

# State of Illinois Goods and Services Disparity Study

2022



State of Illinois  
Commission on Equity  
and Inclusion

**CH** COLETTE  
HOLT  
& ASSOCIATES



# STATE OF ILLINOIS GOODS AND SERVICES DISPARITY STUDY

## 2022

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## About the Study Team

**Colette Holt & Associates** (“CHA”), is a national law and consulting firm specializing in issues related to Minority, Women and Disadvantaged Business Enterprise programs, business diversity initiatives, and affirmative action issues. The firm has conducted court-approved disparity studies and designed court-approved programs for over 30 years, including for numerous governments. CHA also provides training, monitoring and investigative services across the country to agencies and businesses. CHA is led by Colette Holt, J.D., the founding principal of Colette Holt & Associates and a nationally recognized attorney and expert. Ms. Holt is also a frequent expert witness, and a media author, on these issues. 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., Project Administrator; Glenn Sullivan, B.S., Director of Technology; Victoria Farrell, MBA, Director Qualitative Data Collection; and Joanne Lubart, J.D., Associate Counsel.

**Synergetic Solutions, Inc.** (“SSI”) is a minority- and woman-owned business founded in 2013 by President and Project Manager Melissa Hamilton. Strategic Solutions has a proven track record in working with government agencies, engaging in community outreach, and understanding the needs and challenges of business owners. SSI is experienced in providing certification assistance for the Illinois Disadvantaged Business Enterprise Program.

**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.

**L. Binder, Inc.**, founded by LaTasha Binder in 2014, is a full-service marketing research firm. Ms. Binder has partnered with several organizations for strategic projects, program management, and technical assistance services, such as the Small Business Development Centers, State of Illinois Department of Central Management Services, the City of Chicago, the Women Business Development Center, the Chicago Urban League, National Association of Minority Contractors and more.

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# Table of Contents

<b>I. Executive Summary</b> .....	<b>1</b>
A. Summary of Strict Constitutional Standards Applicable to the State of Illinois’ Business Enterprise Program .....	1
B. The State of Illinois’ Business Enterprise Program .....	3
1. Business Enterprise Program Administration .....	3
2. M/WBE Program Eligibility .....	4
3. Race- and Gender-Neutral Measures .....	4
4. Race- and Gender-Conscious Business Enterprise Program Elements .....	5
a. Business Enterprise Program Goals .....	5
b. Counting Participation Towards Contract Goals .....	5
c. Review of Business Enterprise Program Compliance .....	5
d. Contract Monitoring and Enforcement .....	6
e. Advance and Progress Payments .....	6
f. Sheltered Markets .....	6
g. Mentor-Protégé Program .....	7
5. Business Owners’ Experiences with the State’s Business Enterprise Program .....	7
a. Business Owner Interviews .....	7
b. Electronic Survey Comments .....	8
C. Utilization, Availability and Disparity Analyses of the State of Illinois’ Goods and Services Contracts .....	8
D. Analysis of Economy-Wide Disparities in the State of Illinois’ Marketplace .....	14
E. Qualitative Evidence of Race and Gender Barriers in the State of Illinois’ Market .....	15
1. Business Owner Interviews .....	16
2. Electronic Business Owner Survey .....	16
F. Recommendations for Enhancements to the State of Illinois’ Business Enterprise Program .....	17
1. Augment Race- and Gender-Neutral Measures .....	18
a. Pay Promptly and Ensure Prime Vendors Promptly Pay Subcontractors .....	18
b. Develop Virtual Training Tools for State Staff and Vendors .....	18
c. Conduct Increased Outreach .....	19
d. Increase Prime Contract Opportunities .....	19
2. Continue to Implement Narrowly Tailored Race- and Gender- Conscious Measures .....	20
a. Use the Detailed Study Availability Data to Set BEP Contract Goals .....	20
b. Adopt Narrowly Tailored Program Eligibility Standards and Processes .....	21
i. Revise the Business Size Standard for Program Eligibility .....	21
ii. Adopt a Personal Net Worth Standard for Program Eligibility .....	21
c. Ensure Complete and Timely Contract Monitoring .....	22
3. Develop Performance Measures for Program Success .....	22

<b>II. Legal Standards for Local Government Contracting Affirmative Action Programs</b>	<b>23</b>
A. Summary of Constitutional Equal Protection Standards	23
B. Elements of Strict Scrutiny	26
C. Establishing a “Strong Basis in Evidence” for the State of Illinois’ Business Enterprise Program	31
1. Define the State of Illinois’ Market Area	32
2. Determine the State of Illinois’ Utilization of M/WBEs	33
3. Determine the Availability of M/WBEs in the State of Illinois’ Market Area	33
4. Examine Disparities between the State of Illinois’ Utilization of M/WBEs and M/WBE Availability	39
5. Analyze Economy-Wide Evidence of Race- and Gender-Based Disparities in the Illinois Market	41
6. Evaluate Anecdotal Evidence of Race- and Gender-Based Barriers to Equal Opportunities in the Illinois Market	43
D. Narrowly Tailoring a Minority- and Woman-Owned Business Enterprise Program for the State of Illinois	44
1. Consider Race- and Gender-Neutral Remedies	45
2. Set Targeted M/WBE Goals	46
3. Ensure Flexibility of Goals and Requirements	47
4. Review Program Eligibility Over-Inclusiveness and Under-Inclusiveness	48
5. Evaluate the Burden on Third Parties	49
6. Examine the Duration and Review of the Program	51
E. Cases from the Seventh Circuit Court of Appeals	51
1. <i>Builders Association of Greater Chicago v. City of Chicago</i>	52
2. <i>Northern Contracting, Inc. v. Illinois Department of Transportation</i>	54
3. <i>Midwest Fence, Corp. v. U.S. Department of Justice, Illinois Department of Transportation and the Illinois Tollway</i>	56
<b>III. The State of Illinois’ Business Enterprise Program</b>	<b>59</b>
A. Business Enterprise Program History	59
B. Business Enterprise Program Administration	60
C. Business Enterprise Program Eligibility	62
D. Race-Neutral Measures	63
1. Access to Information	64
2. Vendor Outreach and Networking Events	64
3. Vendor Payment Program	64
4. Staff Training	64
E. Business Enterprise Program Goals	65
F. Counting Business Enterprise Program Firm Participation Towards Contract Goals	65
G. Review of Business Enterprise Program Compliance	65
H. Contract Monitoring and Enforcement	66
I. Advance and Progress Payments	67

J. Sheltered Markets . . . . . 67

K. Mentor-Protégé Program . . . . . 67

L. Experiences with the State of Illinois’ Business Enterprise Program . . . . . 67

    1. Business Owner and Stakeholder Interviews . . . . . 67

        a. M/WBE Program Administration . . . . . 67

        b. Access to Procurement Information . . . . . 69

        c. Contract Size . . . . . 69

        d. Payment . . . . . 70

        e. Meeting Contract Goals . . . . . 70

        f. Mentor-Protégé Programs . . . . . 72

        g. Supportive Services and Technical Assistance . . . . . 74

    2. Electronic Survey Responses . . . . . 75

        a. Impact of the Business Enterprise Program . . . . . 75

        b. Business Enterprise Program Certification Criteria and Process . . . . . 78

        c. Contracting Opportunities . . . . . 81

        d. Business Enterprise Program Compliance . . . . . 86

        e. Outreach and Access to Information . . . . . 88

        f. Experiences with business support services . . . . . 90

        g. Experiences with mentor-protégé programs and teaming arrangements . . . . . 91

M. Conclusion . . . . . 93

**IV. Goods and Services Contract Data Analysis for the State of Illinois . . . . . 95**

A. Contract Data Overview . . . . . 95

B. The State of Illinois’ Contract Markets . . . . . 96

    1. Product Market for State Contracts . . . . . 96

    2. Geographic Market for State of Illinois Contracts . . . . . 100

C. The State of Illinois’ Utilization of M/WBEs in its Product and Geographic Market . . . . . 100

D. The State of Illinois’ Utilization of M/WBEs in its Product and Geographic Market . . . . . 104

E. The Availability of M/WBEs for State of Illinois Contracts . . . . . 109

    1. The Methodological Framework . . . . . 109

    2. The Availability Data and Results . . . . . 111

    3. Analysis of the Concentration of Contract Dollars among Firms . . . . . 116

F. Disparity Analysis of M/WBEs for State of Illinois Contracts . . . . . 122

G. Conclusion . . . . . 124

**V. Analysis of Disparities in the State of Illinois’ Marketplace . . . . . 127**

A. Introduction . . . . . 127

B. Disparate Treatment in the State of Illinois’ Marketplace: Evidence from the Census Bureau’s 2016 - 2020 American Community Survey . . . . . 131

    1. The Goods Industry in the State of Illinois . . . . . 134

    2. The Services Industry in the State of Illinois . . . . . 136

    3. The Information Technology Industry in the State of Illinois . . . . . 139

- C. Disparate Treatment in the Central Management Services’ Marketplace: Evidence from the Census Bureau’s 2017 Annual Business Survey . . . . . 141
  - 1. Goods Industry . . . . . 143
  - 2. Other Services Industry . . . . . 146
  - 3. Conclusion . . . . . 147
- D. Evidence of Disparities in Access to Business Capital . . . . . 147
  - 1. Federal Reserve Board Small Business Credit Surveys . . . . . 148
    - a. 2022 Report on Firms Owned by People of Color . . . . . 148
    - b. 2022 Small Business Credit Survey . . . . . 149
    - c. 2021 Report on Firms Owned by People of Color . . . . . 150
      - i. Overview . . . . . 150
      - ii. Performance and Challenges . . . . . 151
      - iii. Emergency Funding . . . . . 151
      - iv. Debt and Financing . . . . . 152
      - v. Findings for Non-employer Firms . . . . . 153
    - d. 2021 Small Business Credit Survey . . . . . 153
    - e. 2018 Small Business Credit Survey . . . . . 154
      - i. Employer firms . . . . . 154
      - ii. Non-employer firms . . . . . 155
    - f. 2016 Small Business Credit Survey . . . . . 156
      - i. The 2016 Small Business Credit Survey: Report on Minority-Owned Firms . . . . . 156
      - ii. The 2016 Small Business Credit Survey: Report on Woman-Owned Firms . . . . . 159
  - 2. Small Business Administration Loans to African American Businesses (2020) . . . . . 161
  - 3. 2010 Minority Business Development Agency Report . . . . . 162
  - 4. Federal Reserve Board Surveys of Small Business Finances . . . . . 164
  - 5. Other Reports . . . . . 164
- E. Evidence of Disparities in Access to Human Capital . . . . . 165
- F. Conclusion . . . . . 165

**VI. Qualitative Evidence of Race and Gender Barriers in the State of Illinois’ Market . . . . . 167**

- A. Business Owner Interviews . . . . . 169
  - 1. Discriminatory Attitudes . . . . . 169
  - 2. Obtaining prime contracts and associated subcontracts . . . . . 171
- B. Anecdotal Survey of Illinois Firms . . . . . 172
  - 1. Respondents’ Profiles . . . . . 172
  - 2. Discriminatory Barriers and Perceptions . . . . . 176
  - 3. Access to Formal/Informal Business and Professional Networks . . . . . 178
  - 4. Access to Financial Supports . . . . . 179
  - 5. Obtaining Work on an Equal Basis . . . . . 180
  - 6. Capacity for Growth . . . . . 181
  - 7. Prompt Payment . . . . . 182
  - 8. Capacity Development and Participation Incentives . . . . . 184
- C. Written Survey Responses . . . . . 184

- 1. Systemic racial exclusion . . . . . 184
- 2. Negative perceptions of competency and professionalism . . . . . 185
- 3. Discriminatory attitudes and behaviors . . . . . 187
- 4. Gender bias and barriers . . . . . 190
- 5. Access to networks. . . . . 192
- 6. Impact of Affirmative Action Contract Goals . . . . . 195
- 7. Financial barriers to opportunities . . . . . 196
- 8. Barriers to equal contract terms . . . . . 199
- D. Conclusion. . . . . 202

**VII. Recommendations for the State of Illinois Business Enterprise**

**Program . . . . . 205**

- A. Augment Race- and Gender-Neutral Measures . . . . . 206
  - 1. Pay Promptly and Ensure Prime Vendors Promptly Pay Subcontractors . . . . . 206
  - 2. Develop Virtual Training Tools for State Staff and Vendors . . . . . 206
  - 3. Conduct Increased Outreach. . . . . 206
  - 4. Increase Prime Contract Opportunities . . . . . 207
- B. Continue to Implement Narrowly Tailored Race- and Gender-Conscious Measures. . . . . 208
  - 1. Use the Detailed Study Availability Data to Set BEP Contract Goals . . . . . 209
  - 2. Adopt Narrowly Tailored Program Eligibility Standards and Processes. . . . . 210
    - a. Revise the Business Size Standard for Program Eligibility . . . . . 210
    - b. Adopt a Personal Net Worth Standard for Program Eligibility . . . . . 211
  - 3. Ensure Complete and Timely Contract Monitoring. . . . . 211
- C. Develop Performance Measures for Program Success . . . . . 212

**Appendix A:**  
**Further Explanation of the Multiple Regression Analysis . . . . . 213**

**Appendix B:**  
**Further Explanation of the Probit Regression Analysis . . . . . 215**

**Appendix C:**  
**Significance Levels. . . . . 217**

**Appendix D:**  
**Unweighted and Weighted Availability. . . . . 219**

**Appendix E:**  
**Qualitative Evidence from Illinois Disparity Studies. . . . . 223**



# List of Tables

- Table 1-1: Industry Percentage Distribution of CMS Contracts by Dollars . . . . . 9
- Table 1-2: Percentage Distribution of Contract Dollars by Race and Gender . . . . . 12  
(share of total dollars)
- Table 1-3: Unweighted M/WBE Availability for State of Illinois Contracts . . . . . 13
- Table 1-4: Aggregated Weighted Availability for State of Illinois Contracts. . . . . 13
- Table 1-5: Disparity Ratios by Demographic Group . . . . . 14
- Table 4-1: Final Contract Data File . . . . . 95  
Number of Contracts
- Table 4-2: Final Contract Data File . . . . . 95  
Net Dollar Value of Contracts
- Table 4-3: Industry Percentage Distribution of State of Illinois Contracts by Dollars . . . . . 97
- Table 4-4: NAICS Code Distribution of Contract Dollars in the Constrained Product Market. . . . . 101
- Table 4-5: Distribution of Contract Dollars by Race and Gender. . . . . 104  
(total dollars)
- Table 4-6: Percentage Distribution of Contract Dollars by Race and Gender . . . . . 107  
(share of total dollars)
- Table 4-7: Unweighted M/WBE Availability for State of Illinois Contracts . . . . . 112
- Table 4-8: Distribution of the State of Illinois’ Spending by NAICS Code (the Weights) . . . . . 114
- Table 4-9: Aggregated Weighted Availability for State of Illinois Contracts. . . . . 116
- Table 4-10: Comparison of the Share of the State of Illinois Spending Captured by the Top Three  
NAICS Codes for Each Demographic Group . . . . . 117
- Table 4-11: The Top Three State of Illinois Spending NAICS Codes. . . . . 118  
for Each Demographic Group
- Table 4-12: Three NAICS Codes where Black Firms Received the Most Spending. . . . . 120
- Table 4-13: Three NAICS Codes where Hispanic Firms Received the Most Spending. . . . . 120
- Table 4-14: Three NAICS Codes where Asian Firms Received the Most Spending . . . . . 121
- Table 4-15: Three NAICS Codes where White Woman Firms Received the Most Spending. . . . . 121
- Table 4-16: Disparity Ratios by Demographic Group . . . . . 123
- Table 4-17: Comparing Utilization and Unweighted Availability in the Five NAICS Codes Where the  
State of Illinois Spends Most of Its Funds . . . . . 124
- Table 5-1: Business Formation Rates . . . . . 135  
Goods, 2016 - 2020
- Table 5-2: Business Formation Probability Differentials for Selected Groups . . . . . 135  
Relative to White Men, Goods, 2016 - 2020
- Table 5-3: Wage Differentials for Selected Groups . . . . . 136  
Relative to White Men, Goods, 2016 - 2020
- Table 5-4: Business Earnings Differentials for Selected Groups . . . . . 136  
Relative to White Men, Goods, 2016 - 2020
- Table 5-5: Business Formation Rates . . . . . 137  
Services, 2016 - 2020

