent; and whether the ratio was greater than 100 percent.

Table 6-24: Comparison of Group’s Ratio of Share of Dollars Over Group’s Share of Contracts

| | Number of times group received contracts in one of the 7 codes | Number of times the ratio was less than 100 percent | Number of times the ratio was greater than 100 percent |
|-----------------|--|---|--|
| Black | 7 | 4 | 3 |
| Hispanic | 5 | 3 | 2 |
| Asian | 6 | 5 | 1 |
| Native American | 1 | 1 | 0 |
| White Women | 5 | 2 | 3 |
| Non-M/WBE | 6 | 1 | 5 |

Source: Colette Holt & Associates analysis of City of Chicago data

Since the weight of the City’s spending varied across the seven NAICS codes, it is useful to compare each group’s share of contract dollars to its share of the number of contracts for the codes in the aggregate. Table 6-25 presents these results. These are the data in Panel C in Table 6-16 divided by the data in Panel

270. The 35 M/WBE contracting opportunities represent the five M/WBE groups times the seven NAICS codes; the 7 non-M/WBE contracting opportunities represents the one group times the seven NAICS codes.

C in Table 6-15.²⁷¹ Since the ratio’s numerator is the share of dollars and the ratio’s denominator is the share of contracts, the value of the ratio provides a measure of disproportionality. If the value is less than 100 percent (meaning the share of contract dollars is less than the share of contracts), then the group gets a disproportionately low share of dollars; if the value is greater than 100 percent (meaning the share of contract dollars is greater than the share of contracts), then the group gets a disproportionately high share of dollars. In Table 6-25, every value for non-M/WBEs exceeds 100 percent, so non-M/WBEs get a disproportionately high share of dollars. For M/WBEs, the results are a bit uneven. These charts show that the opportunity to receive contracts is not the same as the opportunity to receive contracting dollars.

Table 6-25: Ratio of a Group's Share of Dollars Over Its Share of Contracts

| | Prime Contracts | Subcontracts | Prime and Subcontracts Combined |
|-----------------|-----------------|---------------|---------------------------------|
| Black | 66.2% | 173.4% | 86.1% |
| Hispanic | 124.7% | 85.3% | 48.0% |
| Asian | 54.2% | 94.1% | 94.9% |
| Native American | 0.0% | 28.8% | 13.2% |
| White Women | 72.6% | 94.4% | 64.3% |
| Non-M/WBE | 138.5% | 106.6% | 256.0% |
| Total | 100.0% | 100.0% | 100.0% |

Source: Colette Holt & Associates analysis of City of Chicago data

3. The Distribution of Contracts and Contract Dollars Within Groups across the Top Seven NAICS Codes: Different Patterns of Firm Concentration Across Groups

Finally, we examined the distribution of contracts and contract dollars within groups. Here, the question is how many firms captured what share of the contracts and contract dollars? Did a small number of firms receive all (or 50 percent or 25 percent) of the contracts and contract dollars? Differences in patterns may suggest that groups do not interface with the market and the City’s contracting activities in the same way.

Tables 6-26 through 6-32 report:

271. Please note: the data in all of these tables are the numbers rounded. The actual numbers differed from the presented numbers because the Excel spreadsheet is not rounded. Thus, for example, the ratio for Black firms in Table 6-27 rounded to 66.2 percent which is a rounded version of 66.1544701 percent. Using the values for Black firms in Tables 3-17 and 3-18 (2.3 percent and 1.6 percent) yields a ratio of 69.6 percent.

- Row 1: Each group's share of the City's total spending in the NAICS code.
- Row 2: How much this NAICS code captures of the group's overall contract dollars.
- Row 3: How many firms get contracts in the NAICS code.
- Row 4: How many contracts these firms get in the NAICS code.
- Rows 5-8: What share of the group's overall contract dollars goes to the:
 - The firm with the largest share.
 - The firm with the second largest share.
 - The firm with the third largest share.
 - The remaining firms' share of the contract dollars.

The first row presents how the City's contract dollars were distributed across groups. The second row presents how important that NAICS code was to the overall level of spending received by a group. The third and fourth rows present how many firms got contracts and the total number of contracts. The last four rows present how concentrated spending was among a few firms.

The larger is Row 5 or the smaller is Row 8, the more concentrated the City's spending was among a small number of firms. When comparing a M/WBE group to non-M/WBEs, the larger the difference between the M/WBE group's Row 5 (or Row 8) to Row 5 (or Row 8) of non-M/WBEs, the larger the difference in how that group participates in the City's spending compared to how non-M/WBEs participate in the City's spending.

Key takeaway from Table 6-26:

- The concentration of contract dollars among Black firms was more than the concentration of contract dollars among non-M/WBE firms. The top two Black firms received 98.1 percent of all Black contract dollars; the top two non-M/WBE firms received 86.5 percent of all non-M/WBE contract dollars

Table 6-26: NAICS Code 236210 - Industrial Building Construction
NAICS Code Share of the City's Spending (Its Weight): 3.8%

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|--------|----------|-------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 15.16% | 0.00% | 0.00% | 0.00% | 0.00% | 84.84% |
| NAICS Code Share of Group's Total Dollars | 7.60% | 0.00% | 0.00% | 0.00% | 0.00% | 7.10% |
| Group's Number of Firms in NAICS Code | 3 | | | | | 5 |
| Group's Number of Contracts in NAICS Code | 3 | | | | | 9 |
| Dollar Share of Firm1 | 51.00% | | | | | 64.40% |
| Dollar Share of Firm2 | 47.10% | | | | | 22.10% |
| Dollar Share of Firm3 | 1.90% | | | | | 6.20% |
| Dollar Share of the Rest | 0.00% | | | | | 7.30% |

Source: Colette Holt & Associates analysis of City of Chicago data

Key takeaways from Table 6-27:

- This code contributed little to the overall level of the City's contract dollars received by Black and Asian firms (1.4 percent; 0.3 percent).
- The concentration of contract dollars among Black, Asian, and non-M/WBE firms was roughly the same.

Table 6-27: NAICS Code 236220 - Commercial and Institutional Building Construction

NAICS Code Share of the City's Spending (Its Weight): 4.3%

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|-------|----------|-------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 2.47% | 0.00% | 1.19% | 0.00% | 0.00% | 96.34% |
| NAICS Code Share of Group's Total Dollars | 1.40% | 0.00% | 0.30% | 0.00% | 0.00% | 9.10% |
| Group's Number of Firms in NAICS Code | 2 | | 1 | | | 4 |
| Group's Number of Contracts in NAICS Code | 3 | | 1 | | | 5 |

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|--------------------------|--------|----------|-------|-----------------|-------------|-----------|
| Dollar Share of Firm1 | 54.40% | | 100% | | | 71.00% |
| Dollar Share of Firm2 | 45.60% | | | | | 27.00% |
| Dollar Share of Firm3 | 0% | | | | | 1.00% |
| Dollar Share of the Rest | 0% | | 0% | | | 1.00% |

Source: Colette Holt & Associates analysis of City of Chicago data

Key takeaways from Table 6-28:

- The contribution of this NAICS to each group’s total contract dollars varied widely, from 65.3 percent for Asians to 6.8 percent for Blacks.
- The highest concentration of contract dollars
- was among Black firms, with the top two firms capturing 97.5 percent of all Black contract dollars. For the top two non-M/WBE firms, the share was 74.3 percent.

Table 6-28: NAICS Code 237110 - Water and Sewer Line and Related Structures Construction

NAICS Code Share of the City’s Spending (Its Weight): 43.2%

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|--------|----------|--------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 1.21% | 8.30% | 24.71% | 0.00% | 3.04% | 62.73% |
| NAICS Code Share of Group's Total Dollars | 6.80% | 21.00% | 65.30% | 0.00% | 10.10% | 59.20% |
| Group's Number of Firms in NAICS Code | 3 | 7 | 5 | | 6 | 5 |
| Group's Number of Contracts in NAICS Code | 7 | 17 | 38 | | 10 | 32 |
| Dollar Share of Firm1 | 68.80% | 39.30% | 64.90% | | 48.30% | 42.40% |
| Dollar Share of Firm2 | 28.70% | 32.80% | 21.70% | | 26.80% | 31.90% |
| Dollar Share of Firm3 | 2.50% | 19.40% | 5.70% | | 14.20% | 18.90% |
| Dollar Share of the Rest | 0.00% | 8.40% | 7.70% | | 10.70% | 6.80% |

Source: Colette Holt & Associates analysis of City of Chicago data

Key takeaways from Table 6-31:

- As a group, Hispanic and White woman firms each captured about one-third of all of the contract dollars in this NAICS code. Black firms only received 3.1 percent of the contract dollars.
- This NAICS code represented a large share of overall contract dollars for Hispanic and White woman firms: for Hispanics, 36.8 percent of all contract dollars were from this code; for White women, the figure was 48.2 percent.
- Non-M/WBE firms had the lowest level of concentration of all of the groups, with the top three firms receiving similar shares of contract dollars and the rest of the non-M/WBE firms capturing one-quarter of the groups contracts dollars.

Table 6-29: NAICS Code 237310 - Highway, Street, and Bridge Construction
NAICS Code Share of the City’s Spending (Its Weight): 19.5%

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|--------|----------|--------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 3.12% | 32.24% | 11.10% | 0.00% | 32.13% | 21.41% |
| NAICS Code Share of Group's Total Dollars | 7.90% | 36.80% | 13.20% | 0.00% | 48.20% | 9.10% |
| Group's Number of Firms in NAICS Code | 6 | 23 | 7 | | 14 | 21 |
| Group's Number of Contracts in NAICS Code | 11 | 88 | 24 | | 57 | 31 |
| Dollar Share of Firm1 | 60.20% | 47.40% | 79.90% | | 64.20% | 29.90% |
| Dollar Share of Firm2 | 14.70% | 19.80% | 9.90% | | 26.30% | 23.00% |
| Dollar Share of Firm3 | 9.90% | 6.00% | 5.50% | | 2.90% | 21.70% |
| Dollar Share of the Rest | 15.30% | 26.80% | 4.80% | | 6.60% | 25.40% |

Source: Colette Holt & Associates analysis of City of Chicago data

Key takeaways from Table 6-30:

- This NAICS code provided 38.1 percent of all contract dollars received by Black firms. Black firms’ reliance on this code far exceeded that of any other group.
- The concentration of contract dollars among Black firms and Asian firms in this NAICS code

- was much higher for other groups. For Blacks and Asians, the top three firms received 97.8 percent and 100 percent of each group’s contract dollars, respectively.

Table 6-30: NAICS Code 238210 - Electrical Contractors and Other Wiring Installation Contractors

NAICS Code Share of the City’s Spending (Its Weight): 8.9%

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|--------|----------|-------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 33.08% | 7.59% | 9.37% | 0.00% | 19.43% | 30.54% |
| NAICS Code Share of Group's Total Dollars | 38.10% | 3.90% | 5.10% | 0.00% | 13.30% | 5.90% |
| Group's Number of Firms in NAICS Code | 7 | 7 | 3 | | 8 | 21 |
| Group's Number of Contracts in NAICS Code | 12 | 26 | 17 | | 19 | 28 |
| Dollar Share of Firm1 | 36.30% | 23.70% | 38% | | 57.80% | 24.72% |
| Dollar Share of Firm2 | 32.80% | 21.50% | 37% | | 20.00% | 24.19% |
| Dollar Share of Firm3 | 28.70% | 17.40% | 25% | | 10.10% | 13.92% |
| Dollar Share of the Rest | 2.20% | 37.40% | 0.00% | | 12.20% | 37.20% |

Source: Colette Holt & Associates analysis of City of Chicago data

Key takeaway from Table 6-31:

- There was a higher level of concentration among M/WBE firms compared to non-M/WBE firms. The share of contract dollars received by the top two firms in each M/WBE group ranged from 100.0 percent for Asians to 61.6 percent for White women. The top two non-M/WBE firms captured just 46.2 percent of all non-M/WBE contract dollars in this NAICS code.

Table 6-31: NAICS Code 238220 - Plumbing, Heating, and Air-Conditioning Contractors

NAICS Code Share of the City's Spending (Its Weight): 5.8%

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|--------|----------|--------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 23.74% | 31.06% | 4.72% | 0.30% | 15.91% | 24.28% |
| NAICS Code Share of Group's Total Dollars | 17.90% | 10.60% | 1.70% | 100.00% | 7.10% | 3.10% |
| Group's Number of Firms in NAICS Code | 5 | 13 | 2 | 1 | 12 | 24 |
| Group's Number of Contracts in NAICS Code | 7 | 21 | 3 | 1 | 22 | 29 |
| Dollar Share of Firm1 | 87.20% | 57.50% | 82.20% | 100% | 38.10% | 32.10% |
| Dollar Share of Firm2 | 7.10% | 16.60% | 17.80% | 0% | 23.50% | 14.10% |
| Dollar Share of Firm3 | 5.00% | 6.90% | 0% | 0% | 21.80% | 13.00% |
| Dollar Share of the Rest | 0.70% | 18.90% | 0.00% | 0.00% | 16.60% | 40.80% |

Source: Colette Holt & Associates analysis of City of Chicago data

Key takeaways from Table 6-32:

- No non-M/WBE firms received contracts in this NAICS code.
- Hispanic firms received 52.7 percent of all contract dollars spent by the City in this NAICS code.
- Among Hispanic firms, the contract dollars were fairly well dispersed, with the top three firms capturing only 51.2 percent of all of the group's dollars. In contrast, contract dollars going to Black, Asian, and White woman firms were fairly concentrated, with the top three firms receiving 98.3 percent, 99.4 percent, and 91.5 percent, respectively.

**Table 6-32: NAICS Code 484220 - Specialized Freight (except Used Goods)
Trucking, Local
NAICS Code Share of the City's Spending (Its Weight): 4.9%**

| | Black | Hispanic | Asian | Native American | White Women | Non-M/WBE |
|---|--------|----------|--------|-----------------|-------------|-----------|
| Group's Share of NAICS Code | 16.44% | 52.67% | 10.11% | 0.00% | 20.78% | 0.00% |
| NAICS Code Share of Group's Total Dollars | 10.40% | 15.00% | 3.00% | 0.00% | 7.80% | 0.00% |
| Group's Number of Firms in NAICS Code | 5 | 18 | 5 | | 7 | |
| Group's Number of Contracts in NAICS Code | 24 | 114 | 46 | | 43 | |
| Dollar Share of Firm1 | 60.40% | 20.80% | 48.50% | | 61.10% | |
| Dollar Share of Firm2 | 25.40% | 17.40% | 45.00% | | 17.00% | |
| Dollar Share of Firm3 | 12.40% | 13.00% | 5.90% | | 13.40% | |
| Dollar Share of the Rest | 1.70% | 48.80% | 0.60% | | 8.50% | |

Source: Colette Holt & Associates analysis of City of Chicago data

H. Conclusion

We determined the City of Chicago's geographic market; industry or product market; availability of minority- and woman-owned firms as a percentage of all firms; and whether there are disparities in opportunities for City contracts and subcontracts for construction contracts. M/WBEs have received significant opportunities to participate on City projects, both as prime contractors and subcontractors. However, opportunities are not evenly distributed in proportion to availability, and disparities remain. In summary, M/WBEs are much more reliant on subcontracts compared to non-M/WBEs. Examining the top seven NAICS codes, Black, Hispanic, and White woman-owned firms receive over 90 percent of their work is as subcontractors. In contrast, for non-M/WBEs, just under 53 percent of their work is as subcontractors. In addition, the results demonstrate that when examining the dollars received by M/WBEs, there is a small number of firms that receive a large share of the dollars in each NAICS code, and that amongst the various disaggregated racial, ethnic and gender groupings, this pattern continues. This suggests that while the City's program has had some significant success in breaking down barriers to M/WBEs' participation on certain types of City contracts, opportunities are highly concentrated, and dollars are disproportionately small with respect to

prime contracts and certain subcontract opportunities. There is still not parity when comparing a group's share of contracts to its share of dollars.

VII. RECOMMENDATIONS FOR THE CITY OF CHICAGO'S MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE CONSTRUCTION PROGRAM

The quantitative and qualitative data in this study provide a thorough examination of the evidence of the experiences of minority- and woman-owned construction firms in the City of Chicago's geographic and industry construction markets. As required by strict constitutional scrutiny applicable to race- and gender-conscious government contracting programs, we reviewed the City's current Minority- and Women-owned Business Enterprise ("M/W/BE") program for construction contracts and the numerous race- and gender-neutral measures it offers for conformance to constitutional standards and national best practices.