Table 5-6: Business Formation Probability Differentials for Selected Groups . . . . .	138
Relative to White Men, Services, 2016 - 2020	
Table 5-7: Wage Differentials for Selected Groups . . . . .	138
Relative to White Men, Services, 2016 - 2020	
Table 5-8: Business Earnings Differentials for Selected Groups . . . . .	139
Relative to White Men, Services, 2016 - 2020	
Table 5-9: Business Formation Rates . . . . .	139
Information Technology, 2016 - 2020	
Table 5-10: Business Formation Probability Differentials for Selected Groups . . . . .	140
Relative to White Men, Information Technology, 2016 - 2020	
Table 5-11: Wage Differentials for Selected Groups . . . . .	140
Relative to White Men, Information Technology, 2016 - 2020	
Table 5-12: Business Earnings Differentials for Selected Groups . . . . .	141
Relative to White Men, Information Technology, 2016 - 2020	
Table 5-13: Two-Digit NAICS Code Definition of Sector . . . . .	143
Table 5-14: Demographic Distribution of Sales and Payroll Data – Aggregated Groups. . . . .	145
Goods, 2017	
Table 5-15: Disparity Ratios – Aggregated Groups . . . . .	145
Goods, 2017	
Table 5-16: Demographic Distribution of Sales and Payroll Data – Aggregated Groups. . . . .	146
Other Services, 2017	
Table 5-17: Disparity Ratios – Aggregated Groups . . . . .	147
Other Services, 2017	
Table 6-1: Distribution of Industry and Race and Gender of Survey Respondents . . . . .	173

# I. EXECUTIVE SUMMARY

Colette Holt & Associates (“CHA”) was retained by the state of Illinois to perform a disparity study examining its Business Enterprise Program (“BEP” or “Program”) for Minority- and Woman-Owned Business Enterprises (“M/WBEs”). In this Study, we determined the state’s utilization of M/WBEs on state goods and services contracts entered into the Bidbuy system for fiscal year 2018 through the third quarter of fiscal year 2021; the availability of these firms as a percentage of all firms in the state’s geographic and industry market areas; and any disparities between the state’s utilization of M/WBEs and M/WBE availability. We further analyzed disparities in the wider Illinois economy, where affirmative action is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. We also gathered qualitative data about the experiences of minority- and woman-owned firms in obtaining state contracts and associated sub-contracts, as well as in seeking work from other entities. Based on these findings, we evaluated the Program for conformance with constitutional standards and national best practices for government contracting affirmative action programs.

The methodology for this study embodies the constitutional principles of *City of Richmond v. Croson*, Seventh Circuit Court of Appeals’ case law and best practices for designing race- and gender-conscious and small business contracting programs. The CHA approach has been specifically upheld by the federal courts, including in Illinois. It is also the approach developed by Ms. Holt for the National Academy of Sciences that is now the recommended standard for conducting legally defensible disparity studies.

## A. Summary of Strict Constitutional Standards Applicable to the State of Illinois’ Business Enterprise Program

To be effective, enforceable, and legally defensible, a race-based program for public sector contracts must meet the judicial test of constitutional “strict scrutiny”. Strict scrutiny is the highest level of judicial review. The state must meet this test to ensure that any race- and gender-conscious program is in legal compliance.

Strict scrutiny analysis has 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.<sup>1</sup>

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

1. Statistical evidence of the underutilization of minority or woman firms by the agency and/or throughout the agency’s geographic and industry market area compared to their availability in the market area.
2. Anecdotal evidence of race- or gender-based barriers to the full and fair participation of minority and woman firms in the market area and seeking contracts with the agency. Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

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.

Most federal courts have subjected preferences for Woman-Owned Business Enterprises to “intermediate scrutiny”. Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.<sup>2</sup> 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 gender-based presumption of social disadvantage in reviewing the constitutionality of the Disadvantaged Business Enterprise (“DBE”) Program for federally assisted transportation projects<sup>3</sup> or held that the results would be the same under strict scrutiny.

Proof of the negative effects of economic factors on M/WBEs and the unequal treatment of such firms by actors critical to their success will 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 dis-

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1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
2. *Cf. United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).
3. 49 C.F.R. Part 26.

crimination. 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. 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. High quality studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored.

## **B. The State of Illinois’ Business Enterprise Program**

The state of Illinois has adopted a statute and developed policies and procedures for its Business Enterprise Program to promote fair and equitable contracting opportunities for minority- and woman-owned businesses. The Program applies to various types of contracts and state entities. The state has also adopted Program provisions under the Act to promote and encourage the development of businesses owned by persons with disabilities.

### **1. Business Enterprise Program Administration**

Effective January 1, 2022, jurisdiction over the functions of the Program was transferred from Central Management Services (“CMS”) to the Commission on Equity and Inclusion (“CEI”). CEI is comprised of seven members appointed by the Governor. Appointments must be confirmed by the Illinois State Senate, and no more than four members can be of the same political party. The chief administrative and executive officer of the Commission is appointed by the Governor and has general supervisory authority over all personnel of the Commission.

The Program is now managed by CEI’s Business Enterprise for Minorities, Women, and Persons with Disabilities Division. The Division is headed by the Secretary of CEI, who is selected by the CEI chairperson and approved by the Council.

Together with CEI, the BEP Council for Minorities, Women, and Persons with Disabilities (“Council”), established by the Act, oversees the implementation, monitoring and enforcement of the Program to ensure it is meeting the goals of the Act.

Recommendations for increasing participation of BEPs in procurements under the Program may also be made by the Act’s Special Committee on Minority, Female, Persons with Disabilities and Veterans contracting.

Each state agency and public institution of higher education is required to develop an annual Compliance Plan outlining its policy; how the agency intends to reach program goals; program compliance procedures; and a timetable for meeting the goals. The BEP Council reviews and approves the agency Compliance Plans.

The state uses the B2Gnow® Contract Management and Compliance System, a web-based software system, to track program participation and compliance with program goals.

## **2. M/WBE Program Eligibility**

To be certified as a BEP firm, the applicant must be owned at least 51% by a U.S. citizen or legal permanent resident alien, managed and controlled by a minority individual, woman or a person with a disability, and have annual gross sales of less than \$75M.

Four certification processes are available with varying degrees of duration and required paperwork.

- The full application process requires most recent company financial statements, a U.S. Corporate or LLC partnership income tax return, U.S. individual federal income tax returns and other documentation validating ownership information and gross sales. Certification is valid for seven years.
- The BE Enrolled Business Enterprise Certification Program offers automatic certification to businesses certified with the City of Chicago and/or Cook County. This certification is valid for the same period as the City or County certification.
- The FastTrack Certification allows vendors who are certified by the Chicago Minority Supplier Development, Mid-States Minority Supplier Development Council or the Women's Business Development Center a quick seven business day turnaround. FastTrack Certification is valid for one year.
- The Transportation Recognition Certification is a scaled-down version of the Full Certification process, with reduced documentation requirements. The Transportation Recognition Certification is valid for one year.

## **3. Race- and Gender-Neutral Measures**

The Act requires the Commission to further establish targeted efforts to encourage the participation of BEP firms on state contracts through focused outreach efforts directed to these businesses.

The state of Illinois' Quarterly Buying Plan is the single destination for useful information about the upcoming purchasing needs of state agencies. The Buying Plan includes instruction on how to do business with the state, information about small and disadvantaged business programs, and an overview of registration and pre-qualification.

The state conducts regular educational workshops about "Doing Business with Illinois" for small businesses about contracting, policies, rules and regulations; seminars on certification, prompt vendor payment, loans and grants; and one-on-one guidance. In 2022, the state held a vendor summit on how to do business with state agencies and universities that included presentations from subject matter experts about upcoming contracting opportunities and instruction on how to navigate the procurement process and access resources.

#### **4. Race- and Gender-Conscious Business Enterprise Program Elements**

##### **a. Business Enterprise Program Goals**

The state's annual, aggregated aspirational goal is to spend at least 30% of its total non-construction and non-professional services dollars with firms certified through BEP. This overall goal is allocated as follows: MBEs 16%; WBEs 10%; and businesses owned by persons with disabilities 4%. The state's annual, aggregated aspirational goal for construction and professional services contracts is to spend not less than 20% of total dollars with BEP firms. This overall goal is allocated as follows: MBEs 11%; WBE 7%, and businesses owned by persons with disabilities 2%.

The contract goal is the cumulative amount of the percentage availability of certified BEP firms in each weighted scope of work. Contract goals are set by the agency that issues the contract.

##### **b. Counting Participation Towards Contract Goals**

Only expenditures to certified firms that perform a commercially useful function ("CUF") on a contract, as defined in 49 C.F.R. §26.55(c), may be counted toward the BEP goal. A CUF is performed when a firm is responsible for the execution of a distinct element of the work of the contract and carries out its responsibilities by performing, managing, and supervising the work involved, or by fulfilling its responsibilities in a joint venture.

##### **c. Review of Business Enterprise Program Compliance**

All state solicitations that include a BEP goal require bidders or offerors to include a Utilization Plan ("Plan"). The Plan is due at the time of bid or offer

submission. The Plan must demonstrate that the vendor has either met the entire contract goal or has requested a full or partial waiver and made Good Faith Efforts (“GFE”) towards meeting the goal. GFE are defined as those actions, which by their quality, quantity, and intensity are those that one could reasonably expect a bidder/offeror to take if the bidder/offeror were actively and aggressively trying to obtain BEP participation sufficient to meet the BEP contract goal.

Required Plan documentation includes a signed vendor commitment, a subcontract participation agreement and documentation of GFE. Failure to complete and include a Plan, including documentation demonstrating GFE when requesting a waiver, renders the bid or offer as non-responsive. The Agency Procurement Officer must notify CEI of all bids or offers that fail to include a Plan or that include a Plan with deficiencies.

**d. Contract Monitoring and Enforcement**

CEI monitors compliance of state agencies and public institutions of higher education with meeting the Act’s goals and policy. If the Commission determines a vendor is non-compliant, it can recommend imposing administrative remedies to the procuring entity.

State agencies and public institutions of higher education are responsible for monitoring vendor compliance with its Plan and the terms of the contract during performance. Failure to comply with commitments, to cooperate in providing information about the Utilization Plan, or providing false or misleading information is a material breach of the contract. A vendor that does not fulfill the contract goal or did not make sufficient GFE to do so may be subject to remedies or sanctions, including termination of the contract, disqualification of the contractor from doing business with the state for a period of not more than one year, cancellation of any state contract entered into by the vendor, or any other remedies provided for in the contract, at law or in equity.

**e. Advance and Progress Payments**

BEP firms awarded non-construction contracts may apply for advance or progress payments, or both. BEP firms awarded construction contracts may only apply for progress payments.

**f. Sheltered Markets**

The Act authorizes the establishment of a Sheltered Market, where selected contracts can be specifically set aside for bidding by BEP firms. These contracts can be procured on a competitive bid or negotiated basis.

**g. Mentor-Protégé Program**

The state has implemented a mentor-protégé program to assist BEP firms to develop capacity and to enhance their core capabilities through partnering with larger, more experienced firms. The mentor must utilize the protégé for a CUF for at least ten percent of the total contract amount. The protégé must be certified and perform a CUF under the contract.

**5. Business Owners' Experiences with the State's Business Enterprise Program**

To explore the experiences of businesses seeking opportunities on state contracts, we solicited input from 122 individuals and sought their suggestions for changes. We also collected written comments from 350 businesses about their experiences with the state's Program through an electronic survey. The following are summaries of the issues discussed during the interviews and in the survey comments.

**a. Business Owner Interviews**

*Program Administration:* As a general matter, most M/WBEs supported the Program. However, several commented on what they perceive to be a lack of monitoring of prime vendors' compliance with Program and contractual requirements.

*Access to Procurement Information:* Several firm representatives reported that they need more timely information about solicitations. One suggested better processes to help to connect large prime vendors with BEP firms.

*Contract Size:* Several owners pointed to the size and complexity of state contracts as major barriers to their ability to submit bids or proposals as prime vendors.

*Payment:* Many interviewees, both M/WBEs and non-M/WBEs, reported that slow payments are a major problem.

*Meeting Contract Goals:* Goals on goods contracts were reported to be difficult to meet because of the lack of subcontracting opportunities. Goals for veteran-owned businesses were especially problematic. One respondent recommended making the BEP website more useful by providing more information about the certified firms. Another suggested having firms certified as DBEs under the U.S. Department of Transportation's Program be automatically eligible to be used for goal credit in the Program.

*Mentor-Protégé Programs:* There was significant support for the adoption of a BEP mentor-protégé program. The Illinois Tollway's program was men-

tioned by several firms as an excellent model. Prime vendors, while supporting the concept, were wary of the possible legal and Program compliance issues raised by entering into that level of a relationship with a subcontractor.

*Supportive Services and Technical Assistance:* There was general consensus that supportive services and technical assistance services, such as training on preparing bids or proposals, marketing, regulatory compliance, etc., are beneficial to M/WBEs and other small firms. Assistance with obtaining surety bonds was specifically mentioned as a critical need. However, the offerings are only as good as the knowledge and experience of the consultant providing the service. Making training easily accessible was another recommendation.

**b. Electronic Survey Comments**

Survey comments were consistent with those from the interviews. Minority and woman business owners overwhelmingly supported the Program. Certification and goals remain critical to obtaining work. However, several respondents noted some challenges. M/WBEs thought state agencies could adopt stronger compliance procedures and that more monitoring during the contract period was needed to ensure that prime vendors comply with the Program. Offering more technical support, promoting networking between M/WBE and prime firms and overcoming barriers that make it difficult for subcontractors to move into the role of prime vendors were also requested. Many reported slow payments by both the state and prime contractors.

**C. Utilization, Availability and Disparity Analyses of the State of Illinois' Goods and Services Contracts**

The study examined data from state of Illinois goods and services contracts in Bid-Buy for fiscal year 2018 through the third quarter of fiscal year 2021. To conduct the analysis, we constructed all the fields necessary where they were missing in the state's contract records (*e.g.*, industry type; zip codes; six-digit North American Industry Classification System ("NAICS") codes of prime contractors and subcontractors; and firm information, including payments, race, gender; etc.). Missing NAICS codes of prime contractors and subcontractors were assigned by CHA. The Final Contract Data File ("FCDF") contained 170 prime contracts and 59 subcontracts. The net dollar value of contracts to prime contractors and subcontractors was \$425,676,989.

Table 1-1 presents data on the 65 NAICS codes contained in the FCDF. The third column represents the share of all contracts to firms performing work in a particu-

lar NAICS code. The fourth column presents the cumulative share of spending from the NAICS code with the largest share to the NAICS code with the smallest share.

**Table 1-1: Industry Percentage Distribution of CMS Contracts by Dollars**

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
441110	New Car Dealers	17.9%	17.9%
424690	Other Chemical and Allied Products Merchant Wholesalers	16.6%	34.5%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	11.3%	45.8%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	6.8%	52.6%
541611	Administrative Management and General Management Consulting Services	5.3%	57.9%
424410	General Line Grocery Merchant Wholesalers	4.7%	62.6%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	3.3%	65.9%
484220	Specialized Freight (except Used Goods) Trucking, Local	3.3%	69.2%
811111	General Automotive Repair	3.0%	72.1%
424420	Packaged Frozen Food Merchant Wholesalers	2.1%	74.2%
441320	Tire Dealers	2.0%	76.2%
424470	Meat and Meat Product Merchant Wholesalers	1.8%	78.0%
561611	Investigation Services	1.6%	79.6%
561320	Temporary Help Services	1.6%	81.2%
424950	Paint, Varnish, and Supplies Merchant Wholesalers	1.5%	82.7%
423490	Other Professional Equipment and Supplies Merchant Wholesalers	1.4%	84.0%
561720	Janitorial Services	1.3%	85.4%
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.2%	86.6%

State of Illinois Goods and Services Disparity Study 2022

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	1.2%	87.8%
562111	Solid Waste Collection	1.1%	88.9%
488490	Other Support Activities for Road Transportation	1.0%	89.9%
424490	Other Grocery and Related Products Merchant Wholesalers	0.9%	90.8%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.9%	91.7%
561210	Facilities Support Services	0.9%	92.6%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	0.7%	93.3%
424120	Stationery and Office Supplies Merchant Wholesalers	0.7%	94.0%
237310	Highway, Street, and Bridge Construction	0.7%	94.6%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.7%	95.3%
238220	Plumbing, Heating, and Air-Conditioning Contractors	0.6%	95.9%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.5%	96.4%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.5%	96.9%
812331	Linen Supply	0.4%	97.4%
541930	Translation and Interpretation Services	0.4%	97.8%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	0.3%	98.1%
423390	Other Construction Material Merchant Wholesalers	0.3%	98.4%
541512	Computer Systems Design Services	0.3%	98.7%
238290	Other Building Equipment Contractors	0.3%	98.9%
541211	Offices of Certified Public Accountants	0.2%	99.2%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
324121	Asphalt Paving Mixture and Block Manufacturing	0.1%	99.3%
423710	Hardware Merchant Wholesalers	0.1%	99.4%
541620	Environmental Consulting Services	0.1%	99.5%
326299	All Other Rubber Product Manufacturing	0.1%	99.6%
238140	Masonry Contractors	0.1%	99.7%
238210	Electrical Contractors and Other Wiring Installation Contractors	0.1%	99.7%
532420	Office Machinery and Equipment Rental and Leasing	0.04%	99.8%
541511	Custom Computer Programming Services	0.03%	99.8%
561492	Court Reporting and Stenotype Services	0.03%	99.8%
561730	Landscaping Services	0.02%	99.9%
424910	Farm Supplies Merchant Wholesalers	0.02%	99.9%
532283	Home Health Equipment Rental	0.02%	99.9%
541110	Offices of Lawyers	0.02%	99.9%
325611	Soap and Other Detergent Manufacturing	0.01%	99.9%
423420	Office Equipment Merchant Wholesalers	0.01%	99.9%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	0.01%	99.9%
423460	Ophthalmic Goods Merchant Wholesalers	0.01%	99.96%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.01%	99.96%
541310	Architectural Services	0.01%	99.97%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.01%	99.98%
423220	Home Furnishing Merchant Wholesalers	0.01%	99.98%
424130	Industrial and Personal Service Paper Merchant Wholesalers	0.01%	99.99%
518210	Data Processing, Hosting, and Related Services	0.003%	99.99%
561410	Document Preparation Services	0.003%	99.99%
531390	Other Activities Related to Real Estate	0.003%	99.998%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
488510	Freight Transportation Arrangement	0.001%	99.999%
424710	Petroleum Bulk Stations and Terminals	0.001%	100.000%
<b>TOTAL</b>		<b>100.0%</b>	

Source: CHA analysis of state of Illinois data

To determine the geographic market area, we applied the standard of identifying the firm locations that account for close to 75% of contract and subcontract dollar payments in the FCDF.<sup>4</sup> Firm location was determined by zip code and aggregated into counties as the geographic unit. The state of Illinois captured 80.8% of the FCDF and therefore, we used the state as the geographic market.

We next determined the dollar value of the state’s utilization of M/WBEs, as measured by payments to prime firms and subcontractors and disaggregated by race and gender.<sup>5</sup>

Table 1-2 presents the summary of distribution of contract dollars. Chapter IV provides detailed breakdowns of these results.

**Table 1-2: Percentage Distribution of Contract Dollars by Race and Gender  
(share of total dollars)**

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
6.3%	3.1%	0.5%	0.0%	3.5%	13.4%	86.6%	100.0%

Source: CHA analysis of state of Illinois data

Using the modified “custom census” approach to estimating availability and the further assignment of race and gender using the FCDF, the Master M/W/DBE Directory and other sources, we determined the unweighted availability of M/WBEs in the state’s market area. For further explanation of the role of unweighted and weighted availability and how these are calculated, please see Appendix D.<sup>6</sup>

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4. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 (“*National Disparity Study Guidelines*”), at p. 29.  
 5. For our analysis, the term “M/WBE” includes firms that are certified by government agencies, including by the Business Enterprise Program and minority- and woman-owned firms that are not certified.  
 6. The USDOT “Tips for Goal Setting” urges recipients to weight their headcount of firms by dollars spent. See *Tips for Goal-Setting in the Disadvantaged Business Enterprise Program*, <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

We next determined the aggregated unweighted availability of M/WBEs, and then the availability of M/WBEs weighted by the state’s spending in its geographic and industry markets. Table 1-3 presents these results.

**Table 1-3: Unweighted M/WBE Availability for State of Illinois Contracts**

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
2.1%	1.5%	1.0%	0.0%	5.9%	10.5%	89.5%	100.0%

Source: CHA analysis of state of Illinois data; Hoovers; CHA Master Directory

**Table 1-4: Aggregated Weighted Availability for State of Illinois Contracts**

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
1.9%	2.6%	0.9%	0.0%	5.7%	11.1%	88.9%	100.0%

Source: CHA analysis of state of Illinois data; Hoovers; CHA Master Directory

We next calculated disparity ratios for total M/WBE utilization compared to the total weighted availability of M/WBEs, measured in dollars paid.

A *disparity ratio* is the relationship between the utilization and weighted availability, determined above. Mathematically, this is represented by:

$$DR = U/WA$$

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% of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.<sup>7</sup> 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.<sup>8</sup> A more in-

7. 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.”).

8. 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.

depth discussion of statistical significance is provided in Chapter IV and Appendix C.

Table 1-4 presents the calculated disparity ratios for each demographic group. The disparity ratios for Asians, Native Americans and White women were substantively significant. The disparity ratios for all groups are statistically significant at the 0.001 level.

**Table 1-5: Disparity Ratios by Demographic Group**

Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE
333.90% <sup>***</sup>	119.70% <sup>***</sup>	55.20% <sup>‡</sup>	0.00% <sup>‡</sup>	62.10% <sup>***‡</sup>	121.20% <sup>***</sup>	97.40% <sup>***</sup>

*Source: CHA analysis of state of Illinois data*

*‡ Indicates substantive significance*

*\*\*\* Statistically significant at the 0.001 level*

In order to get a better understanding of the extremely high disparity ratios, we examined more closely the five NAICS codes where the state spent 65.4% of its contract dollars. For each NAICS code, we compared a demographic group’s utilization of the state’s contract dollars to its unweighted availability. Chapter IV provides more detail on this analysis.

Most striking, was the lack of contract dollars received by M/WBEs in these five codes. Blacks and Hispanics only had significant opportunities in one NAICS code (424410). The largest share of contract dollars received by Asians in 5.7% in NAICS code 423120. White women got small shares of the contracts in NAICS codes 423110 and 423120 (2.4% and 3.5%, respectively).

## **D. Analysis of Economy-Wide Disparities in the State of Illinois’ Marketplace**

Evidence of the experiences of minority- and woman-owned firms outside of the Program is relevant and probative of the state’s consideration of continuing to implement a race- and gender-conscious program, because rigorous contracting diversity programs are rarely imposed outside of specific government agencies. To examine the outcomes throughout the state’s marketplace, we explored two Census Bureau datasets and the government and academic literature relevant to how discrimination in the state’s market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the state’s prime contract and subcontract opportunities.

We analyzed the following data and literature:

- State of Illinois data from the Census Bureau’s American Community Survey from 2016 through 2020. This rich data set establishes with greater certainty any causal links between race, gender and economic outcomes. We employed a multiple regression statistical technique to examine the rates at which minorities and women form firms. In general, we found that even after considering potential mitigating factors, business formation rates by Blacks, Hispanics and White women are lower compared to White males. The data indicate that non-Whites and White women receive lower wages and Blacks and White women receive lower 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.
- State of Illinois industry data from the Census Bureau’s 2017 Annual Business Survey. This dataset indicated large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), and the payroll of employer firms.
- Surveys and literature on barriers to access to commercial credit and the development of human capital further reports that minorities continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed. These results support the conclusions drawn from the anecdotal interviews and analysis of the state’s contract data that M/WBEs face obstacles to achieving success on contracts outside of M/WBE programs.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall marketplace discrimination without some type of affirmative intervention.

## **E. Qualitative Evidence of Race and Gender Barriers in the State of Illinois’ Market**

In addition to quantitative data, anecdotal evidence of firms’ marketplace experiences is relevant to evaluating whether the effects of current or past discrimination continue to impede opportunities for BEP firms such that race-conscious contract goals are needed to ensure equal opportunities to compete for contracts. To explore this type of anecdotal evidence, we received input from 122 participants in small group business owner interviews. We also received 350 net responses to an electronic anecdotal survey and written comments during the study period.

## **1. Business Owner Interviews**

Many minority and woman business owners reported that while some progress has been made in integrating their firms into public and private sector contracting activities through race- and gender-conscious contracting programs, significant barriers remain.

The following are brief summaries of the most common views expressed by numerous participants.

- Many minority and female owners reported that they face negative assumptions and biases about their competency.
- Sexism still is a barrier to the success of many woman owners.
- Some owners resorted to making a White male the external face of the company.
- Having equal access to information about contracting opportunities and professional networks was mentioned by several entrepreneurs as barriers to fair chances to obtain state work.
- Contract goals were reported to be critical to M/WBEs' ability to get work.

## **2. Electronic Business Owner Survey**

Results from the electronic survey were similar to those of the interviews. Almost a third (31.6%) reported that they still experience barriers to equal contracting opportunities; 24.4% said their competency was questioned because of their race or gender; and 17.8% indicated that they had experienced job-related sexual or racial harassment or stereotyping. Responses to the survey's open-ended questions provided further detail about these experiences. The following is a summary of the most common written responses received.

- Many minorities reported that fair opportunities to compete for contracts were not available because of systemic racial barriers and their credentials and competency are routinely questioned.
- A person with disabilities had also experienced negative assumptions about his capabilities.
- Many minority and woman respondents reported instances of implicit bias that affect their ability to obtain work. Subtle discriminatory attitudes and behavior were common.
- Several woman respondents reported experiencing sexist attitudes about their competency, skill and professionalism. Some women reported incidents of sexual harassment and hostile behavior.

- Many minority and woman business owners felt excluded from formal and informal networks. Lack of access to decision-makers puts them at a further disadvantage relative to their non-BEP counterparts. Some noted their exclusion from networks was exacerbated during the COVID pandemic.
- Many minority and woman respondents reported that prime bidders often use them only to meet affirmative action goals.
- Some M/WBEs reported that they were listed on utilization plans but then were not used on the project.
- Many M/WBEs reported discriminatory obstacles when trying to obtain financing, bonding and insurance that impact their ability to compete on an equal basis. Small and new firms face particularly large challenges.
- Slow payments by government entities and prime contractors further disadvantaged BEP firms.
- Several minority and woman respondents reported they are charged higher pricing by suppliers than non-M/WBE firms.
- Many BEP firms reported pressure to reduce pricing or compensation relative to their White male counterparts based on their M/WBE status.
- Bid shopping was a problem reported by several M/WBEs.

## **F. Recommendations for Enhancements to the State of Illinois' Business Enterprise Program**

The quantitative and qualitative data in this study provide a thorough examination of the evidence of the experiences of minority- and woman-owned business enterprises in the state of Illinois' geographic and industry markets for goods and services contracts for the agencies included in the study. As required by strict constitutional scrutiny, we analyzed evidence of the state's utilization of M/WBEs as a percentage of all firms as measured by dollars spent, as well as M/WBEs' experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the state with the evidence necessary to determine whether there is a strong basis in evidence for the continued use of race- and gender-conscious goals for its Business Enterprise Program, and if so, how to narrowly tailor its remedies.

The state has implemented an aggressive and successful Program for decades. Utilization of M/WBEs has exceeded availability for most groups. This is the outcome of setting goals, conducting outreach, and enforcing requirements.

However, evidence beyond the state's achievements strongly suggests these results reflect the success of the Program in countering the discrimination in its contracting markets. We found that although M/WBEs as a whole received ample dollars on state jobs, opportunities were concentrated amongst a small group of subindustries that are of relatively low importance to overall state purchasing. Outside of state and local government contracts, M/WBEs face large disparities in opportunities for public sector and private sector work, as well as discrimination in the access to business capital. Our disparity studies for other Illinois and Chicago area governments support the conclusion that the current effects of past discrimination and ongoing bias would be barriers to state work in the absence of affirmative action remedies. M/WBEs reported instances of bias and discrimination, and that they receive little work without the use of contract goals.

These results are the type of evidence that the state can consider in evaluating whether there is a continuing need for race- and gender-conscious remedies and, if so, how to narrowly tailor such remedies.

Based upon these results, we make the following recommendations.

## **1. Augment Race- and Gender-Neutral Measures**

The courts require that governments use race- and gender-neutral approaches to the maximum feasible extent to address identified discrimination. Increased participation by BEP firms through race- and gender-neutral measures will also reduce the need to set BEP contract goals. We therefore suggest the following enhancements of the state's current efforts.

### **a. Pay Promptly and Ensure Prime Vendors Promptly Pay Subcontractors**

Slow payment by the state was a major criticism. This is a serious problem for all firms, but especially for BEP firms and other small businesses with limited cash flow and financing options. It further discourages them from bidding as prime contractors because they fear cash crunches and the added burdens of being responsible for paying subcontractors.

### **b. Develop Virtual Training Tools for State Staff and Vendors**

The state should create targeted training videos for all aspects of the Program. These should include certification criteria and processes; contract goal setting; GFE, standards and processes; CUF reviews; compliance monitoring; substitution requests; and working with the various state agencies and universities. This is especially important since the Program has been moved from CMS to CEI. Vendors and agency staff will need guidance about the roles and responsibilities of the new Commission, which unlike CMS, will have limited contracting opportunities.

**c. Conduct Increased Outreach**

Many M/WBEs requested assistance with penetrating the network of the state's buyers and other officials with procurement responsibilities. Regular "meet and greets" with specific agencies with contracting authority would be helpful to assist these small firms to learn about upcoming opportunities and meet important agency staff.

It is also important to focus on the subindustries where M/WBEs have received few, if any, state dollars, as identified in Tables 4-10 through Tables 4-15. For example, while Black-owned firms did well in Investigation Services, Temporary Help Services and Janitorial Services, they received no contract dollars in many other codes. To uncover any barriers and elicit ideas for broader subindustry participation, we suggest meetings with firms certified in the areas in which the state spends significant dollars, but in which M/WBEs do not participate. The state should also consider conducting early and targeted outreach about specific solicitations to expand the areas in which M/WBE obtain state work.

**d. Increase Prime Contract Opportunities**

While certified firms no longer experience disparities in access to state contracts overall, contracts for prime work are either out of reach for most M/WBEs (especially Black contractors), or too risky for them to take on. We recommend the state place special emphasis on reducing barriers to prime awards.

One race- and gender-neutral method to reduce barriers would be to "unbundle" contracts, which is an important race- and gender-neutral component to a defensible program. In conjunction with reduced experience and insurance 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.

Another important component of supporting prime contracting by minority and woman firms is adopting experience requirements for specific solicitations that are no greater than necessary to protect the state's interests. Agencies should review these requirements to ensure that BEP firms are not unfairly disadvantaged and that there is adequate competition for projects.