- We interviewed M/WBEs and non-M/WBEs about their experiences with the City's program and solicited their suggestions for enhancements. City staff also provided extensive input about the operations of the program and recommendations for improvements.
- We solicited anecdotal or qualitative evidence of M/WBEs' experiences in obtaining City construction prime contracts and subcontracts and in seeking work on private sector projects.
- We examined Census Bureau data sets to evaluate whether there are disparities in the overall Chicago area construction economy, where contracting affirmative action programs are rarely imposed. These results shed light on whether the City might function as a passive participant in market wide discrimination absent intervention to remedy the market failure of discrimination.
- We examined government and academic reports on discriminatory barriers to access to the financial and human capital necessary for entrepreneurial success.
- We analyzed evidence of M/WBE utilization by the City as measured by dollars spent.

- We estimated the availability of M/WBEs in the City’s construction marketplace in the aggregate and by detailed industry code.
- We compared the City’s utilization of M/WBEs to the availability of all ready, willing, and able firms in its markets to calculate whether there are disparities between utilization and availability.

We found that although M/WBEs as a whole received ample dollars on City jobs, opportunities were concentrated amongst a small group of firms and were mostly in subcontracting. These results provide the City with the evidence necessary to support the continuing need for race- and gender-conscious remedies and to narrowly tailor those remedies. The recommendations that follow are based upon these findings and are directed towards increasing the ability of M/WBEs to participate more fully in all aspects of the City’s construction market.

A. Continue to Administer Race- and Gender-Neutral Measures

Strict constitutional scrutiny requires that a government use race- and gender-neutral measures²⁷² to the maximum feasible extent. As discussed in Chapter I, while the City does not have to first try and then establish the failure of every possible option before applying race- and gender-conscious elements, it must make sincere efforts to use race- and gender-neutral approaches to reduce inequality.

1. Create a Department of Business Opportunity

The City of Chicago adopted its original M/WBE program in 1985, one of the first in the nation. From its inception, the program and its administrative functions have been housed in the procurement department. While this made sense when the first ordinance was enacted in 1990, more than 30 years of national experience suggests that business inclusion and equity should be a separate, standalone department or office apart from the Department of Procurement Services (“DPS”). We have learned in the ensuing years that while there must be close coordination between the M/WBE office and the purchasing function, the missions of these critical functions are not identical. Procurement Services’ mission is to serve as the purchasing agent for the City and obtain the services and goods the City needs in a fair, efficient and cost-effective manner. While not in conflict with non-discrimination and inclusion, the purchasing function’s mission does not focus on remediating barriers or advocating for small, minority and woman-owned firms. A new office would sup-

272. “Race- and gender-neutral” means an activity designed to assist all small businesses, regardless of the race or gender of the firm’s owner(s). See 49 C.F.R. § 26.5.

port equal access to contracts and support the growth and success of M/WBEs and small firms.

The following are the reasons a new and separate department is recommended:

- A separate office can serve as an advocate for M/WBEs and small firms. Many M/WBEs suggested the City needs an ombudsmen function to whom they can turn for advice and support, but such a role is inappropriate for purchasing officials. While the current program documents provide for binding arbitration to settle disputes between certified firms and prime contractors, this highly aggressive tool is useful only in the most extreme of cases. In fact, no one we interviewed had used this approach.
- Further, access to capital, surety bonding support and other business assistance and economic development initiatives are not central to the mission of procuring goods and services for the City. The efforts now underway are fragmented and loaded on top of DPS staff's extensive responsibilities.
- The M/WBE program is just one of many functions in DPS. This seems to lead to bottlenecks in addressing issues and managing the workflow. The requirement that the Chief Procurement Office ("CPO") sign off on the great majority of decisions required for routine program administration leads to delays, as the CPO has a myriad of other duties. A new department can lead with process improvements. Separating the functions will permit the reporting structure to be clear and accessible to vendors; increase the ability of the staff to focus on these issues; and promote accountability for the many decision required to implement the program.
- Contractors and City personnel agree that the program is greatly under resourced. More staff is required. Routine decisions take months and answers to queries are sometimes inconsistent or not provided. Informational resources cannot be kept up to date (for example, the list of "Procurement Improvements, Programs & Initiatives Implemented" on the DPS website has not been updated since 2018). Payment delays are a major issue. Review and evaluations of current program elements are not being conducted because DPS personnel are overwhelmed with day-to-day administration. A separate department with more focused attention will shed light on what new support is required to increase program success.

A number of City construction contracts are not administered by DPS. A separate unit, ensuring coordination and uniformity

to the greatest possible extent, will reduce burdens on all contractors and subcontractors as well as City staff. Personnel from this new unit could be detailed to the user departments to increase efficiencies and support transparency and accountability.

A separate office is now, by far, the most common structure for contracting affirmative action programs nationally. Successful programs, such as those for the Cities of Houston, Denver and Austin, have fully separate departments that report directly to the Mayor or the City Manager. Likewise, the U.S. Department of Transportation's Disadvantaged Business Enterprise program, which has been upheld by every court that has considered a challenge and is generally considered to be the gold standard, requires that the DBE Liaison Officer director report to the agency's highest-ranking officer.²⁷³

2. Pay Promptly and Ensure Prime Vendors Promptly Pay Subcontractors

Slow payment by the City was the number one criticism of the City's construction activities. Beyond monthly pay applications, low change order processing and contract closeout delays were additional problems. This is a serious problem for all firms, but especially for M/WBEs and other small businesses with limited cash flow and financing options. It further discourages M/WBEs from bidding as prime contractors because they fear cash crunches and the added burdens of being responsible for paying subcontractors.

Slow payments from prime vendors to subcontractors and suppliers were also reported. The City does utilize the payment module in the C2 system; however, questions were raised about how closely the submissions of prime vendors were monitored. More staff resources should be devoted to ensuring that the information is received in a timely manner and is then reviewed by the City.

We understand that Mayor Lori Lightfoot recently established the Prompt Payment Working Group, which is expected to make recommendations for improvements shortly.

273. 49 C.F.R. §26.25. "What is the requirement for a liaison office? You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part."

3. Focus on Supporting Opportunities for M/WBEs to Perform as Prime Contractors

While certified firms no longer experience disparities in access to City subcontracts, contracts for prime work are either out of reach for most M/WBEs (especially Black contractors), or too risky to take on, especially in industry codes involving large City spending.²⁷⁴ We recommend the City place special emphasis in reducing barriers to prime awards, so that M/WBE dollars are not concentrated in less lucrative subsectors, through the following elements:

a. Increase Contract “Unbundling”

City projects are often very large and complex. Not surprisingly, contract size is a disincentive to small firms to seek contracts. Smaller contracts are an important race-neutral component to a defensible program. Unbundling projects, providing longer lead times and simplifying requirements would assist smaller businesses to take on more City work. In conjunction with reduced insurance and bonding requirements where possible, unbundled contracts would permit smaller firms and M/WBEs to bid as prime contractors, as well as enhance their subcontracting opportunities. Unbundling must be conducted within the constraints of the need to ensure efficiency and limit costs to taxpayers, as extra work often is required to create and administer several unbundled contracts rather than a single agreement.

b. Provide Mobilization Payments and “Quick Pay” Schedules

Having the cash or access to working capital to begin a larger City job is a major barrier for M/WBEs and all small firms. Increasing the use of upfront mobilization payments and more frequent payment schedules (often called “quick pay”) would reduce structural barriers to the participation of a broader group of contractors. The Department of Aviation has adopted innovative payment approaches that could be the model for the City.

c. Review the Small Business Initiative and the Midsize Business Initiative

The Small Business Initiative (“SBI”) and the Midsize Business Initiative (“MBI”) are designed to increase opportunities for smaller firms by limiting the pool of eligible bidders to like-sized firms. These small business “set-asides” have had some success. However, interview participants reported that their utility has been limited, with only a small number of contracts awarded using these procurement methods. The value of these initiatives would be greatly increased by raising the size limit of contracts for the SBI

274. NAICS code 237110, Water and Sewer Line and Related Structures Construction and NAICS code 237310 Highway, Street, and Bridge Construction, together account for almost two thirds of City construction spending.

and by using the MBI program more widely. Perhaps a more focused approach that sets targets for awards for SBI and MBI contracts would lead to greater success. In any event, an information campaign is needed to make firms aware of the opportunities that will be made available.

4. Ensure Full and Complete Contract Data Collection

All departments should enter their contract data in the C2 system. Lack of uniformity in systems and reporting significantly slowed the process of data collection for this Study. But, more importantly, disparate systems make it harder to track progress, spot issues early and ensure transparency and accountability. It also burdens vendors with having to learn different systems. Several user staff mentioned that they do not have access to the system.