## 2. Continue to Implement Narrowly Tailored Race- and Gender-Conscious Measures

### a. Use the Detailed Study Availability Data to Set BEP Contract Goals

Using study data to set legally defensible contract goals will provide transparency and defensibility, as well as reduce requests for goal reductions or full waivers. Goal setting involves four steps:

1. Weight the estimated dollar value of the scopes of the contract by six-digit NAICS codes, as determined during the process of creating the solicitation.
2. Determine the unweighted availability of M/WBEs in those scopes, as estimated in the disparity study.
3. Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
4. Adjust the resulting percentage based on current market conditions and progress towards the annual goals.

The B2Gnow<sup>®</sup> electronic data collection and monitoring system already contains a contract goal setting module developed to utilize the study data as the starting point. By employing the B2Gnow 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.

This targeted contract goal setting methodology eliminates the need for “categorical” exemptions to the Program and the administrative burden of determining those exemptions. Only contracts for personal services, utilities, real estate acquisition and intergovernmental agreements would be exempt for contract goal setting. It may turn out that individual contracts either have no M/WBE availability or there are no subcontracting opportunities, but this approach is grounded in the specifics of the contract.

We further urge the state to bid some contracts without goals that are determined to have significant opportunities for M/WBE participation, or that involve scopes of work with high utilization. These control contracts can illuminate whether certified firms are used or even solicited in the absence of goals. The development of some “unremediated markets” data, as held by the courts, including the Seventh Circuit Court of Appeals, will be probative of whether the Program remains needed to level the playing field for minorities and women. The outcomes of “no goals” contracts will be critical in evaluating how effective race-neutral measures are in achieving non-discriminatory outcomes.

**b. Adopt Narrowly Tailored Program Eligibility Standards and Processes**

As discussed in Chapter II, the federal courts have held that strict constitutional scrutiny requires that race- and gender-conscious remedies be limited to socially and economically disadvantaged individuals. The failure to adopt limits on the size of the firm, as measured in gross receipts, and the personal net worth of the owner, have proved to be fatal in litigation, including in the Seventh Circuit Court of Appeals. We suggest the following revisions.

**i. Revise the Business Size Standard for Program Eligibility**

The current Program sets a limit of \$75M in an applicant firm’s gross receipts, regardless of industry, for program eligibility. It does not appear that this amount is averaged over some period of time. We were unable to unearth any legislative history that supports this amount, which has been raised over the life of the Program.

The City of Chicago updated its size and personal net worth tests in 2021 based upon the disparity study we conducted. The size limits were raised to 150% of the U.S. Small Business Administration standards and the time over which gross receipts are averaged was raised from five years to seven years. We suggest that the state consider this approach. While still relatively small by comparison to major companies, these higher limits will permit minority and woman businesses to compete for larger subcontracts and prime contracts, as well as to make inroads into the market for privately financed projects.

To bring further rigor and defensibility to the Program, we recommend that the BEP Council’s ability to grant “exceptions” to the certification standards be eliminated. This subjective and potentially arbitrary approach is unlikely to survive legal scrutiny, as it will permit firms that are not owned, managed and controlled by socially or economically disadvantaged individuals or that are not small, to participate.

**ii. Adopt a Personal Net Worth Standard for Program Eligibility**

The courts are also clear that there must be a limit on the personal net worth (“PNW”) of the owner of the applicant firm to ensure that the Program is narrowly tailored to assist only economically disadvantaged individuals. We suggest that the state adopt the PNW limit of the City of Chicago’s program, currently \$2,379,729.54. This amount should be adjusted every February by the change in the Consumer Price Index.

Further, the state could follow the City’s approach to determining which assets should be included in the test. The need for liquidity, especially given the slow pay by the state 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 firms in the Illinois market. We therefore suggest that the state count only assets that are fully liquid, that is, cash on hand and in brokerage accounts of marketable securities. The classes of assets not subject to the calculation would include 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.

**c. Ensure Complete and Timely Contract Monitoring**

Many M/WBEs reported that while the state conducts 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 agencies conduct CUF and prompt payment reviews, would alleviate concerns about the actual operations of the Program after contracts have been awarded.

**3. Develop Performance Measures for Program Success**

The state should develop quantitative performance measures for M/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. Possible benchmarks might be:

- Increased bidding by certified firms as prime vendors.
- Increased prime contract awards to certified firms.
- Increased M/WBE size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which BEP firms are awarded prime contracts and subcontracts.

The state has mandated, by statute, that a disparity study be conducted and we suggest this approach be continued, assuming no change in the federal case law governing M/WBE programs. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, the state must ensure that they are narrowly tailored.

## II. LEGAL STANDARDS FOR LOCAL GOVERNMENT CONTRACTING AFFIRMATIVE ACTION 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”.<sup>9</sup> Strict scrutiny constitutes the highest level of judicial review.<sup>10</sup> 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.<sup>11</sup>

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

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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.

seeking contracts with the agency.<sup>12, 13</sup> Anecdotal data can consist of 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;<sup>14</sup>
2. The efficacy of race-neutral remedies at overcoming identified discrimination;<sup>15</sup>
3. The flexibility and duration of the relief, including the availability of waiver provisions;<sup>16</sup>
4. The relationship of numerical goals to the relevant labor market;<sup>17</sup> and
5. The impact of the relief on the rights of third parties.<sup>18</sup>

In *Adarand Constructors, Inc. v. Peña*,<sup>19</sup> 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”) federal Disadvantaged Business Enterprise (“DBE”) program for federally assisted transportation contracts.<sup>20</sup> Just as in the local government context, the national legislature must have a compelling governmental interest for the use of race-conscious programs adopted by state and local governments, and the remedies adopted must be narrowly tailored to that evidence.<sup>21</sup>

Most federal courts, including the Seventh Circuit,<sup>22</sup> have subjected preferences for Woman-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny”.<sup>23</sup> Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.<sup>24</sup> 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

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12. *Id.* at 509.

13. For this Study, CHA has included the qualitative or anecdotal evidence collected for our Chicago area and Illinois studies.

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

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

16. *Id.*

17. *Id.*

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

19. *Adarand III*, 515 U.S. 200.

20. The federal DBE Program regulation is set forth in 49 Code of Federal Regulations Part 26 and Part 23. Part 26 addresses participation by DBEs in United States Department of Transportation Financial Assistance Programs. Part 23 deals with participation of DBEs in airport concessions.

21. 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).

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

gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program<sup>25</sup> or held that the results would be the same under strict scrutiny.<sup>26</sup>

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”.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

Unlike most legal challenges, the defendant bears the initial burden of producing “strong evidence” in support of its race-conscious program.<sup>31</sup> As held by the Seventh Circuit,<sup>32</sup> 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.<sup>33</sup> “[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.”<sup>34</sup>

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23. See, e.g., *Associated Utility Contractors of Maryland v. Mayor of Baltimore*, 83 F. Supp. 2d 613, 620 (D. Md. 2000) (“*Baltimore I*”); *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).
  24. Cf. *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).
  25. *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*”).
  26. *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).
  27. 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).
  28. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
  29. *Heller v. Doe*, 509 U.S. 312, 320 (1993).
  30. The standard applicable to status based on sexual orientation or gender identity has not yet been clarified by the courts.
  31. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).
  32. See generally *Dunnnett Bay Construction Company v. Borggren*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7th Cir. 2015).
  33. *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*”).
  34. *Engineering Contractors II*, 122 F.3d at 916.

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”<sup>35</sup> 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.<sup>36</sup> For example, in 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.”<sup>37</sup> When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.<sup>38</sup> 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.<sup>39</sup>

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,<sup>40</sup> the Court, for the first time, extended the highest level of judicial exam-

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35. *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) (10<sup>th</sup> Cir. 2003) (“*Concrete Works IV*”).
  36. *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*”).
  37. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).
  38. *Coral Construction*, 941 F. 2d at 921; *Engineering Contractors II*, 122 F.3d at 916.
  39. *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works II*, 36 F.3d 1513, 1522-1523; *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 Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

ination 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 upon “strong evidence”<sup>41</sup> 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”. Many programs fail to meet the “compelling governmental interest” requirement, the “narrow tailoring” requirement, or both.

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% of the project to Minority-Owned Business Enterprises (“MBEs”).<sup>42</sup> A business located anywhere in the nation was eligible to participate so long as it was at least 51% 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% 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

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40. U.S. Const. Amend. XIV, §1.

41. 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.

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

it had essentially become a “passive participant” in a system of racial exclusion ...[it] could take affirmative steps to dismantle such a system.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> 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

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43. 488 U.S. at 491-92.

44. 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.”).

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

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.”<sup>46</sup>

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.”<sup>47</sup>

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% quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.<sup>48</sup> 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.”<sup>49</sup>

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

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

47. *Id.*

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

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

appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.<sup>50</sup>

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 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.<sup>51</sup> 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.<sup>52</sup>

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 Minority- and Woman-Owned Business Enterprise ("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*.<sup>53</sup>

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

51. *Id.* at 502.

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

53. *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").

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 contrast, the USDOT DBE program avoids these pitfalls. The federal DBE program “provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*.”<sup>54</sup>

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 State of Illinois’ Business Enterprise Program

The case law on the DBE program should guide the State of Illinois program for state 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 M/WBEs will be judged against this legal framework.<sup>55</sup> 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 econometric 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.<sup>56</sup> 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.<sup>57</sup>

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54. *Western States Paving*, 407 F.3d at 994.

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

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

*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 immaterial 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.”<sup>58</sup>

The State 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.”<sup>59</sup> 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 will examine in determining the constitutional validity of Illinois’ race- and gender-conscious program and the steps in performing a disparity study necessary to meet those elements.

## **1. Define the State of Illinois’ Market Area**

The first step is to determine the relevant geographic market area in which the State 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.<sup>60</sup> Illinois must therefore empirically establish the geographic and product dimensions of its 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.<sup>61</sup> This study employs long established economic principles to empirically establish the State’s geographic and product market area to ensure that any program based on the study satisfies strict scrutiny.

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57. *Id.*

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

59. *Id.* at 977.

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

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

A commonly accepted definition of geographic market area for disparity studies is the locations that account for at least 75% of the agency's contract and subcontract dollar payments.<sup>62</sup> Similarly, the accepted approach is to analyze those detailed industries that make up at least 75% of the prime contract and associated subcontract payments for the study period.<sup>63</sup> This produces the utilization results within the geographic market area.<sup>64</sup>

## 2. Determine the State of Illinois' Utilization of M/WBEs

The study should next determine the State'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 State'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 ("NAICS") or other industry codes, work descriptions or other important information not collected by the State) 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% of the contract dollars in the final contract data files should be collected to ensure a comprehensive file that mirrors the State's contracting and procurement activities.

## 3. Determine the Availability of M/WBEs in the State of Illinois' Market Area

Next, the study must estimate the availability of minorities and women in the State's relevant geographic market area to participate in its contracts as prime contractors and associated subcontractors. Based on the product and geographic utilization data, the study should calculate unweighted and weighted

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62. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 ("*National Disparity Study Guidelines*").

63. *Id.* at 50-51.

64. For this Report, we found the State's market area to be the entire state of Illinois. Please see Chapter IV for additional details.

M/WBE availability estimates of ready, willing, and able firms in the State'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/BEP Master Directory. This methodology includes both certified firms and non-certified firms owned by minorities or women.<sup>65</sup> The Master Directory consists of all available government and private M/WBE directories, limited to firms within the State's geographic and product market.
  - The firms contained in the
  - State'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 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.<sup>66</sup> This will produce estimates of woman and minority business availability in the State'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

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

66. 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.

share of the State’s spending in each NAICS code. The unweighted availability determination will be weighted by the share of dollars Illinois 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 State’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. This approach is favored for several reasons. As recognized by the courts, including the Seventh Circuit Court of Appeals and the *National Disparity Study Guidelines*,<sup>67</sup> 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 DBE availability calculation that casts a broader net” than merely using bidders lists or other agency or government directories.<sup>68</sup> A broad methodology is also recommended by the federal DBE Program, which has been upheld by every court.<sup>69</sup> 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

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67. *National Disparity Study Guidelines*, at 57-58.

68. *Northern Contracting III*, 473 F.3 at 723.

69. *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](https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf).

the agency's market areas that have not been able to access its opportunities.

- 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.<sup>70</sup>
- 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 program<sup>71</sup> and most recently in the successful defense of the Illinois State Toll Highway's DBE program.<sup>72</sup>

Other methodologies relying only on vendor or bidder lists may overstate or understate availability as a proportion of the State's actual markets because they reflect only the results of the State'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. Firms that fail to respond to a survey are called “unavailable” even if the firm is actually working on State 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*

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

71. *Northern Contracting III*, 473 F.3d 715.

72. *Midwest Fence II*, 840 F.3d 932; see also *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *cert. denied*, 137 S.Ct. 2292 (2017) (CHA served as testifying experts for the Tollway).

*Study Guidelines*, these capacity factors are not race- and gender-neutral variables. 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.*”<sup>73</sup> Significantly, *Croson* does not “require disparity studies that measure whether construction firms are able to perform a *particular contract.*”<sup>74</sup>

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.<sup>75</sup> “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.”<sup>76</sup> “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.”<sup>77</sup>

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

74. *Id.*

75. 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).

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

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

There are also practical reasons to not circumscribe availability through “capacity” limitations. First, there is no agreement concerning what variables 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.”<sup>78</sup> 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 VI, 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.

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

#### 4. Examine Disparities between the State of Illinois' Utilization of M/WBEs and M/WBE Availability

A disparity study for a state 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.<sup>79</sup>

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.<sup>80</sup> An index less than 100% 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 the significance of a result. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. This is based on the Equal Employment Opportunity Commission's "eighty percent rule" that a ratio less than 80% presents a *prima facie* case of discrimination by supporting the inference that the result may be caused by the disparate impacts of discrimination.<sup>81</sup> 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.<sup>82</sup> A more in-depth discussion of statistical significance is provided in Appendix C.

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

80. *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).

81. 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.<sup>83</sup>

Illinois 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.<sup>84</sup>

Nor must Illinois 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.<sup>85</sup>

The State 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.<sup>86</sup>

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82. 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.

83. *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”).

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

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

86. *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.<sup>87</sup>

## 5. Analyze Economy-Wide Evidence of Race- and Gender-Based Disparities in the Illinois 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<sup>88</sup>. 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.<sup>89</sup>

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87. *Id.* at 973.

88. *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.”).

89. *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.”<sup>90</sup> 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”.<sup>91</sup>

For example, in unanimously upholding the federal 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.<sup>92</sup> 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.<sup>93</sup>

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90. *Id.*

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

92. *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*”).

93. *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 Illinois 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.”<sup>94</sup> 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.<sup>95</sup> 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.”<sup>96</sup> “[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.”<sup>97</sup>

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] offered 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 – and 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’ perceptions.”<sup>98</sup> 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.”<sup>99</sup>

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

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

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

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

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

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

## D. Narrowly Tailoring a Minority- and Woman-Owned Business Enterprise Program for the State of Illinois

Even if Illinois 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.”<sup>100</sup> In contrast, as discussed above, programs that closely mirror those of the federal DBE Program<sup>101</sup> have been upheld using that framework.<sup>102</sup> 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;<sup>103</sup>
- The efficacy of race- and gender-neutral remedies at overcoming identified discrimination;<sup>104</sup>
- The relationship of numerical benchmarks for government spending to the availability of minority- and woman-owned firms and to subcontracting goal setting procedures;<sup>105</sup>
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;<sup>106</sup>
- The relationship of numerical goals to the relevant market;<sup>107</sup>
- The impact of the relief on third parties;<sup>108</sup> and
- The over inclusiveness of racial classifications.<sup>109</sup>

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

101. Although numerous regulatory pronouncements have been issued since the federal DBE program was revamped in 1999, the 1999 rule remains in effect.

102. *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).

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

104. *Paradise* at 171.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Croson* at 506.

109. *Paradise* at 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,<sup>110</sup> and the failure to seriously consider such remedies has proven fatal to several programs.<sup>111</sup> 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 State 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.<sup>112</sup> Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup> 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

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110. *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).

111. *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.

112. *See* 49 C.F.R. §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”).

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

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

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

subsumed in the exhaustion requirement.”<sup>116</sup> 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.”<sup>117</sup>

## 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.<sup>118</sup> 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.<sup>119</sup> “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*.”<sup>120</sup>

It is settled case law that goals for a particular solicitation must 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.<sup>121</sup> 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.<sup>122</sup> Not only is transparent, detailed contract goal setting legally mandated,<sup>123</sup> 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.

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

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

118. *Webster*, 51 F.Supp.2d at 1379, 1381 (statistically insignificant disparities are insufficient to support an unexplained goal of 35% M/WBE participation in County contracts); *see also Baltimore I*, 83 F.Supp.2d 613, 621.

119. 49 C.F.R. §26.45 (b).

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

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

122. *Midwest Fence I*, 2015 WL 1396376 at \*23.

123. *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.<sup>124</sup> 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 program,<sup>125</sup> 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].<sup>126</sup>

Chicago’s program failed narrow tailoring by imposing a “rigid numerical quota” on prime bidders’ utilization of MBEs and WBEs.<sup>127</sup> 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.<sup>128</sup>

124. 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”).

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

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

127. *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.”).

128. *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 State’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.<sup>129</sup> 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”.<sup>130</sup> 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.”<sup>131</sup> However, at least one court has held some quantum of evidence of discrimination for each group is sufficient; *Crososn* does not require that each group included in the ordinance suffer equally from discrimination.<sup>132</sup> 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.<sup>133</sup>

The over-inclusiveness concern is mitigated by the requirement that the firm’s owner(s) must be disadvantaged.<sup>134</sup> The federal 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.<sup>135</sup> “[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively

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129. *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).

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

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

132. *Concrete Works IV*, 321 F.3d at 971 (Denver introduced evidence of bias against each group; that is sufficient); *cf. Midwest Fence II*, 840 F.3d 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.”).

133. *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 over-inclusiveness.”).

134. 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*; Part 26, Appendix E: *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.”<sup>136</sup> 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).”<sup>137</sup>

## 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.<sup>138</sup> The trial court in the City of Chicago case noted that “there was little testimony about the effectiveness of race-neutral programs.”<sup>139</sup> However, “innocent” parties can be made to share some of the burden of the remedy for eradicating racial discrimination.<sup>140</sup>

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.<sup>141</sup>

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135. *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).

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

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

138. *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).

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

140. *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.”).

141. *Midwest Fence I*, 2015 WL 1396376 at \*22.

Burdens must be proven and cannot constitute mere speculation by a plaintiff.<sup>142</sup> “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.”<sup>143</sup>

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. Part 26 provides this remedy for discrimination against DBEs seeking prime contractor work,<sup>144</sup> and it does not limit the application of the program to only subcontracts.<sup>145</sup> 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.<sup>146</sup>

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142. *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).

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

144. 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.”).

145. 49 C.F.R. §26.45(a)(1).

146. *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.”<sup>147</sup> 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.<sup>148,149</sup> How old is too old is not definitively answered<sup>150</sup>; however, governments would be wise to analyze data at least once every five or six years.<sup>151</sup>

In contrast, the federal DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.<sup>152,153</sup> 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.”<sup>154</sup>

## 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.

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

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

149. 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.

150. *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.”).

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

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

153. The Federal DBE Program was reauthorized in the Infrastructure and Investment and Jobs Act, Public Law No: 117-58 earlier this year.

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

## 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 its strong basis in evidence for its M/WBE program designed to remedy discrimination against minority- and woman-owned construction firms.<sup>155</sup> 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.<sup>156</sup>

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% of City contracts be awarded to minority-owned businesses and five 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 a 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% MBE and five 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-

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155. *BAGC v. Chicago*, 298 F. Supp.2d 725.

156. 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.

utilization of M/WBEs on City projects was not sufficient to abandon remedial efforts, as that result is “skewed by the program itself.”

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.”<sup>157</sup>

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:

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

- There was no meaningful individualized review of M/WBEs' eligibility;
- 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.<sup>158</sup> 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% of IDOT's available firms.<sup>159</sup> It next examined the possible impact of discrimination on the formation of firms. As required by "step 2" of Part 26,

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158. *Northern Contracting III*, 473 F.3d 715. Ms. Holt authored IDOT's DBE goal submission and testified as IDOT's expert witnesses at the trial.

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

IDOT considered whether to adjust the step 1 base figure to account for the “continuing effects of past discrimination” (often called the “but for” discrimination factor).<sup>160</sup> 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% higher, for an estimate of DBE availability “but for” discrimination of 27.51%.

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 goals;<sup>161</sup> 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% 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

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160. 49 C.F.R. §26.45(d)(3).

161. *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%, this goal is completely voluntary -- the average DBE usage rate in 2002 and 2003 was 1.6%. On the basis of all of this data, IDOT adopted 22.77% 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.<sup>162</sup>

### **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 Part 26, IDOT's implementation of those regulations and its DBE program for state funded contracts, and to the Illinois Tollway's<sup>163</sup> separate DBE program was rejected.<sup>164</sup>

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 nor 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

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

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

164. *Midwest Fence II*, 84 F. Supp 705.

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 program<sup>165</sup> 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.<sup>166</sup>

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."<sup>167</sup>

The bases upon which the Tollway's program were held to be 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.<sup>168</sup>

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 industry, the Court finds the Tollway Program's burden on non-

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165. 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.

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

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

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

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.<sup>169</sup>

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

# III. THE STATE OF ILLINOIS' BUSINESS ENTERPRISE PROGRAM

The state of Illinois has adopted a statute and developed policies and procedures for its Business Enterprise Program (“BEP” or “Program”) to promote fair and equitable contracting opportunities for minority- and woman-owned businesses. The Program applies to various types of contracts and state entities.<sup>170</sup>

## A. Business Enterprise Program History

The Business Enterprise Program was codified in 1989 to foster the continuing economic development of minority-owned and woman-owned businesses (“M/WBEs” or “BEPs”) through the Business Enterprise for Minorities, Women, and Persons with Disabilities Act (“Act”). The Act applies to all state agencies and state universities. The primary goal of the Program is to encourage participation in the state's procurement process as both prime contractors and subcontractors in the area of goods and services. This includes, but is not limited to, insurance services, investment management services, information technology services, accounting services, architectural and engineering services, and legal services. Contracts awarded by a retirement system, pension fund, or investment board are exempt from the Program.

The state has also adopted Program provisions under the Act to promote and encourage the development of businesses owned by persons with disabilities.

The Program was amended in 2016, 2018 and 2021.<sup>171</sup> Our firm conducted a Disparity Study in 2015 that supported the inference that barriers based on race and gender continued to impede opportunities on state projects for each racial and ethnic minority group, for White women, for minorities as a whole and for M/WBEs as a whole.

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170. 30 ILCS 575, Business Enterprise for Minorities, Women, and Persons with Disabilities Act.

171. Public Act 099-0462, Executive Order 2016-08, Public Act 100-0391, Executive Order 2018-07 and Public Act 101-0657.

## B. Business Enterprise Program Administration

Effective January 1, 2022, the Commission on Equity and Inclusion (“CEI”)<sup>172</sup> became responsible for administration of the Program, when the jurisdiction over the functions of the program were transferred from Central Management Services (“CMS”) to CEI. Prior to 2022, the program was administered by CMS.

CEI is comprised of seven members appointed by the Governor. Appointments must be confirmed by the Illinois State Senate, and no more than four members can be of the same political party. The chief administrative and executive officer of the Commission is appointed by the Governor and has general supervisory authority over all personnel of the Commission. Appointees serve four-year terms.<sup>173</sup>

The roles and authority of CEI include the following:

- Facilitating and streamlining communications between the Business Enterprise Council for Minorities, Women, and Persons with Disabilities, the purchasing entities, the Chief Procurement Officers, and others in all State and university procurements.
- Establishing a scoring evaluation for State agency directors, public university presidents and chancellors, and public community college presidents. The scoring shall be based on the following three principles: (1) increasing capacity; (2) growing revenue; and (3) enhancing credentials.
- Exercising the authority and duties provided under Section 5-7 of the Illinois Procurement Code.
- Providing support for diversity in State hiring and in working with State agencies.
- Overseeing the implementation of diversity training of the State workforce.
- Proposing and submitting to the Governor and the General Assembly legislative changes to increase inclusion and diversity in State government, as deemed necessary and appropriate.
- Overseeing the following entities:
  - The Illinois African American Family Commission;
  - The Illinois Latino Family Commission;
  - The Asian American Family Commission;

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172. 30 ILCS 574, Commission on Equity and Inclusion Act.

173. Members who are initially appointed will serve one to three years. Four shall be appointed for a term to expire on the third Monday of January, 2023, and three (including the Chairperson) shall be appointed for a term to expire on the third Monday of January, 2025.

- The Illinois Muslim American Advisory Council;
- The Illinois African American Fair Contracting Commission; and
- The Business Enterprise Council for Minorities, Women, and Persons with Disabilities.
- Adopting rules as necessary for the implementation and administration of the requirements of the Commission on Equity and Inclusion Act (30 ILCS 574).
- Undertaking the duties provided to it under Section 45-57 of the Illinois Procurement Code.

The Program is now managed by CEI's Business Enterprise for Minorities, Women, and Persons with Disabilities Division. The Division is headed by the Secretary of CEI who is selected by the CEI chairperson and approved by the Council.

Together with CEI, the Business Enterprise Council for Minorities, Women, and Persons with Disabilities ("Council"), established by the Act, oversees the implementation, monitoring and enforcement of the Program to ensure it is meeting the goals of the Act. Council members include the Chairperson of CEI, the Secretary of Human Services and the Directors of the Departments of Human Rights, Commerce and Economic Opportunity, Central Management Services, Transportation and the Capital Development Board. The Comptroller, or his or her designee, serves as an advisory member. In addition, the Council includes ten representatives appointed by the Governor from minority-owned, woman-owned businesses, or a business owned by a person with disabilities; two members of the business community; and a representative from public institutions of higher education. Agencies appoint a BEP liaison to provide the Council with their agency's annual spending with BEP firms; the agency's annual compliance plan; and to assist in setting contract goals.

Among other duties, the Council is authorized to:

- Devise a certification and registration procedure.
- Maintain a list of BEP certified firms.
- Review rules and regulations for Program implementation.
- Review compliance plans submitted by each State agency and public institution of higher education.
- Make annual reports to the Governor and the General Assembly on the status of the Program.
- Serve as a central clearinghouse for information on pending and awarded state contracts.

- Establish a toll-free telephone number to facilitate information requests concerning the certification process and pending contracts.

To carry out these responsibilities, the Council has established the Outreach, Certification and Compliance Subcommittees.

Recommendations for increasing participation of BEPs in procurements may also be made by the Act's Special Committee on Minority, Female, Persons with Disabilities and Veterans contracting. This Committee reviews Illinois procurement laws regarding BEP contracting. It is comprised of three people appointed by leadership of the Illinois House, the Illinois Senate, the Director of CEI, the Council chairperson and the chief procurement officer of each State agency participating in the program.

Each state agency and public institution of higher education must develop an annual Compliance Plan outlining its policy; how the agency intends to reach the goals; program compliance procedures; and a timetable for meeting the goals. The Council reviews and approves the Compliance Plan and may reject any Plan that does not comply with the Act or any rules or regulations. A BEP utilization report is required to be filed by each agency and university with the Council each year, that includes a self-evaluation of its efforts to meet its goals.

The state uses the B2Gnow<sup>®</sup> Contract Management and Compliance System, a web-based software system, to track Program participation. The system provides automated communication with contractors via email regarding compliance issues, reporting, automated tracking of contract goals and participation, and automatic verification of subcontractor payments.

## **C. Business Enterprise Program Eligibility**

The Business Enterprise Program Certification Division certifies minority, women, and persons with disabilities owned businesses that meet the following requirements:

- Have at least 51% ownership by a minority, woman, or person with a disability.
- Have at least 51% of their business controlled by one or more minority groups, women, or persons with a disability.
- The owner must be a citizen of the United States or a legal permanent resident alien.
- Have annual gross sales of less than \$75M based on federal income tax returns of the business.

Firms exceeding the gross sales cap can apply to the Council for certification for a particular contract if the firm can demonstrate that the contract would have significant impact on the BEP firm's business.

The Program has four certification processes:

1. The full application process: Vendors must submit a notarized affidavit signed by an officer of the firm, along with the most recent company financial statements, a U.S. Corporate or LLC partnership income tax return, U.S. individual federal income tax returns and other documentation validating ownership information and gross sales. The full application process generally takes 60 days after the completed application and supporting documentation are submitted. The full BEP certification is valid for seven years. To maintain certification, vendors must submit an annual No Change Affidavit.
2. The BE Enrolled Business Enterprise Certification Program ("BE BEP"): This offers automatic certification to businesses certified with the City of Chicago and/or Cook County. The BE BEP certification is valid for the duration and for the commodity codes of the certification held with the City of Chicago and/or Cook County.
3. The FastTrack Certification: This allows vendors who are certified by the Chicago Minority Supplier Development, Mid-States Minority Supplier Development Council or the Women's Business Development Center to apply by submitting proof of certification from the partner and a notarized BEP application affidavit. Turnaround time to process these applications is seven business days. FastTrack Certification is valid for one year.
4. The Transportation Recognition Certification: this is a scaled-down version of the Full Certification process, with condensed documentation requirements. Vendors are required to complete an online application as well as provide a notarized BEP application, a current business license and current tax return and proof of certification from either the Illinois Department of Transportation, the Chicago Transit Authority, METRA or Pace Bus. The Recognition Certification application processing time is approximately 15 to 30 business days. The Transportation Recognition Certification is valid for one year.

## **D. Race-Neutral Measures**

The Act requires the Commission to further establish targeted efforts to encourage the participation of BEP firms on state contracts through focused outreach efforts directed to these businesses.

## **1. Access to Information**

The State of Illinois' Quarterly Buying Plan is designed to serve as a single-destination for useful information to the state's vendor community and to make vendors aware of the upcoming purchasing needs for a range of agencies. Recent additional resources include instruction on how to do business with the state, information about small and disadvantaged business programs, and an overview of registration and pre-qualification.

## **2. Vendor Outreach and Networking Events**

The state regularly holds pre-bid conferences providing an opportunity for networking with other potential bidders/proposers and obtaining more information regarding the project.

The state conducts regular educational workshops about "Doing Business with Illinois," for small businesses about contracting, policies, rules and regulations; seminars on certification, prompt vendor payment, loans and grants, along with one-on-one guidance. Workshops are offered in Chicago and Springfield. In 2022, the state held a vendor summit that offered workshops on how to do business with state agencies and universities, presentations from subject matter experts to answer questions about upcoming contracting opportunities and instruction on how to navigate the procurement process and accessing resources.

The BEP website also lists many resources for small firms, such as other state agencies, local governments, small business development centers, business resources, chambers of commerce, assist agencies, etc. The BEP team regularly holds virtual office hours for the public to ask any questions about the certification process. If necessary, the certification team will hold one-on-one meetings to address questions in English/Spanish.

## **3. Vendor Payment Program**

The state offers a Vendor Payment Program designed to assist all vendors and service providers with working capital during the payment cycle.

## **4. Staff Training**

Staff participate in B2Gnow® training.

## E. Business Enterprise Program Goals

As of January 2022, the state’s annual, aggregated aspirational goal is to spend at least 30% of its total non-construction and non-professional services<sup>174</sup> dollars with firms certified through BEP. This overall goal is allocated as follows: MBEs 16%; WBEs 10%; and businesses owned by persons with disabilities 4%. The state’s annual, aggregated aspirational goal for construction and professional services contracts is to spend not less than 20% of total dollars with BEP firms. This overall goal is allocated as follows: MBEs 11%; WBE 7%, and businesses owned by persons with disabilities 2%. Contract goals are based on the availability of BEP certified vendors and the scope of work for the contract. The overall contract goal is the cumulative amount of the availability of certified BEP firms in each percentage weighted scope of work. Contract goals are set by the procuring institution/agency that issues the contract. The Agency’s Procurement Officer performs the initial goal setting using the BEP Project Goal Setting Form. The final goal is then determined by the CEI BEP Compliance Officer.