Payments to the non-certified subcontractors are not being tracked. While reporting to the Mayor, the City Council and the public understandably focuses on the participation by certified firms, full contract monitoring requires that all payments be tracked. This is necessary to develop narrowly tailored estimates of M/WBE availability and to develop the overall group of firms of which M/WBE will comprise some fraction. Leaving out the payments to non-M/WBE subcontractors will provide a distorted picture of the firms in each NAICS code that are in fact doing work for the City. It will also increase the costs and time to conduct the court-mandated regular reviews of the program.

5. Establish a Construction M/WBE Program Working Group

Many contractors supported the suggestion of forming a Construction M/WBE Program Working Group to address issues and develop solutions, including consideration of the recommendations in this Report. A regular, industry-specific forum is needed to focus on construction prime contractors' and subcontractors' concerns. We suggest this group consist of City staff from the new department (or DPS) and major construction departments; M/WBE focused construction organizations; and general industry associations. The group should be chaired by the new Director of the Office of Business Opportunity (or the CPO) and charged with developing consensus on short- and long-term program improvements and new initiatives. Initially, monthly meetings may be required, with the group determining its own schedule. This group could interface with the Prompt Payment Working Group so that industry expertise and experiences are integrated into that effort. We suggest a first report within 90 days of the first meeting, and then quarterly updates on issues and the impact of new program elements or policy changes.

B. Continue to Implement Race- and Gender-Conscious Measures

The study's statistical and anecdotal results support the determination that the City has a strong basis in evidence to continue to implement a narrowly tailored, fully race-conscious M/WBE program that includes all groups for race-conscious relief for its construction contracts. In our judgement, the evidence in the study, both quantitative and qualitative, establishes that barriers on the basis of race and gender continue to impede full and fair opportunities for M/WBEs.

The City has been implementing an aggressive program for many years. This has resulted in the disadvantaged groups having reached overall "parity" on City projects. However, the experiences of M/WBEs outside of the City's program strongly suggest that the City's utilization results are largely driven by the imposition of contract goals, not that race and gender are no longer significant barriers to opportunities. The anecdotal reports of inadequate access to information, biased perceptions, entrenched and closed networks, lack of access to capital and bonding, and other impediments on the basis of, or exacerbated by, race and gender would impede M/WBEs' success on City contracts were it not for the program's remedial intervention. Further, the economy-wide analyses in Chapter V reveal that in the overall Chicago area economy, where contracting equity programs are rare as a portion of total economic activity, M/WBEs experience very large and significant disparities to full and fair chances to entrepreneurial success. For example, minorities and women form businesses at rates well below comparable White men and earn significantly less from the businesses that they do form. Similarly, minority- and woman-owned firms experience large disparities in the ratios of their sales and their payrolls relative to the number of their firms. Government and academic research reveal that minorities and women still do not enjoy full and fair access to financial and human capital and other resources needed to support the growth and success of their businesses.

Overall, the picture that emerges shows the continuing effects of discrimination in creating barriers to the full and fair participation of all firms across all product markets in the City's relevant geographic market area. The City's programs have been successful in the award of construction contracts, but the experiences of M/WBEs outside of contracting affirmative action programs strongly suggests that it is the use of flexible contract goals that has led to these results. Without the use of contract goals to level the playing field, the City might function as a "passive participant" in the "market failure" of discrimination. The continued use of contract goals is therefore warranted.

To the extent M/WBEs are widely and significantly used by the City in excess of their current availability, it would be prudent for the City to consider not setting contract goals on a small percentage of contracts where there is ample availability.

The City should carefully monitor the outcomes of these “unremediated market” contracts to illuminate the remedial impact of the intervention and determine whether race- and gender-conscious remedies can gradually be phased out without adverse consequences.

1. Reaffirm the Current MBE and WBE Program Goals

The City should continue to set annual, overall targets for utilization of MBEs and WBEs on its construction contracts. The current goals of 26 percent for MBE participation and 6 percent for WBE participation have been achieved and there is no reason to expect that these levels cannot be maintained going forward.

2. Use the Detailed Study Availability Data to Set M/WBE Contract Goals

As discussed in Chapter II, the City’s constitutional and regulatory responsibility is to ensure that its program implementation is narrowly tailored to its geographic and procurement marketplace. Many prime contractors questioned how the City sets its contract goals and reported that goals sometimes do not reflect the actual skills of available firms or the work that can reasonably be subcontracted. Using study data will provide transparency and defensibility, as well as reduce requests for waivers.

The C2 electronic data collection and monitoring system contains a contract goal setting module developed to utilize the study data as the starting point. We have worked extensively with this system’s vendor to develop a simple, defensible methodology to use the study data. The unweighted availability estimates should be weighted by the expected scopes of the particular contract, including the prime vendor’s anticipated self-performance. The results will be the first step in setting the contract goal. The City should then review the result considering other factors, such as the entry of new firms into the program, other current Chicago area projects that may impact availability, progress towards meeting the annual goals, any unique aspects to the scopes, or other relevant factors. Any adjustment to the calculated goal should be fully documented. Written policies explaining the contract goal setting steps should be disseminated so that all contracting actors understand the methodology. By employing the C2 system as the starting point for goal setting, and fully documenting any adjustments, bidders will gain confidence that the goals are based on demonstrable evidence that the targets are reasonable and achievable.

For contracts with few scopes, such as demolition work, the City should consider setting a combined goal for MBEs and WBEs, especially if there is the possibility that the awardee might be a certified firm. This will permit smaller

contractors to bid as primes and reap the benefits of serving as the prime contractor without the burden of trying to further subdivide the work.

3. Review Program Eligibility Standards and Processes

The current limits on the annual gross receipts of a certified firm and on the personal net worth of its owner are major impediments to the growth and development of M/WBEs, especially as prime contractors. We recognize the courts have held that strict constitutional scrutiny requires some limits on who can be considered a socially and economically disadvantaged individual. The current approach, which originates from the national standard under the U.S. DOT DBE program, in our view is too restrictive for a market as complex, expensive and large as the City of Chicago's. We suggest some additional refinements to the current approach.

a. Revise the Business Size Standard for Program Eligibility

The current ordinance adopts the U.S. Small Business Administration's size standards for program eligibility. The City averages the firm's gross receipts²⁷⁵ over a five-year period. While these vary by 6-digit NAICS codes, ranging from the highest limit at \$39.5M for heavy civil work to \$16.5M for specialty trade contractors, these national numbers do not fully reflect the size of the firms against which M/WBEs must compete in the Chicago construction marketplace. Firms somewhat above these thresholds are still not able to fully compete with long established non-M/WBEs who, in many cases, have had decades to make critical business and financial connections, build client networks, gain expertise, acquire market share and build their businesses from public contracts. We therefore suggest that the threshold be raised to 150 percent of the applicable NAICS code size standard. While still relatively small by comparison to major area construction companies, this will permit minority and woman businesses to more effectively compete for larger and more complex subcontracts and prime contracts, as well as to make inroads into the market for privately financed projects.

We further recommend that the period over which gross receipts will be averaged be lengthened to seven years from the current five-year period. This will more accurately reflect the market strength of the certified firm over time.

275. "Gross receipts" is defined in 13 C.F.R. § 121.104 as "all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances."

b. Revise the Personal Net Worth Standard for Program Eligibility

The personal net worth limit likewise functions as a ceiling on the growth and success of certified firms. While also required by the courts, the current test does not reflect the actual cash flow needs of construction firms. Interviewees reported that the need for liquidity, especially given the slow pay by the City and other government agencies upon which M/WBEs are disproportionately reliant, means that illiquid assets are of diminished value for purposes of managing the cash flow, surety bonding requirements, and the growth needs of construction firms in this market. We therefore suggest that the City exclude the individual's ownership interest in an applicant, or other business that is not publicly held, the individual's equity in any real estate and any related fixtures or furnishings and the value of the individual's interest in any pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs.

c. Revise the Employee Location Requirement for Program Eligibility

Since the inception of the ordinance, not only must the applicant firm be located in the six-County Chicago region, but also that the majority of its full-time work force must live in the region. Chicago's program may be unique in the nation by imposing this extra requirement. In our view, this is an unnecessary limitation on the pool of available firms (which was not applied in determining the availability estimates in Chapter VI, since there are no datasets to link up firms with the homes of their employers). The legal standard is whether the firm operates in the agency's market, not whether the firm's employees reside there. The residence of a firm's employees has no relationship to whether the firm faces discriminatory barriers on the basis of the race or gender of its owner and this limitation should be dropped.

d. Address Certification and Recertification Delays

Several certified firms reported that the processing time for initial applications and even recertification applications was very long. We suggest that the City review this process for timeliness, and work towards eliminating any roadblocks. While program integrity is of paramount value, legitimate firms can be discouraged by reports of long wait times. Prime contractors who might otherwise use new subcontractors may demur because of concerns that a firm will not be certified or remain certified by the time of bid or proposal submission.