Goals are not set on procurements that do not offer subcontracting opportunities or where there is insufficient BEP availability to ensure adequate competition. Exemptions of entire classes of contracts and individual contract exemptions must be made in writing by the agency or institution of higher learning to the Council. Requests must include documented justification for the exemption.

## F. Counting Business Enterprise Program Firm Participation Towards Contract Goals

Only expenditures to certified firms that perform a commercially useful function (“CUF”) on a contract, as defined in 49 C.F.R. §26.55(c), may be counted toward the BEP goal. A CUF is performed when a firm is responsible for the execution of a distinct element of the work of the contract and carries out its responsibilities by actually performing, managing, and supervising the work involved, or by fulfilling its responsibilities in a joint venture.

## G. Review of Business Enterprise Program Compliance

All state solicitations that include a BEP goal require bidders or offers to include a Utilization Plan (“Plan”). The Plan is due at the time of bid or offer submission. The Plan must demonstrate that the vendor has either met the entire contract goal or has requested a full or partial waiver and made Good Faith Efforts (“GFE”) towards

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174. Professional services include insurance, investment management, accounting, architectural, engineering, legal and information technology services.

meeting the goal. GFE are defined as those actions, which by their quality, quantity, and intensity are those that one could reasonably expect a bidder/offeror to take if the bidder/offeror were actively and aggressively trying to obtain BEP participation sufficient to meet the BEP contract goal. GFE documentation must include Items of work that correspond to the GFE checklist, and a detailed accounting of the efforts made to contact and negotiate with BEP firms and justification for rejecting any BEP firms. Required Plan documentation includes a signed vendor commitment, a subcontract participation agreement and documentation of GFE. Failure to complete and include a Plan, including documentation demonstrating GFE when requesting a waiver, renders the bid or offer as non-responsive. A “cure” period of up to 10 days from the date of notification is allowed for an otherwise successful bidder to demonstrate its GFE to meet the contract goal(s). The deficiency in the bid or proposal may only be cured by contracting with additional BEP subcontractors who are certified at the time of bid submission. Submission of a blank utilization plan renders a bid or offer non-responsive and is not curable. The Procurement Officer must notify CEI of all bids or offers that fail to include a utilization plan or that include a utilization plan with deficiencies.

## **H. Contract Monitoring and Enforcement**

Compliance of state agencies and public institutions of higher education with meeting the goals and policy of the Act is monitored by CEI. If the Commission determines a vendor is non-compliant, it can recommend imposing and issuing administrative remedies for violations of contract provisions to the State agency and public institutions.

State agencies and public institutions of higher education are responsible for monitoring vendor compliance with its Plan and the terms of the contract during performance. They evaluate the contractor's fulfillment of the BEP contract goal prior to the expiration or termination of a contract. Failure to comply with commitments, to cooperate in providing information about the utilization plan, or providing false or misleading information concerning compliance or eligibility of the Program vendors, GFE or any other material fact or representation is considered a material breach of the contract. The agency files a report with the Secretary of CEI. If, upon review, the Secretary determines that the vendor did not fulfill the contract goals or did not make sufficient GFE to do so, the vendor may be subject to remedies or sanctions for breach of contract, including termination of the contract, disqualification of the contractor from doing business with the State for a period of not more than one year, cancellation of any contract entered into by the vendor or any other remedies provided for in the contract, at law or in equity.

## I. Advance and Progress Payments

The Act authorizes the establishment of a Sheltered Market, where selected contracts can be specifically set aside for bidding by BEP firms. These contracts can be procured on a competitive bid or negotiated basis.

## J. Sheltered Markets

The Act authorizes the establishment of a Sheltered Market, where selected contracts can be specifically set aside for bidding only by BEP firms. These contracts can be procured on a competitive bid or negotiated basis.

## K. Mentor-Protégé Program

The State has implemented a mentor-protégé program to assist BEP firms to develop capacity and to enhance their core capabilities through partnering with larger, more experienced firms. The mentor must utilize the protégé for a commercially useful function for at least ten percent of the total contract amount. The protégé must be certified and perform a CUF under the contract.

## L. Experiences with the State of Illinois' Business Enterprise Program

To explore the impacts of the Program, we interviewed 122 individuals about their experiences and solicited their suggestions for changes. We collected written comments from businesses about their experiences with the program through an electronic survey. We also received written comments throughout the study period.

### 1. Business Owner and Stakeholder Interviews

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

#### a. M/WBE Program Administration

As a general matter, most M/WBEs supported the program.

I've been working with the state for probably about 10 years or so. I believe that the state is doing everything to help us as a small business. And I think I've done well with

dealing directly with the state. Now especially in the last two, three years.

However, several commented on what they perceive to be a lack of monitoring prime vendors' compliance with program and contractual requirements.

The problem is the prime contractor. That's a problem. And it is very frustrating that the state who is spending the money cannot hold the prime contractors accountable.

[There] has [not] been any form of compliance regardless of, what the law is and their requirements in their utilization plan to provide quarterly reports.... There has to be some form of accountability. And to say that you have a BEP program to enhance, to grow revenue, increase capacity and enhance credentials, and you don't have accountability. You have to question whether there's really a commitment to growing minority businesses.

There's certainly enough resources, it seems like, to critique every single part of your life and your business [during the certification process], but yet there's not enough resource or focus on holding primes or those accountable to achieving these BEP goals.

These programs are only as strong as they're being enforced. And generally, if these contractors/primes know that there's no consequence then sure, they'll tell you whatever you need to hear to get the contract. And then it sounds as if once they've got it, it's like see ya. Oh, well. So, I think that it would behoove CMS to understand the value of one, monitoring the compliance and making sure that because... What's being watched also there seems to make a difference. And they know if they're being watched that, that seems to make a difference too. But then once these major contractors realize that you can't get the next contract or there's going to be some kind of liquidated damages or there's some price to pay, then all of a sudden, they tend to stop playing these games.

The agency directors don't give a damn about BEP.... You have to put somebody's head on the chopping block and make them enforce.

**b. Access to Procurement Information**

Several firm representatives reported that they need more timely information about solicitations.

[State agencies] know these bids are coming due. They know months ahead of time. It's just they wait until the last minute to put it out. If they would just open that window a bit and use a tickler like we do. 60 days ahead of time you want to go out and look for a new vendor. Why aren't you giving that vendor time to put together a logical solution for you?... By the time the prime actually figures out who they want to even approach, I'm down to seven, sometimes five days. Honestly, sometimes a weekend. And I'm like, "Are you kidding? I can't help. I'm sorry."

One suggested enhancement would be better processes to help to connect large prime vendors with BEP firms.

It would really be helpful if when they actually put out a proposal that there's a place that we can sign up on and say, "I have qualified experience on here."

**c. Contract Size**

Several owners listed the size and complexity of state contracts as major barriers to their ability to submit bids or proposals as prime vendors.

Why don't we just break [the contract] apart? Why can't we give [the large firm] 80 and give us 20 and let us fulfill it? If we qualify to do the work, we qualify to do the work. Now they say that's very difficult to have more than one prime, but there has to be a way.

They need to unbundle their RFPs if they truly are committed to supporting minority participation.... Why do we need to force the primes to work with us? Why don't we just have our own piece of that bid?

The state prime vendors put a big premium on the hourly rates that we provide. So, the state is really losing money at the same because generally our rates are going to be lower than a larger, bigger company.... If they could somehow figure out a way to unbundle the RFPs and not force the primes to use us where we could bid on our own as our own entities, that would be very helpful.

If they really, really want to help us as small business, they need to [unbundle and set aside contracts] really. And let [the large prime vendors] do their own thing. They got big fish to fry. Let us do the small one, have something out that can help us instead of begging [name], and begging [name] and begging all these people who are not ready to give out, they don't want to give up a penny of that contract.

**d. Payment**

Many interviewees, both M/WBEs and non-M/WBEs, reported that slow payments are a major problem.

We've got [state] people that are handling our paperwork that don't have a clue what's supposed to be there and not be there. So, I think all of those things layered on top of actually being on the job and doing the work has caused a real terrible bottleneck.... And there's always a thing that we've been asking for a hundred years, is direct payment to subcontractors.... As subcontractors and primes, we really need to get together and start to say no to some of this nonsense that's going on, because it's crazy.

You just have to make sure you put money to the side to survive and keep on going forward. And that's just part of the business, because there's always going to be a contractor who's not going to pay you on time, period, no matter what they agree to. And you just have to accept it.

Slow payment also impacts a firm's reputation, not just its balance sheet.

If you don't understand the process and the banks aren't giving any of us loans for our cashflow and in our government space cashflow is always the issue, it just reinforces that perception to the agency, well, they're always crying they don't have money.

**e. Meeting Contract Goals**

Goals on goods contracts were reported to be difficult to meet because of the lack of subcontracting opportunities.

We struggled because it's really, it's parts orders. And I didn't have any, I struggled with how I add another layer onto the contracts that we were completing, and it was a real struggle. And we ended up hiring a very good firm to do some freight, but that was freight after I had products

shipped to me. So, it was an added layer that really was almost unnecessary layer, but it was the only way I was going to be able to add that and that's where my struggle came in.... I didn't know how we would've approached telling them that, gosh, adding another layer's just adding costs it's unnecessary on this contract because it's just parts. And if there was a better, maybe with everyone a little better explanation on our YouTube video I could have watched later to at least brought it, because what our conversations, we were limited on the amount we could ask. And then when we did do it, we didn't do it correctly, but we ended up resolving it, but I really feel it was an unnecessary add on.... [Submitting evidence of GFE was] not real option. We were sort of told that.... I didn't know how we would've approached telling them that, gosh, adding another layer's just adding costs it's unnecessary on this contract.

Goals for veteran-owned businesses were especially problematic.

The situation with the veterans is that they hold you ransom. They know that right now they have the power of really sending in these very high numbers and you will use [them] regardless. And they tell you because they know their pool is so small that they will not negotiate with you. When I say negotiate is because we respect the numbers, right? But sometimes they come like literally 80% higher.... I had a trucking company that literally told me, "I know you need me, so just pay the premium and that's it." And so, I think that's something they should do at this part of the study too with veterans. So, if your pool is very short, think twice before, maybe encourage the use of veterans, but don't put a goal.

If they want to promote the BEP for the veteran small business, they may need to make the accessibility of the database that they've worked very hard to put together extremely easy.

One suggestion was to make the BEP website more useful by providing more information about the certified firms.

I find the website regarding the BEP more directed at signing up and getting people into the program than for contractors to actually utilize them.

Some participants wanted firms certified as Disadvantaged Business Enterprises (“DBEs”) under the U.S. Department of Transportation’s program<sup>175</sup> be automatically eligible to be used for goal credit in the Program.

We'd love to be able to have the DBEs be a qualified BEP, the contract that we have for supplying [material] and [material] we have to get a trucker that's almost two hours away from our plant to haul the material, to get the correct credit. Whereas if the DBEs were acceptable, we'd have truckers very local and it would ultimately result in a reduction in cost of the product also.

**f. Mentor-Protégé Programs**

There was significant support for the adoption of a BEP mentor-protégé program. The Illinois Tollway’s program was mentioned by several firms as an excellent model.

Mentor-protégé is one of the best things for the mid-level contractors that are doing the like the Tollway. I'm on the mentor-protégé there. It's one that it's grown me tremendously. It depends on the contractor you're involved with, and the commitment that they put into it.... When I first started in it, it was a struggle, but now that we understand how it works, and we do our meetings, so they get my opinion now and they tell me their thoughts, like to see how they process the work through their companies. It's interesting. It's really brought me to a different level on how I perceive a general contractor, and can understand the way it goes through the system to be. And then once it's been, how it's gone through the system for paying back to us. So, if everybody could see that in CMS and mentor-protége, I think it's an important thing for the contractors to be working with us minorities to understand each other better, because it does work.

One interviewee had a negative experience with another program.

I really have a lot of respect for people that can do a mentor-protégé program, survive that do well, because I can't. I did one many years ago and it was the most God awful experience of my life. They paid absolutely no attention to me. They just rolled over, and it was awful. I

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175. 49 C.F.R. Part 26. Members of the Illinois Unified Certification Program that conduct DBE certifications are the Illinois Department of Transportation, the City of Chicago, the Chicago Transit Authority, Metra and Pace Bus.

think we really have to either give it more rules in most cases, but you really have to watch it, because why would somebody in my field want to train me to do a better job so that I could be a more fierce competitor to them than I already am. It just doesn't make sense to me.

Prime vendors, while supporting the concept, were wary of the possible legal and program compliance issues raised by entering into that level of a relationship with a subcontractor.

We are involved in a mentor-protégé at [name]. And I will tell you that we were a little bit hesitant because we're encouraged to hold hands, but not that much. I always liken this to dating. It wants you to date, but we don't get too exclusive, but then be really exclusive. But then how much meetings you're having, but don't again send them flowers. But so, it made us hesitant because we don't want to get penalized for it. And I think putting more of that onus on supportive services, if it's contracted with D or M or W or BEP firms to say, "Hey, here's your coordinator." It was kind of like your quarterback and can come to your office on your time and do it. I think that would be more helpful.... In general, mentor-protégé programs are seen by our legal counsel as problematic. And so, we do not pursue that pathway.... As the goals grow, we need the firms the population to grow and the firms need to get bigger and you need to work with firms to develop the capacity that we need to hit the program objectives. So, yeah, I see the concept is great for protégé, help them grow, help them develop it. If they're a 10-man firm or a 10-person firm, what does it take to become a thousand-person firm that can take place through a mentor-protege relationship. But It's fraught with a lot of legal concerns.

Our legal counsel, just anytime you go to them with the concept of doing a mentor-protege program, or even mentioning those two words, they immediately, walls up, guards up. They will not, they won't even entertain it. So, what we've kind of our work around in a way has been to do these mentor-protégé situations where it's one of our existing subcontractors.

And I do [participate] very gladly because we need help. In my team estimating here, the chief estimator is amazing. They really support me, help in the DBE community, but ...

you have to show disconnect, right? They have to be independent because that's the main goal of commercially useful function, right? They have to be able to estimate their job and know what they're doing, even though they're growing.

**g. Supportive Services and Technical Assistance**

There was a general consensus that supportive services and technical assistance services, such as training on preparing bids or proposals, marketing, regulatory compliance, etc., are beneficial to M/WBEs and other small firms. Assistance with obtaining surety bonds was specifically mentioned as a critical need.

Increase my bonding ability. So, I could increase what I bid on, because right now, I'm maxed out in my ability to provide any more bonds for the rest of the year, because I have a couple bigger contracts and there's been some state work and other things that I've been wanting to bid, but I've maxed out in my bonding capability.... Any help with that I think would be helpful for smaller companies like myself.

However, the offering is only as good as the consultants providing the services.

What I have found with many technical assistance programs, they're willing to help, they're good in math, but if you have never bid a job, public work, taking into account union wages, Davis Bacon, closing weekends, I mean, there's so many factors that you have to take into account that if you have someone that doesn't have the knowledge, it won't be very helpful for them because like they're learning together. The technical person is learning with the mentor-protégé.

Making training easily accessible was suggested.

When you are growing your business, you cannot afford to shut your doors during the week and go down to in-person workshops. But if you could log on at 3:00 AM in your home and very similar to a YouTube video, get that information on your own time. That makes more business sense.

## 2. Electronic Survey Responses

Written comments from the electronic survey have been categorized and are presented below. Comments are indented and have been edited for readability.

### a. Impact of the Business Enterprise Program

Minority and woman respondents overwhelmingly supported the Program. Many stated the Program was essential to obtaining State business.