Another revision that would reduce the impact of delays on recertification would be to eliminate the expiration of certification status, as is the case in

the DBE program, so that eligibility must be affirmatively removed. The use of “extension letters” has been problematic and resulted in confusion for both certified firms and prime bidders. Annual “No Change” affidavits and other materials requested by the City would still be required, but the firm would remain certified until its recertification application is denied. This shifts the risk of City delays away from the applicant and any prime bidder seeking to commit to use that recertification applicant onto the City.

4. Clarify, Revise and Publicize the Requirements for Good Faith Effort to Meet Contract Goals

Numerous prime contractors reported that it is very difficult to establish their Good Faith Efforts (“GFEs”) to meet a contract goal. Many will not bid a project unless they are certain they will meet the goals. To address this possible diminution of competition and provide the flexibility that is required by strict constitutional scrutiny, we recommend that the City review the policies and documents for submitting and evaluating GFEs and then provide targeted training to bidders and agency staff on how to submit acceptable GFEs.

This should include how to substitute a non-performing firm during contract performance. Currently, it appears the City’s focus is on contract close out. It must be clear to contractors and City staff that evaluation of GFEs is not to be left until contract closeout but remains a continuing prime contractor obligation throughout contract performance. Not only does waiting slow down the process of closing out projects, but it also changes prime contractors’ assessment of the risk of using a smaller or less experienced certified firm. If there is no decision at the time a substitution is needed, prudent firms will not take the unnecessary risk of not making the goal by taking a chance on someone new and ending up being assessed liquidated damages. Contractors that do not meet the goal must be able to demonstrate at the time the deficiency occurs that they made GFEs, not wait for the vagaries and delays of a post award review.

Further, to assist firms that have grown beyond the size or personal net worth limits of the program but who still face discriminatory barriers because they remain owned by socially disadvantaged individuals, we suggest that a prime bidder’s utilization of such firms be counted towards evidence of its GFEs to meet a contract goal. While these dollars would not be credited towards meeting the goal, the use of non-certified M/WBEs would demonstrate non-discrimination.

5. Ensure Contract Monitoring

Many M/WBEs reported that while the City does a good job of outreach, they often felt that little attention was paid to contract compliance during performance. This is a resource issue. More staff to conduct actual field audits, and/or insisting that project managers from the user departments conduct commercially useful function and prompt payment reviews, would alleviate concerns about whether contractors are meeting their obligations after contracts have been awarded.

6. Revise, Streamline and Develop Success Metrics for Procurement Bid Incentives

The City currently has several bid incentives for prime contractors. These include preferential consideration in the bidding process by reducing their bidding price; providing extra credit towards their goals when meeting specific criteria for utilization of M/WBEs; and awarding a credit against the contract's base bid on contracts for which there is no M/WBE goal but M/WBEs will still be utilized. There appears to have been no evaluation of the success of these measures in creating opportunities for M/WBEs. Further, most contractors we interviewed were unaware of them, so an information campaign seems warranted. We suggest that the City begin to keep records of how many contracts were subject to which incentives; the dollars paid to M/WBEs on contracts with incentives; the effect on prices of these incentives; and the contracting community's overall satisfaction with these approaches.

7. Implement a Technical Assistance, Capital Access and Guaranteed Surety Bonding Program for M/WBEs

While there are many training opportunities available through the City and assist agencies, M/WBE and non-M/WBE interview participants, suggested that the City develop a robust technical assistance, capital access and bonding support program.

A program might include:

- Consultative and technical assistance, including one-on-one coaching.
- Contractor assessments.
- Referrals to qualified partner resources, including surety brokers, insurance brokers, lenders, certified public accountants and construction attorneys.

- Educational opportunities for contractors (bonding, QuickBooks© and other systems training, estimating, marketing, etc.).
- Surety partner commitments.
- Pre-claims resolution.

Business owners and stakeholder group representatives reported that the Illinois Tollway has implemented a program along these lines and that M/WBEs found it to be helpful. Perhaps the City can partner with the Tollway to increase the availability of these services and the pool of firms that can participate or expand its own programs. Relationships with other government agencies should also be explored.

8. Revise the Mentor-Protégé Program

The City's current Mentor-Protégé program is project-based rather than focused on building long term relationships. Several M/WBEs stated that this one-off approach was not as helpful to their long-term success as having a more senior firm that is committed to work with them on expanding their capabilities. We therefore suggest the program be revised to establish the elements of a relationship-based approach rather than a project-based approach.

An excellent national model is provided in the DBE program regulations at 49 C.F.R. § 26.35 and the Guidelines of Appendix D to Part 26. In addition to the standards provided in Part 26, the General Counsel's Office at the USDOT has provided some additional guidance²⁷⁶, and the USDOT's Office of Small Disadvantaged Business Utilization has adopted a pilot program²⁷⁷ and has drafted sample documents.²⁷⁸

The following elements reflect best practices:

- A description of the qualifications of the mentor, including the firm's number of years of experience as a construction contractor or consultant; the agreement to devote a specified number of hours per month to working with the protégé; and the qualifications of the lead individual responsible for implementing the development plan.
- A description of the qualifications of the protégé, including the firm's number of years of experience as a construction contractor or consultant;

276. <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>.

277. <https://www.transportation.gov/osdbu/procurement-assistance/mentor-protege-pilot-program>.

278. <https://www.transportation.gov/small-business/procurement-assistance/mentor-protege-program-sample-agreement-1>.

the agreement to devote a specified number of hours per month to working with the mentor; and the qualifications of the M/WBE owner(s).

- An agency-approved written development plan, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement, a schedule for meetings and development of action plans, and the services and resources to be provided by the mentor to the protégé. The assistance provided by the mentor must be detailed and directly relevant to agency projects. The development targets should be quantifiable and verifiable— such as increased bonding capacity, increased sales, increased areas of work specialty or prequalification, etc.— and reflect objectives that increase the protégé’s capacities and expand its business areas and expertise.
- A long term and specific commitment between the parties, *e.g.*, 12 to 36 months.
- The use of any equipment or equipment rental must be detailed in the plan, and should be further covered by bills of sale, lease agreements, etc., and require prior written approval by the agency.
- Any financial assistance by the mentor to the protégé must be subject to prior written approval by the agency and must not permit the mentor to assume control of the protégé.
- A fee schedule to cover the direct and indirect cost for services provided by the mentor for specific training and assistance to the protégé.
- The development plan must contain a provision that it may be terminated by mutual consent or by the agency if the protégé no longer meets the eligibility standards for M/WBE certification; either party desires to be removed from the relationship; either party has failed or is unable to meet its obligations under the plan; the protégé is not progressing or is not likely to progress in accordance with the plan; the protégé has reached a satisfactory level of self-sufficiency to compete without resorting to the plan; or the plan or its provisions are contrary to legal requirements.
- Submission of quarterly reports by the parties indicating their progress toward each of the plan's goals.
- Regular review by the agency of compliance with the plan and progress towards meeting its objectives. Failure to adhere to the terms of the plan or to make satisfactory progress would be grounds for termination from the program.

This level of direction and oversight may require additional City resources. Close monitoring of the program will be critical, but other entities have reported success with such an approved approach.²⁷⁹

C. Develop Performance Measures for Program Success

The City should develop performance measures to evaluate the effectiveness and the overall success of the programs in reducing the systemic barriers identified by the study. In addition to meeting the MBE and WBE goals, possible benchmarks include:

- Increased number of firms becoming certified.
- Increased prime contract bidding by certified firms.
- Increased prime contract awards to certified firms.
- Increased subcontracting by certified firms in industries where their activity levels have been lower.
- Increased “capacity” of certified firms as measured by the ability to perform more varied and specialized work, increased bonding limits, size of jobs, profitability, or other factors.
- Progress towards achievement of the annual aspirational MBE and WBE goals.
- The number of bids and the dollar amount of the awards and the goal shortfall where the bidder submitted good faith efforts to meet the contract goal and the outcomes of such submissions.
- The number, type, and dollar amount of substitutions of certified firms during contract performance.

Annual evaluation of the results of contracts with no goals where there is ample M/WBE availability.

279. See <https://www.illinoistollway.com/documents/20184/87215/DBE+Partnering+for+Growth+GUIDELINES+09-2016.pdf/5b8eed8c-8d47-4ec5-bcad-7300a38c76b6> (Illinois State Toll Highway Authority); <https://new.mta.info/doing-business-with-us/small-business-programs> (New York Metropolitan Transit Authority); <https://www.modot.org/sites/default/files/documents/ecr/ecr/documents/modotmentorprotegeprogram-finalrevision-06-17-2014.pdf> (Missouri Department of Transportation).

APPENDIX A:

FURTHER EXPLANATION OF THE MULTIPLE REGRESSION ANALYSIS

As explained in the report, multiple regression statistical techniques seek to explore the relationship between a set of independent variables and a dependent variable. The following equation is a way to visualize this relationship:

$$DV = f(D, I, O)$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu$$

where C is the constant term; β_1 , β_2 and β_3 are coefficients, and μ is the random error term.

The statistical technique seeks to estimate the values of the constant term and the coefficients.

In order to complete the estimation, the set of independent variables must be operationalized. For demographic variables, the estimation used race, gender and age. For industry and occupation variables, the relevant industry and occupation were utilized. For the other variables, age and education were used.

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. Since this report examined the City of Chicago, the analysis was limited to data from the six counties in the Chicago Metropolitan Area (Cook; DuPage; Lake; Kane; Will; and McHenry). The coefficient for the new variable showed the impact of being a member of that race or gender in the county metropolitan area.

APPENDIX B:

FURTHER EXPLANATION OF THE PROBIT REGRESSION ANALYSIS

Probit regression is a special type of regression analysis often used in statistical analysis when results are largely binary rather than varying in degrees along a scale. Probit regression analysis is used to explore the determinants of business formation because the question of business formation is a “yes” or “no” question: the individual does or does not form a business. Hence, the dependent variable (business formation) is a dichotomous one with a value of “one” or “zero”. This differs from the question of the impact of race and gender of wages, for instance, because wage is a continuous variable and can have any non-negative value. Since business formation is a “yes/no” issue, the fundamental issue is: how do the dependent variables (race, gender, etc.) impact the probability that a particular group forms a business? Does the race or gender of a person raise or lower the probability he or she will form a business and by what degree does this probability change? The standard regression model does not examine probabilities; it examines if the level of a variable (*e.g.*, the wage) rises or falls because of race or gender and the magnitude of this change.

The basic probit regression model looks identical to the basic standard regression model:

$$DV = f(D, I, O)$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry and occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu$$

where C is the constant term; β_1 , β_2 , and β_3 are coefficients, and μ is the random error term.

As discussed above, the dependent variable in the standard regression model is continuous and can take on many values while in the probit model, the dependent variable is dichotomous and can take on only two values: zero or one. The two models also differ in the interpretation of the independent vari-

ables' coefficients, in the standard model, the interpretation is fairly straightforward: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.²⁸⁰ However, in the probit model, because the model is examining changes in probabilities, the initial coefficients cannot be interpreted this way. One additional computation step of the initial coefficient must be undertaken in order to yield a result that indicates how the change in the independent variable affects the probability of an event (*e.g.*, business formation) occurring. For instance, with the question of the impact of gender on business formation, if the independent variable was WOMAN (with a value of 0 if the individual was male and 1 if the individual was female) and the additional computation chance of the coefficient of WOMAN yielded a value of -0.12, we would interpret this to mean that women have a 12 percent lower probability of forming a business compared to men.

280. The exact interpretation depends upon the functional form of the model.

APPENDIX C:

SIGNIFICANCE LEVELS

Many tables in this Report contain asterisks indicating that a number has statistical significance at 0.001, 0.01, or 0.05 levels (sometimes, this is presented as 99.9 percent; 99 percent and 95 percent, respectively) and the body of the report repeats these descriptions. While the use of the term seems important, it is not self-evident what the term means. This Appendix provides a general explanation of significance levels.

This Report seeks to address the question of whether or not non-Whites and White women received disparate treatment in the economy relative to White males. From a statistical viewpoint, this primary question has two sub-questions:

- What is the relationship between the independent variable and the dependent variable?
- What is the probability that the relationship between the independent variable and the dependent variable is equal to zero?

For example, an important question facing the City of Chicago as it explores whether each racial and ethnic group and White women continue to experience discrimination in its markets is do non-Whites and White women receive lower wages than White men? As discussed in Appendix A, one way to uncover the relationship between the dependent variable (*e.g.*, wages) and the independent variable (*e.g.*, non-Whites) is through multiple regression analysis. An example helps to explain this concept.

Let us say, for example, that this analysis determines that non-Whites receive wages that are 35 percent less than White men after controlling for other factors, such as education and industry, which might account for the differences in wages. However, this finding is only an estimate of the relationship between the independent variable (*e.g.*, non-Whites) and the dependent variable (*e.g.*, wages) – the first sub-question. It is still important to determine how accurate the estimation is. In other words, what is the probability that the estimated relationship is equal to zero – the second sub-question.

To resolve the second sub-question, statistical hypothesis tests are utilized. Hypothesis testing assumes that there is no relationship between belonging to a particular demographic group and the level of economic utilization relative to White men (*e.g.*, non-Whites earn identical wages compared to White men

or non-Whites earn 0 percent less than White men). This sometimes is called the null hypothesis. We then calculate a confidence interval to find the probability that the observed relationship (*e.g.*, -35 percent) is between 0 and minus that confidence interval.²⁸¹ The confidence interval will vary depending upon the level of confidence (statistical significance) we wish to have in our conclusion. When a number is statistically significant at the 0.001 level, this indicates that we can be 99.9 percent certain that the number in question (in this example, -35 percent) lies outside of the confidence interval. When a number is statistically significant at the 0.01 level, this indicates that we can be 99.0 percent certain that the number in question lies outside of the confidence interval. When a number is statistically significant at the 0.05 level, this indicates that we can be 95.0 percent certain that the number in question lies outside of the confidence interval.

281. Because 0 can only be greater than -35 percent, we only speak of “minus the confidence level”. This is a one-tailed hypothesis test. If, in another example, the observed relationship could be above or below the hypothesized value, then we would say “plus or minus the confidence level” and this would be a two-tailed test.

APPENDIX D:

UNWEIGHTED AND WEIGHTED AVAILABILITY

Central to the analysis, under strict constitutional scrutiny, of an agency's contracting activity is understanding what firms could have received contracts. Availability has two components: unweighted availability and weighted availability. Below we define these two terms; why we make the distinction; and how to convert unweighted availability into weighted availability.

Defining Unweighted and Weighted Availability

Unweighted availability measures a group's share of all firms that could receive a contract or subcontract. If 100 firms could receive a contract and 15 of these firms are minority-owned, then MBE unweighted availability is 15 percent (15/100). *Weighted availability* converts the unweighted availability through the use of a weighting factor: the share of total agency spending in a particular NAICS code. If total agency spending is \$1,000,000 and NAICS Code AAAAAA captures \$100,000 of the total spending, then the weighting factor for NAICS code AAAAAA is 10 percent ($\$100,000/\$1,000,000$).

Why Weight the Unweighted Availability

It is important to understand *why* weighted availability should be calculated. A disparity study examines the overall contracting activity of an agency by looking at the firms that *received* contracts and the firms that *could have received* contracts. A proper analysis does not allow activity in a NAICS code that is not important an agency's overall spending behavior to have a disproportionate impact on the analysis. In other words, the availability of a certain group in a specific NAICS code in which the agency spends few of its dollars should have less importance to the analysis than the availability of a certain group in another NAICS code where the agency spends a large share of its dollars.

To account for these differences, the availability in each NAICS code is weighted by the agency's spending in the code. The calculation of the weighted availability compares the firms that received contracts (utilization) and the firms that could receive contracts (availability). Utilization is a group's share of total spending by an agency; this metric is measure in dollars, *i.e.*,

MBEs received 8 percent of all dollars spent by the agency. Since utilization is measured in dollars, availability must be measured in dollars to permit an “apples-to-apples” comparison.