Opportunities I wouldn't have otherwise. Networking with bigger prime vendors.

Provided opportunities for contracts with prime vendors that otherwise likely wouldn't entertain a conversation with a small, woman owned business.

Requiring WBE participation has greatly assisted our business in getting subcontracts.

[The Program has helped our business by] setting goals for WBEs.

Being certified has opened up doors with new customers.

The certifications are helpful when larger companies need to show that they are doing business with a WBE company.

They opened the door to a wealth of opportunities that I would not be pursuing otherwise. 10 years ago, my business was 100% private sector I knew nothing about MBE designations and working as a sub-contractor - I was introduced to this by attending seminar and it changed my world.

They provided the certification that allowed us to get contracts with the University of Illinois and CDB.

We are selected by prime contractors for our certifications.

We have a better chance of winning bids with the BEP program.

We have been able to obtain CDB work through our CMS certification.

We have been able to team with several A/E firms on construction projects due to our WBE certification. This

network of A/E firms continues to expand the more participation we encounter.

Being BEP WBE certified supports our law firm's engagement as legal counsel for Cook County Health and Hospitals System.

Yes, being CMS/BEP certified provided experience in bidding on bigger projects, working with prime contractors.

Yes, it has allowed us to gain experience to compete for prime work plus develop relationships with larger firms.

CMS BEP has helped us to obtain key large projects at [the University of Illinois Urbana Champaign]. I have also benefited from added training about how to participate in the bidding process and qualify to bid for UIUC.

Customers think of it as a benefit doing business with a minority.

Has helped when we have gotten jobs for [Chicago Public] Schools.

It has allowed me to perform services to Utilities who are my clients.

It has definitely opened doors for us with Medicaid/Medicare insurance as well as utility companies.

It has help in the development and continued growth by placing goals and my firm has gotten contracts because of BEP goals.

Keep doing what you're doing! It's a great program and we are grateful to you.

It has opened up opportunities for us, because a lot of contractors would not have worked with us without the enforcement of CMS policies.

It has put a spotlight on my business for Prime contractors to meet their goals, it has entitled/qualified us to apply/receive special funding for a variety of projects.

The percentages help ALOT!!!

My business has grown over 50% due to WBE Certification thru BEP Program.

Being certified helped several firms obtain business with private sector clients.

WBE certification is important to other non-government clients.

The certification has assisted with private companies!

Some BEP firms found the Program to be only marginally helpful and thought more could be done to assist them.

We have gotten some business through the programs however the terms, pay, expectations are not always equitable, and when they are minority businesses have to fight and push for fairness.

We have met several other businesses who asked to include us as a sub, but none of them have materialized so far.

I have been asked to be in proposals as a WBE though none yet have been successful.

I have had some work due from the BEP program but it is not sufficient.

I like the webinars and potential opportunities, but I have had the opportunity yet.

It does offer several useful training opportunities.

It has helped a little bit in getting new business but not as much as we would have liked.

Having the status as an MBE but no work has come from the state.

Several complimented Program staff.

CMS BEP program has been phenomenal, time and time again. When we needed them to process paperwork for ourselves or a subcontractor in an expeditious manner, they came through for us. We are eternally grateful for their phenomenal support.

Our company expanded our NIGP Codes with State of Illinois last December. We felt the BEP Office was very helpful in this process.

CMS responded pretty promptly when I needed their assistance.

Others thought program staff could be more responsive.

A level playing field does not exist, need to speak to departments that can make something happen, instead of being transferred all over the place.

They could at least be a little helpful by answering emails or providing information.

My recommendation would be for the BEP department to have a more robust customer service department.

Every time we have called or reached out there has been almost no response - have not been able to reach a person.

Some requested greater access to agency buyers and CMS staff.

Access to purchasing managers [would be helpful].

Doing business with the state of IL in general is very confusing. We don't have a dedicated staff member to respond to bids, ask questions - we're not even always sure when Q&A is allowed and when it's not.

Set up a call and help with direct introductions to decision makers to give us access.

Transparency is appreciated. There should be an organizational chart with names and how we can utilize the person. Anyone working in the program should understand what a "day in the life" of a business owner is like. They should understand how difficult it is to make money.

Have some type of orientation of CMS of staff roles within the CMS Dept.

Opportunity to Publish Capabilities Statement of products and services to State Procurement Officers.

One non-BEP firm also requested easy access to BEP staff.

Easy access to additional qualified staff [would be helpful to our business].

**b. Business Enterprise Program Certification Criteria and Process**

Many M/WBE respondents found the certification process burdensome, challenging to navigate and paperwork intensive.

Improve the efficiency of the certification process. I nearly quit a few times due to the necessary level of detail. They required more personal tax information than banks or lenders. It has to be a barrier for those without business experience.

Simplify the certification process. It is overwhelming with little direction. Each time you address a question, there are five more added to address. It is frustrating and makes us question whether it is worth it.

They require too many personal financial documents from passive out of state owners.

The certification is valuable, but the certification process itself was very, very cumbersome.

Make the process to register as a BEP vendor less problematic.

Certification process should be more streamlined.

Facilitate the certification process and even when simplified help people walk through it.

I have tried. But the process has taken almost six months.

The two owner-operator women are happy to provide this information, but the process is too onerous.

Better support from the BEP certification department and a better process (particularly with renewing certification and applying).

The standard recertification process was also seen as burdensome.

I have been certified for over 22 years. I sign a no change affidavit every year. To go thru the complete re-certification process periodically when there have clearly been no changes is frustrating, a waste of my time and taxpayer money.

Get certification through faster and easier. It is a ton of paperwork to send. I can understand for the 1st time, but after that, I should not have to do so much work to get recertified.

Make paperwork easy and renewals easy.

Make the recertification process easier. We spend a lot of time searching for documentation and trying to understand requests making it necessary to consult our accountant and spend additional funds.

I did find the initial application very difficult for most new business owners to comprehend, but I will add that the people over the application are very helpful and will answer your questions with haste. (The lady assisting me was very helpful when it came to stocks).

One BEP had a good experience with the FastTrack certification process.

I love the FastTrack program, and the turnaround time is excellent for new companies.

Some respondents suggested universal certifications or reciprocity with other certifying agencies to broaden the types of certifications accepted for the Program. This would streamline the process and reduce the burden on M/WBEs.

Have a universal MWBE certification.

Why can't one certification account for all? Make the certification/recertification process less cumbersome and confusing as it relates to the certifications for other agencies such as the difference between being certified for SBE, MBE, Cook County, etc.

Dual certification with City of Chicago or Cook County would be greatly helpful since both other entities seem to be way behind on reviewing apps.

Have one set of MWE/WBE goals if city, state and county are participating in funding of a project. Would like to participate in some projects, but not able to because not certified with city/county.

Accept the WBENC certification without requiring a plethora of same or more documentation especially for long established WBEs.

Several respondents urged greater scrutiny of certified firms to identify "front" companies.

Stop the pass-through companies from bidding.

There is still a good old boy's network out there. Still a lot of companies that put minorities into business to be there front.

Vendors that position white women as 51% ownership to avoid providing minority participation.

It has not brought in much business for us because there are several companies that say they are WBEs but there are no women who are actually working owners. It's often a wife or other relationship that allows them the certification when in reality, the company is run by men.

**c. Contracting Opportunities**

Some M/WBE respondents believed the current participation percentages are too low.

It's not enough for M/WBE's to be on these projects. We need to be able to earn money on these projects. We go through a lot of pain and at the end of the project we made 2% profit if that, more often than not, the project cost us money.

Mandatory minimum 40% revenue MBE participation.

More projects with full value expectations. A 3% WBE requirement can be as low as 10k or less. 30% gives us an actual amount of responsibility on a team.

Increase the percentage and provide bonus points for exceeding the percentage. We strive to create all WBE and MBE teams.

Please increase the goals, stop making these large multi-year contracts which no responsible supplier can maintain due to supply chain and raw material constraints. Manufacturers will not commit to multi-year pricing and long-term deals lack flexibility and ignore market realities.

The numbers are not aggressive enough, It feels more like aspiration than requirements, and some organizations like IEMA still use words like "aspirational goal." How seriously do you take the word aspiration?

Many requested making the bid and solicitation documents and process less complicated.

RFPs that we can respond to and more simplified processes for submitting bids.

Less bureaucracy/hoops to jump through in bidding projects.

Better system of solicitation.

I am grateful for the opportunities but I feel the complexity of the process to bid on some things will cause us to pass on opportunities where the work is just too great to figure out how to be compliant or submit bids that will get accepted. I feel it is very difficult to navigate all of the various systems available for M/WBEs and time consuming to figure it out.

I own a small business and the bureaucracy involved with the bidding process is astronomical. I'm so busy running the business that I don't have the time that bid review requires and I can't delegate this to anyone on my team. Maybe there could be a streamlined process for smaller projects where we could actually get our foot in the door? That would be extremely helpful.

Make the process of bidding on things clearer and easier.

These projects and bids need to be simplified, the paperwork KILLS SMALL BUSINESS.

The bid and proposal process sometimes seemed unfair.

I feel that sometimes the bids are cancelled to accommodate a different vendor.... When a bid is published more information should be released if the bid is cancelled and why. I am currently bidding on a bid that has been cancelled 3 X and I know I am the only BEP certified vendor on the list. Seems like there is something scrupulous going on. I am currently seeing that an emergency extension has been given to the current vendor WHY? Don't know no information given. These are the things that are kept secret.

Inside connections. An architect who is well-connected chose his personal favorite studio to perform work. We were never offered an opportunity.

Some M/WBE respondents requested more opportunities to perform as prime contractors.

Ability to secure prime contract not only with CMS but with CDB and other governmental agencies in the State as well as the Higher education sector.

Need direct contracting with state & public private agencies.

Promoting projects where MWBE firms can prime. Also Promote the importance that the Agency places on MWBE firms, their participation and follow through.

Being considered for a prime role on a CDB project. I am not sure how to introduce my company to those in the decision-making positions.

Prime contracts that are attainable and ability to subcontract to larger majority firms.

Award more contracts to architectural firms enrolled in the BEP as prime.

One method suggested to increase prime contracting opportunities is to offer smaller projects or “unbundle” contracts.

Decouple projects to enable minority businesses to compete. This is almost never done on IT projects. For example, the \$1B (Yes, billion) dollars the state has spent on their ERP could have had massive participation value outside of two Primes.

Break out Lighting Design in the projects, instead of lumping it in with other architectural tasks. We get excluded because architecture and engineering firms either take on the lighting design in-house or hire subs that are not M/WBEs.

Consideration of making the contracts smaller or more specific for small procurement options or allowing BEP firms to solely big without having to rely on Prime contractors.

Others urged set-asides for all small firms.

The biggest suggestion I can make would be to set-aside state contracts as 100% for Illinois small businesses when there are two qualified Illinois small businesses in a NAICS code who can do the work. I think the state needs to more closely mirror the federal guidelines instead of trying to do a percentage thing.

I am VBE certified and would like to see more set aside job opportunities for Veteran companies.

It would be better in my opinion to set aside entire contracts - so we could do the majority or 100% of the work on a contract, rather than 5 to 10%, which is often the undesirable, repetitive task, or low profit portion of a job.

[Offer more] specific Shelter Market projects.

Many M/WBEs requested more technical support and training to respond to solicitations.

Assistance in learning the process to work in the system.

Assistance to complete the actual RFPs. There should be someone who can mentor businesses from beginning to end especially knowing that the government has way too much paperwork.

I would like to learn how to fill out the RFPs.

Understanding the contracting better so I feel confident to try bidding.

We could use more communication and guidance on how to obtain contracting.

More training on how to win business with CMS and master the website for projects.

Several expressed concerns about the way contracts were written.

You need to have experienced contract writers review all the City, County and state contracts. They are ambiguous.

When you have contracts that are ambiguous, you can [be] disqualified because the way in which it is written.

Slow payments were cited by firms of all types.

I sold (1) chair to the State of Illinois many years ago. They took over 8 months to pay the invoice. I do not pursue State of Illinois projects. The very program that is to help would put me out of business if the project was large. I can't and won't float money for the state.

FASTER processing and payment from ALL agencies. Some agencies are extremely slow in paying the prime. Projects

with BEP goals should be handled promptly as most BEP firms have limited funding.

Hard when I have to support the contract when not paid for services.

It has been difficult working with CMS because we cannot submit for additional payment prior to receiving approval for previous payment and this often stagnates the payment process.

Our bond was cancelled because we couldn't afford to pay for an annual corporate accountant review. We can't afford to pay for things because CMS doesn't pay their bills. They are also very slow to pay. We have over \$50k owed to us by UIUC for work we have done. As a small business this is crippling. Private companies are quicker to start once the bid is awarded, allow for material increases and pay in a timely matter.

Government work does not pay quickly and often we have a difficult time waiting for the payments and have to turn down work until we are paid. We essentially have to fund the work until it is paid and being a smaller firm that makes day to day operations difficult. Larger more established firms have larger pockets.

Having to fund a project for 60-90 days prior to being paid is the biggest obstacle. Getting paid within 30 days would be ideal.

Payment every 30 days [is necessary].

We are never sure when the state will pay. We do business outside CMS with state or state-adjacent entities, and payment is well over 90 days. We can't float that kind of cash.

I typically do not bid for CMS contracts as we are not typically the "low cost" option (as we are a union shop) and do not want to risk long lag time in being paid by the State.

Work on getting rid of the delayed payment barrier for M/WBEs.

The most difficult portion is on time payment from government agencies or prime contractor. They do not

honor the terms of contract. As a small business we financially can't carry multiple outstanding balances.

Timely payment would help with our cash flow and would allow our bidding to be more competitive. We bid higher because of how long it takes to get paid.

On time payments from CMS would be helpful since it would greatly improve cashflow. The reason we do not submit bids anymore is because of the prompt payment act. We cannot leverage our receivables out 120 to 150 days without a higher interest-rate payment from the state.

Several M/WBEs also reported slow return of retainage dollars.

When an MBE contractor is completed with their work and all of the closeout documents are in, they should be paid their retention dollars within 30 days.

CMS and other agencies need to pay MBE contractors their retention dollars quicker. We cannot wait a year for that money!

Getting work is one thing getting paid is another. Retention payment is terrible.

**d. Business Enterprise Program Compliance**

Several BEPs thought state contracting agencies could adopt stronger compliance procedures.

CMS BEP IS NOT examining every contract and RFP the various state agencies issue to ensure compliance with state laws. The state legislature needs to SERIOUSLY address having more local and state agencies have BEP program and goal requirements for state funds they receive.

Actual Contract Compliance and adherence protocol put in place.

The program needs more teeth to enforce rules. And to protect MBE subs. The 10-day cure period post bid needs to end.

Many state, local and education agencies either do not have, or have very weak language in their MWBE programs.

The State of Illinois BEP mandate has not been enforced by the legislators - The insurance companies are treating it as a cash cow, which it's not. Certified companies suffer as a result of it.

Many state, local and education agencies... do not have adequate compliance language to enforce and ensure that prime contractors search, engage and subcontract with MWBE vendors.

No enforcement by the agencies that implement the guidelines.

Contracting guidelines are not adhered to by Prime Contractors, and are not enforced by MWDBE guidelines. Contractual requirements are not enforced by contract administrators.

Many suggested additional monitoring to ensure that prime contractors comply with the Program.

Once the Contract is awarded Prime Contractors willfully do whatever they please without any respect for the Contract requirements. Contract percentages are not enforced and subcontractors lose out. The programs were founded so that subcontractors would one day become Prime Contractors and the success rate percentages of this occurring is zero.

One of the requirements of the BEP program is that the primes reach out (phone/email) to all interested vendors. I'm getting blast emails one or two days prior to a due date asking if we are interested. We normally answer yes, attach our capabilities statement, NIGP codes that we are certified in, and contact information. The majority of these emails go unanswered. I've even seen awards being made with a waiver, where we specifically stated we are interested and have the skill sets to assist. There needs to be a way for CMS to check. Not just asking the prime vendor for a list of all the emails they sent out, but possibly also ask for a copy of all the responses that prime received in their inquiry.