How to Calculate the Weighted Availability

Three steps are involved in converting unweighted availability into weighted availability:

- Determine the unweighted availability
- Determine the weights for each NAICS code
- Apply the weights to the unweighted availability to calculate weighted availability

The following is a hypothetical calculation.

Table A contains data on unweighted availability measured by the number of firms:

Table A

| NAICS | Black | Hispanic | Asian | Native American | White Women | Non-M/W/DBE | Total |
|--------------|-----------|-----------|-----------|-----------------|-------------|-------------|-------------|
| AAAAAA | 10 | 20 | 20 | 5 | 15 | 400 | 470 |
| BBBBBB | 20 | 15 | 15 | 4 | 16 | 410 | 480 |
| CCCCCC | 10 | 10 | 18 | 3 | 17 | 420 | 478 |
| TOTAL | 40 | 45 | 53 | 12 | 48 | 1230 | 1428 |

Unweighted availability measured as the share of firms requires us to divide the number of firms in each group by the total number of firms (the last column in Table A). For example, the Black share of total firms in NAICS code AAAAAA is 2.1 percent (10/470). Table B presents the unweighted availability measure as a group’s share of all firms.

Table B

| NAICS | Black | Hispanic | Asian | Native American | White Women | Non-M/W/DBE | Total |
|--------|-------|----------|-------|-----------------|-------------|-------------|--------|
| AAAAAA | 2.1% | 4.3% | 4.3% | 1.1% | 3.2% | 85.1% | 100.0% |

| NAICS | Black | Hispanic | Asian | Native American | White Women | Non-M/W/DBE | Total |
|--------------|-------------|-------------|-------------|-----------------|-------------|--------------|---------------|
| BBBBBB | 4.2% | 3.1% | 3.1% | 0.8% | 3.3% | 85.4% | 100.0% |
| CCCCC | 2.1% | 2.1% | 3.8% | 0.6% | 3.6% | 87.9% | 100.0% |
| TOTAL | 2.8% | 3.2% | 3.7% | 0.8% | 3.4% | 86.1% | 100.0% |

Table C presents data on the agency’s spending in each NAICS code:

Table C

| NAICS | Total Dollars | Share |
|--------------|-------------------|---------------|
| AAAAAA | \$1,000.00 | 22.2% |
| BBBBBB | \$1,500.00 | 33.3% |
| CCCCC | \$2,000.00 | 44.4% |
| TOTAL | \$4,500.00 | 100.0% |

Each NAICS code’s share of total agency spending (the last column in Table C) is the weight from each NAICS code that will be used in calculating the weighted availability. To calculate the overall weighted availability for each group, we first derive every NAICS code component of a group’s overall weighted availability. This is done by multiplying the NAICS code weight by the particular group’s unweighted availability in that NAICS code. For instance, to determine NAICS code AAAAAA’s component of the overall Black weighted availability, we would multiply 22.2 percent (the NAICS code weight) by 2.1 percent (the Black unweighted availability in NAICS code AAAAAA). The resulting number is 0.005 and this number is found in Table D under the cell which presents NAICS code AAAAAA’s share of the Black weighted availability. The procedure is repeated for each group in each NAICS code. The calculation is completed by adding up each NAICS component for a particular group to calculate that group’s overall weighted availability. Table D presents this information:

Table D

| NAICS | Black | Hispanic | Asian | Native American | White Women | Non-M/W/DBE |
|--------------|--------------|--------------|--------------|-----------------|--------------|--------------|
| AAAAAA | 0.005 | 0.009 | 0.009 | 0.002 | 0.007 | 0.189 |
| BBBBBB | 0.014 | 0.010 | 0.010 | 0.003 | 0.011 | 0.285 |
| CCCCCC | 0.009 | 0.009 | 0.017 | 0.003 | 0.016 | 0.391 |
| TOTAL | 0.028 | 0.029 | 0.037 | 0.008 | 0.034 | 0.864 |

To determine the overall *weighted availability*, the last row of Table D is converted into a percentage (*e.g.*, for the Black weighted availability: $0.028 * 100 = 2.8$ percent). Table E presents these results.

Table E

| Black | Hispanic | Asian | Native American | White Women | Non-MWBE | Total |
|-------|----------|-------|-----------------|-------------|----------|--------|
| 2.8% | 2.9% | 3.7% | 0.8% | 3.4% | 86.4% | 100.0% |

APPENDIX E:

QUALITATIVE EVIDENCE FROM CHICAGO AREA DISPARITY STUDIES

In addition to the anecdotal data collected for the City of Chicago and provided in Chapter IV of this Report, Colette Holt & Associates has conducted several studies in Illinois that shed light on the experiences of minority- and woman-owned firms in the Chicago area marketplace. As with this report for the City of Chicago, we interviewed minority- and woman-owners and non-M/WBE representatives about barriers to the full and fair participation of all firms in the agency's market area. The total number of participants for these interviews was 570 individuals.

This summary of anecdotal reports provides an overview of the following disparity studies:²⁸²

- Illinois State Toll Highway Authority (“Tollway”)
- State of Illinois Department of Central Management (“CMS”)
- Regional Transportation Authority (“RTA”)
- Chicago Transit Authority (“CTA”)
- Cook County (“Cook”)
- Northeast Illinois Regional Commuter Railroad Corporation doing business as Metra (“Metra”)
- Metropolitan Water Reclamation District of Greater Chicago (“MWRD”)

282. Copies of these studies can be accessed by clicking the study name above or at the following links: Tollway <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Illinois-State-Toll-Highway-Authority-Disparity-Study.pdf>; CMS <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-State-of-Illinois-Department-of-Central-Management-Services-Disparity-Study.pdf>; RTA <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-RTA-Availability-Study.pdf>; CTA <http://www.mwbelaw.com/wp-content/uploads/2019/12/Chicago-Transit-Authority-Disparity-Study-2019.pdf>; Cook <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-Cook-County-Illinois-Disparity-Study.pdf>; Metra <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-Metra-Availability-Study.pdf>; MWRD <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-The-Metropolitan-Water-District-of-Greater-Chicago-Disparity-Study.pdf>; and Pace <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Pace-Chicago-Suburban-Bus-Disparity-Study.pdf>

- Pace Suburban Bus (“Pace”)

1. Discriminatory Attitudes and Negative Perceptions of Competency and Professionalism

Many minority and woman owners reported being stigmatized by their race and/or gender. Subtle and overt stereotyping and race and gender discrimination were commonplace. Respondents reported that White men often evince negative attitudes concerning their competency, skill, and professionalism.

Biases about the capabilities of minority and woman business owners impact all aspects of their attempts to obtain contracts and to ensure they are treated equally in performing contract work. The often prevailing viewpoint is that M/WBEs and smaller firms are less qualified and less capable.

They try to put a stigma on us.... It’s like a stigma that they have to use us because there’s participation requirements and they make us sound like we’re not good at what we do. And there are some really good MBE, WBEs out there. (Cook, page 129)

There’s still the perception that if you’re a minority or a woman, you can’t perform.... That there’s something wrong with you, you know, there’s something lacking.... They stick with the good old boys. (Tollway, page 111)

I contacted a man in the beginning one time and asked him about doing kind of a joint deal.... And he informed me he would rather not bid a job than have to work with DBE[s]. (CMS, page 125)

[What] we learned a long time ago was the MBE or the WBE or the DBE [certifications], they can help you or hurt you. We changed our marketing materials years ago and put that in the back end because what are we first and foremost? We are an engineering solution providers for the clients, and if this project happens to have goals, we can help you fulfill that as well, it’s a win-win.... There is always this preconceived notion that [because] you are an M[BE] you can’t be that competent. (RTA, page 119)

Small, minority, women, disadvantaged businesses are perceived to not always have all the qualifications, regardless of how long they’ve been in business. Sometimes, even in just the way primes deal with you, they assume a certain amount of incompetence, even though they’ve been working with you for a while. (CMS, page 123)

The other message that I got [at an outreach meeting for Illinois Tollway projects] was that this was a sacrifice on the part of the primes, that they needed to be thanked for coming on board in that way. I found it very offensive. (RTA, page 121)

[General contractors] do not rely on our expertise. They think we're just fronts or that we don't know our businesses and they don't trust us or that we know what we're doing. In the beginning, I know people don't believe at all that I knew what I was doing. (MWRD, page 132)

They think that because you're a minority or a woman business that you don't have your act together. (Pace, page 118)

[State personnel] look down on us as some kind of beggars for percentages. (CMS, page 124)

When we are 60, 70 people still people ask, what capacity [do you have]? We could do as good as any bigger firm in the city, but they will still ask the same question. Even the state departments will ask the same question. (CMS, page 125)

My other big burr in my saddle is always about capacity. We're just like they are. I mean if we get a big job, we can hire people just like they can. Because you want to know why? The engineers all want to go to whoever's got the big fancy job. They're technical people. They want the juicy projects.... It's not difficult to build capacity. If you can continue to win big recognizable projects. (Tollway, page 112)

Many women reported unfair treatment or sexual harassment in the business world.

Let's just be honest. I'm a woman who's in construction so that just equals bullseye.... Other contractors who come in behind you and they call you [trade] chicks. Or they tell you, what has the world come to because you're [trade] chicks.... Men come out and they complain that a woman is running the crew.... Even the men I hire, I'm giving you a paycheck, struggle with taking orders from a woman.... Someone comes to the job and they go to one of the guys [I employ] and they say, are you the lead here? (CMS, page 125)

I have on several occasions been offered jobs in exchange for sex. I've had guys order several drinks my way to try to get me drunk at a networking event. They pull me to the side because we've talked on other occasions about a specific job, and they'll

say this job is coming up and they'll name one of my competitors. He's doing this and he's doing that and blah, blah, blah. A few drinks in, they want, okay, "what are you going to do" sort of thing. It's happened quite a bit. (CTA, page 59)

They call you sweetheart. Sweetheart, honey, just inappropriate comments. (Pace, page 119)

There is an old boys' network that is misogynistic. Let's just be honest with it.... You're a woman, you can't possibly do that. That's a ridiculous notion anymore, at least in my perspective. But I can tell you of all of the W[BE]s that I know, they have that problem working in a male-dominated situation where unless, and I hate to say it in these terms, unless you're related or have some inside track, you're not going to get selected unless they absolutely have to use you for something.... There's a lot more women entering the [engineering] field. But that's going to take a while and overcoming that prejudice [won't be easy]. (Cook, page 131)

In negotiations, people think that women aren't savvy businesspeople and that I'll just do this for nothing. (CMS, page 125)

It's a common occurrence for people [both general contractors and agency personnel] to assume that I'm an administrative person rather than the president.... They'll even go to the point of quizzing me about rudimentary questions about [trade]. (Pace, page 119)

My biggest problem is I can't walk in a room, or any women, I'm somebody's wife. I mean my husband has never worked for me in my whole life. He's a carpenter.... I've sat on executive boards and I've never been addressed as an [specialty trade] contractor on an executive board without oh, she's so-and-so's wife or other [specialty trade] contractor's wives, where they've sat back and said, do you know my wife? They don't want nothing to do with me. (Tollway, page 111)

I always feel that I have to do more than everyone else, maybe because I'm a woman. We have that thing that we always have to walk the extra mile, that 100 mile smarter than everyone else. (CTA, page 57)

2. Access to Formal and Informal Business and Professional Networks

Both minority and women respondents reported difficulty in accessing networks and fostering relationships necessary for professional success and viability. This difficulty extended to agency staff. Respondents were unable to gain access to and communicate with key agency decisionmakers.

The support system that small White businesses have in the United States is far greater than the support system that a Puerto Rican business has, or an African-American business has.... And not just networks as in who you know. Networks to money, the ease of cash flow.... The networks and gaining access to those is really the fundamental difference that I see [between M/WBEs and small White-male owned firms] (Cook, page 132)

[Construction] is still a relationship business. It's establishing relationship with your client and with who you're going to do business with. What I struggle with is that I can't have the same relationship with my client, who are primarily men, as men can have with them.... They're going to give projects to people that they like, people that they know, people that they have a solid relationship with. And that's a struggle that I have as a woman is that I can't establish the same relationship. It's not a good scene for me to be out in a bar until two in the morning with my male clients. (Tollway, page 110)

[The CTA should hire DBEs to] do staff augmentation that allows us to get to know some of the people without having to work through a prime that doesn't really want you to get to know who they know. (CTA, page 64)

3. Obtaining Work on an Equal Basis

Respondents reported that institutional and discriminatory barriers continue to exist in the Chicago area marketplace. They were in almost unanimous agreement that contract goals remain necessary to level the playing field and equalize opportunities. Race- and gender-neutral approaches alone are viewed as inadequate and unlikely to ensure a level playing field.

I remember when the Tollway had no goals, and it was absolutely abysmal. There was never a minority or a female that worked on a Tollway job, ever. And we would tell them, DOT has goals. They find women and minorities to do work. It's the

same type of work that the Tollway and the DOT does. And it wasn't until the Tollway started to have some goals that we started, we all started to get work on Tollway projects. (Tollway, page 113)

There's been jobs where as soon as the goal's met, then they just call up whoever they normally call... we do get more work when there is a goal involved. (Tollway, page 114)

The minute there's not a goal, those primes walk away, and they go back to the old boys' network. (Pace, page 121)

It may not be intentional, but there is still a prevalent feeling I feel in the industry, particularly engineering, that we've got to use them because we got to, if we don't use them, we're not going to get the job. (CMS, page 123)

I don't think that [a totally race- and gender-neutral program would] be good enough.... Everybody's got somebody that knows somebody that has a cousin that owns a small business that will do work. So, if you don't force it, it won't happen. (RTA, page 120).

If there isn't a program somewhere, there is no incentive for anybody to use me. And the fact that there are minority- and women- and veteran-owned options, that is the only reason I'm even going to get the experience to be able to become the prime.... In the engineering world, the larger firms are just getting larger, so it's very hard to just even have entry. (MWRD, page 134)

If there's no goal and unless you have a very specific specialty, nobody's going to call you. I mean, this is consistent for me in many states. (CTA, page 62)

In the past two years, Metra has eliminated the DBE goals on [certain entire categories of] purchases. So, we used to be subcontractor on those contracts and once they eliminated those goals there was no prime that wanted to partner with us.... The [DBE contract] goal was reduced to zero. And so, we were really disappointed and inquired why that happened and were never able to get a response. (Metra, page 124)

It always goes back to relationships.... We're all in the trust business. (MWRD, page 134)

Where there have been goals and I've been on teams and they took away goals for whatever reason, I was denied the opportunity. Flat out. Taken off the team. (Cook, page 133)

I lost my certification, and I was not able to do any business. I got no opportunities. (CTA, page 62)

Prime contracts were especially difficult to obtain on an equal basis.

Perception is a huge issue. There's a constant perception that if you have the certification, how could you be prime? Why should you be prime? Why are you prime, you're disadvantaged? (CTA, page 59)

If you have an MBE, WBE status it somehow implies non-prime. (Cook, page 131)

The assumption [was] that all of these White male guys in gray suits were the primes, and the DBEs weren't at the event and were some kind of outsiders. (RTA, page 121).

The general contractors are the only ones that get to the size of graduation and they generally go out of business once they graduate. Our subcontractors don't ever get to that size because of the fact that they don't have private work to grow off of. They only have this MBE, WBE work. (Cook, page 133)

The [DBE program] forces the primes to throw a broad net and bring in capable partners to participate. And that's how ultimately you get the exposure and with the exposure you get the credibility so that as a minority or small business you can prime yourself. (Metra, page 124)

We have graduated from the DBE program before and we reentered it. And the year that we graduated, the following year our revenues dropped by about 30 to 40 percent.... As a DBE firm or MBE firm, it is our responsibility to look down the road and to prepare ourselves for graduation... If we had more prime relationships with the clients, we probably would have been more sustainable. (Tollway, page 114)

Because you don't have that one person who has 15 years or some sort of CTA experience, they move on to somebody else, which some of the work that we do doesn't necessarily require.... We do it for all the other agencies in the city and the state or whatever, but then we're kind of bounced out of there because we don't have that CTA experience.... When they come

out with smaller RFQs that seemingly would be a perfect entre for smaller businesses, there may be 500, half million-dollar contracts, million-dollar contracts, which many of the companies in here are more than capable of doing, it still goes to the largest large firm in the area. It's almost like, "We want you to come after these contracts", but then at the end of the day, do they really? (CTA, page 64)

Many respondents indicated that even M/WBEs who had access to large public contracts through M/WBE programs found it difficult to obtain private sector opportunities.

We do not get [private sector opportunities] and we've been in business quite some time. We have really good relationships with all these contractors, but we've actually even down with a few of them and talked about doing private work. They were in shock like, "I didn't realize you'd want to do private work". Why wouldn't I want to? (CTA, page 62)