CMS rules are not being followed.

As a WBE, we receive many solicitations to quote jobs. However, we receive little notice and have difficulty

providing the requested information. But the contractor can show they solicited from a WBE.

Contractors are not required to comply with Contract requirements. Discriminatory barriers that hinder the growth of Subcontractors is the absence of program compliance adherence!

The primes understand the inefficiencies of the state agencies and their actions reflect the lack of accountability for non-compliance with the awarded contracts and failure to achieve the 3 tenants of the BEP Program.

Continue to push prime contractors and/or buyers for the State to make sure the goals are met.

Primes and facilities are not held accountable for the participation commitments.

Follow up with contacts and payment applications to make sure we are performing accordingly and get payments accordingly.

Follow-up with Prime Contractors who submit proof they've reached out to WBE/DBE firms to see how often they actually hire them.

Primes need to be held accountable for BEP goals. We get named and the work never materializes.

The Programs for M/WBEs as they currently exist is an epic fail for minority, women-owned business enterprises because we do not receive the contract percentages that we have bid for.

Audits that reflect non-participation on multi-million dollar projects are not followed up adequately.

**e. Outreach and Access to Information**

Some M/WBEs were unaware of bidding opportunities and requested more outreach.

Advance notice of potential projects in the pipeline giving firms opportunity to prepare internally. Staffing, capacity, funding, etc.

Access to RFPs and opportunities to subcontract for our specialized services.

Being able to access bids easier and being notified.

Being told about upcoming opportunities to take advantage of those opportunities.

More access before RFPs are issued. Often, by the time an RFP is issued, there's already a forerunner.

Advance notice of potential projects in the pipeline giving firms opportunity to prepare internally.

Email updates for opportunities.

Networking opportunities with primes and with agency staff were found to be helpful. More were requested.

The networking events CMS hold are VERY useful, I would like more of these events.

Help us meet & greet decision makers with the Capital Development Board so we have better chance of prime selection.

More networking events in person for specific large projects when they are in the first stages of planning and design.

Diversity Day where firms may introduce themselves and their capabilities.

More meet and greets.

Many BEP firms urged more targeted outreach and networking opportunities based on specific industries.

Targeted emails on bid opportunities for small businesses or with M/WBE requirements.

Segment the networking by industry.

Send out opportunities that are segregated by type. I don't do any construction, but I do research and evaluation work.

Notify us with only services we provide instead of giving us the all the items on bid.

Receive bids that are relevant to one's company.

Having my information out there more at live networking opportunities; easier access to knowing what is out there in my realm for contracts instead of having to sift through loads of information -- specific targeting.

Several M/WBEs asked for better search tools for identifying projects and contract opportunities that were relevant to their businesses.

[A] list of projects [that] can be searched by NAICS codes, website listing of all certified firms with short description of capabilities.

If CMS could provide a way for us to look for upcoming contracts in our industry, we would be extremely grateful.

It would be helpful to rework IllinoisBid so that business opportunities are searchable by NAICS instead of the odd categories that exist now. It is hard to find new opportunities.

One non-BEP suggested more information be included on BEP vendor lists.

Categorize BEP vendor lists in more detail to make it easier to meet BEP goals on bids.

**f. Experiences with business support services.**

Those who participated in supportive services generally found them helpful.

[Procurement Technical Assistance Center] has been very helpful in helping us develop.

The [Small Business Development Center] and S.C.O.R.E. have been essential to our success.

The [Women's Business Development Center] does an excellent job in these areas.

Trying to secure funds to pay vendors for state orders has been difficult. The vendor assistance program has worked well for us.

The WBDC offers outstanding programs.

Very Informative.

Wonderful. Looking forward to participating more.

More educational webinars and one on one counseling.

I learned how to use new systems to located new bid opportunities, learned how to create capability statements and fill out and understand contracts.

I received estimating services when bidding on an Illinois Tollway project. Positive experience.

Assistance with obtaining capital, bonding, insurance and other business needs was cited by some respondents as critical to increasing their capacity to take on more business.

CMS should partner with big banks so small businesses with MBE/WBE certification can apply for large line of credit loans.

Need more funding support and more ways to allow small business to participate in big construction projects.

I would need to be able to get capital so I can grow the business by purchasing equipment to keep up with the demand.

More capital to consistently run payroll. I sometimes have to use my reserve money when the clients pay over 90 days when their net is 15 or 30 net.

Access to capital. Small business loans that are affordable.

Banks are not willing to provide enough working capital. We need banks to help small business grow by providing larger lines of credit.

Being able to get loans at a better rate.

Better access to loans to cover project costs until paid.

**g. Experiences with mentor-protégé programs and teaming arrangements**

Most of those who had participated in a mentor-protégé or teaming arrangement found them useful.

[We] have partnered with prime contractors many times to pursue opportunities together. Not necessarily a "formal" JV arrangement, but prime-sub partnering to market, bid, and win work.

I enjoyed spending time with other CEO's and finding that my problems were also their problems. I spent one year meeting at least once a month with that group.

I have MP with projects with other agencies. So far most have been fruitful.

Overall good, it depends on the relationship with the other firm.

Opportunities to make our services known through connections with mentors and navigating the diversity supplier departments has been valuable. Partnering with other firms has allowed us to build our resume of work.

We have been involved with mentoring programs with virtually no results. We have however had success with joint ventures.

Mentor protégé program which could help me get experience in areas that I am lacking.

Need better access to mentor companies that are WILLING to help a small company like mine to gain a foot in State of IL contracting process.

Strategic partnerships with committed and competent companies.

I believe CMS could assist in matching or suggesting M/WBE to get mentoring from a company they have been doing business with and provide the larger company benefits or point to mentor the M/WBE company under supervised protocols to assure we are being mentored appropriately.

I feel that BEP should focus on methods that can help my company get contracts such as carve out or look for ways for my company to get access to contracts with a proper mentor/protege program.

It would be great if the BEP program would assign us Mentors or Coaches who would help us navigate through finding procurement opportunities, buyers and the process of obtain contracts.

For some the mentoring or teaming experience was not positive.

I have had very bad partnerships where I performed most of the work yet had to split the profits 50%.

Mentor protégé programs vary depending on the client and prime. In general, they are too broad and not specific to the needs of our firm.

## **M. Conclusion**

The Program has been successful in ensuring that BEP firms receive opportunities on state contracts. Prime contractors were generally able to comply with Program requirements. The Program was supported by participants and was generally viewed as important to their growth and development. However, respondents reported that there are some challenges to address, including increasing Program monitoring and compliance; increasing current efforts to unbundle contracts; removing hurdles that make it difficult for subcontractors to move into the role of prime vendors; increasing communication regarding prospective contracting opportunities; paying prime firms and subcontractors promptly; and developing initiatives to facilitate relationships between M/WBEs and large firms for specific projects and industries.



# IV. GOODS AND SERVICES CONTRACT DATA ANALYSIS FOR THE STATE OF ILLINOIS

## A. Contract Data Overview

We analyzed data for state of Illinois goods and services contracts in the Bid Buy system for fiscal year 2018 through the third quarter of fiscal year 2021. To conduct the analysis, we constructed all the fields necessary where they were missing in the contract records (*e.g.*, industry type; zip codes; six-digit North American Industry Classification System (“NAICS”) codes of prime contractors and subcontractors; and Minority- and Woman-owned Business Enterprise (“M/WBE”) information, including payments, race, gender; etc.). Tables 4-1 and 4-2 provide data on the resulting Final Contract Data File (“FCDF”) for the state’s contracts.

**Table 4-1: Final Contract Data File  
Number of Contracts**

Contract Type	Total Contracts	Share of Total Contracts
Prime Contracts	170	74.2%
Subcontracts	59	25.8%
<b>TOTAL</b>	<b>229</b>	<b>100.0%</b>

*Source: CHA analysis of state of Illinois data*

**Table 4-2: Final Contract Data File  
Net Dollar Value of Contracts**

Business Type	Total Contract Dollars	Share of Total Contract Dollars
Prime Contracts	\$401,892,591	94.4%
Subcontracts	\$23,784,398	5.6%
<b>TOTAL</b>	<b>\$425,676,989</b>	<b>100.0%</b>

*Source: CHA analysis of state of Illinois data*

The following sections present our analysis, which consisted of five steps:

1. The determination of the product and geographic markets for the analysis.
2. The estimation of the utilization of M/WBEs by the state.
3. The calculation of the M/WBE unweighted and weighted availability in the state's marketplace.
4. The examination of concentration of contract dollars among M/WBE and non-M/WBE firms.
5. The presentation of the M/WBE disparity analysis.

## B. The State of Illinois' Contract Markets

As discussed in Chapter II, the federal courts<sup>176</sup> require that a local government narrowly tailor its M/WBE program elements to its market area. A market has two dimensions: industry and spatial. This means the study must determine the products or industries which an agency purchases and the geographic location of the firms from which it purchases. These elements of the analysis must be empirically established.<sup>177</sup> The accepted approach is to analyze those detailed industries, as defined by six-digit NAICS codes,<sup>178</sup> that make up at least 75% of the prime contract and subcontract payments for the study period.<sup>179</sup> The determination of the state's product and geographic market for goods and services required three steps:

1. Develop the FCDF to determine the product market. These results are provided in Table 4-3.
2. Identify the geographic market.
3. Determine the product market constrained by the geographic parameters. Table 4-4 presents these results.

### 1. Product Market for State Contracts

To establish the state's product market, we developed the FCDF, which consisted of 65 NAICS codes, with a total contract dollar value of \$425,676,989. Table 4-3 presents each NAICS code with its share of the total contract dollar

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176. *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 M/WBE program); see 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.").
  177. *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").
  178. [www.census.gov/eos/www/naics](http://www.census.gov/eos/www/naics).
  179. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 ("*National Disparity Study Guidelines*").

value. The NAICS codes are presented in the order of the code with the largest share to the code with the smallest share.

**Table 4-3: Industry Percentage Distribution of State of Illinois Contracts by Dollars**

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
441110	New Car Dealers	17.9%	17.9%
424690	Other Chemical and Allied Products Merchant Wholesalers	16.6%	34.5%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	11.3%	45.8%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	6.8%	52.6%
541611	Administrative Management and General Management Consulting Services	5.3%	57.9%
424410	General Line Grocery Merchant Wholesalers	4.7%	62.6%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	3.3%	65.9%
484220	Specialized Freight (except Used Goods) Trucking, Local	3.3%	69.2%
811111	General Automotive Repair	3.0%	72.1%
424420	Packaged Frozen Food Merchant Wholesalers	2.1%	74.2%
441320	Tire Dealers	2.0%	76.2%
424470	Meat and Meat Product Merchant Wholesalers	1.8%	78.0%
561611	Investigation Services	1.6%	79.6%
561320	Temporary Help Services	1.6%	81.2%
424950	Paint, Varnish, and Supplies Merchant Wholesalers	1.5%	82.7%
423490	Other Professional Equipment and Supplies Merchant Wholesalers	1.4%	84.0%
561720	Janitorial Services	1.3%	85.4%
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.2%	86.6%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	1.2%	87.8%

State of Illinois Goods and Services Disparity Study 2022

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
562111	Solid Waste Collection	1.1%	88.9%
488490	Other Support Activities for Road Transportation	1.0%	89.9%
424490	Other Grocery and Related Products Merchant Wholesalers	0.9%	90.8%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.9%	91.7%
561210	Facilities Support Services	0.9%	92.6%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	0.7%	93.3%
424120	Stationery and Office Supplies Merchant Wholesalers	0.7%	94.0%
237310	Highway, Street, and Bridge Construction	0.7%	94.6%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.7%	95.3%
238220	Plumbing, Heating, and Air-Conditioning Contractors	0.6%	95.9%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.5%	96.4%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.5%	96.9%
812331	Linen Supply	0.4%	97.4%
541930	Translation and Interpretation Services	0.4%	97.8%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	0.3%	98.1%
423390	Other Construction Material Merchant Wholesalers	0.3%	98.4%
541512	Computer Systems Design Services	0.3%	98.7%
238290	Other Building Equipment Contractors	0.3%	98.9%
541211	Offices of Certified Public Accountants	0.2%	99.2%
324121	Asphalt Paving Mixture and Block Manufacturing	0.1%	99.3%
423710	Hardware Merchant Wholesalers	0.1%	99.4%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
541620	Environmental Consulting Services	0.1%	99.5%
326299	All Other Rubber Product Manufacturing	0.1%	99.6%
238140	Masonry Contractors	0.1%	99.7%
238210	Electrical Contractors and Other Wiring Installation Contractors	0.1%	99.7%
532420	Office Machinery and Equipment Rental and Leasing	0.04%	99.8%
541511	Custom Computer Programming Services	0.03%	99.8%
561492	Court Reporting and Stenotype Services	0.03%	99.8%
561730	Landscaping Services	0.02%	99.9%
424910	Farm Supplies Merchant Wholesalers	0.02%	99.9%
532283	Home Health Equipment Rental	0.02%	99.9%
541110	Offices of Lawyers	0.02%	99.9%
325611	Soap and Other Detergent Manufacturing	0.01%	99.9%
423420	Office Equipment Merchant Wholesalers	0.01%	99.9%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	0.01%	99.9%
423460	Ophthalmic Goods Merchant Wholesalers	0.01%	99.96%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.01%	99.96%
541310	Architectural Services	0.01%	99.97%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.01%	99.98%
423220	Home Furnishing Merchant Wholesalers	0.01%	99.98%
424130	Industrial and Personal Service Paper Merchant Wholesalers	0.01%	99.99%
518210	Data Processing, Hosting, and Related Services	0.003%	99.99%
561410	Document Preparation Services	0.003%	99.99%
531390	Other Activities Related to Real Estate	0.003%	99.998%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
488510	Freight Transportation Arrangement	0.001%	99.999%
424710	Petroleum Bulk Stations and Terminals	0.001%	100.000%
<b>TOTAL</b>		<b>100.0%</b>	

Source: CHA analysis of state of Illinois data

## 2. Geographic Market for State of Illinois Contracts

To determine the geographic market area, we applied the standard of identifying the firm locations that account for close to 75% of contract and subcontract dollar payments in the FCDF.<sup>180</sup> Firm location was determined by zip code and aggregated into counties as the geographic unit. The state of Illinois captured 80.8% of the FCDF and therefore, we used the state as the geographic market.

## C. The State of Illinois’ Utilization of M/WBEs in its Product and Geographic Market

Having determined the state’s product and geographic market area, the next step was to determine the dollar value of its utilization of M/WBEs<sup>181</sup> as measured by net payments to prime firms and subcontractors and disaggregated by race and gender. There were 53 NAICS codes after constraining the FCDF by the geographic market; the dollar value of the contracts in these codes was \$343,821,245. Table 4-4 presents these data. We note that the contract dollar shares in Table 4-4 are equivalent to the weight of spending in each NAICS code. These data were used to calculate weighted availability<sup>182</sup> from unweighted availability, as discussed below.

180. *National Disparity Study Guidelines*, at p. 29.

181. 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. The inclusion of all minority- and female-owned businesses in the pool casts the broad net approved by the courts and that supports the remedial nature of these 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 M/WBE availability calculation that casts a broader net.”).

182. 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>.

**Table 4-4: NAICS Code Distribution of Contract Dollars in the Constrained Product Market**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
441110	New Car Dealers	\$76,291,224	22.2%
424690	Other Chemical and Allied Products Merchant Wholesalers	\$53,933,776	15.7%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	\$48,145,200	14.0%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	\$26,320,820	7.7%
424410	General Line Grocery Merchant Wholesalers	\$20,040,484	5.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$13,927,128	4.1%
811111	General Automotive Repair	\$12,650,796	3.7%
424420	Packaged Frozen Food Merchant Wholesalers	\$8,863,529	2.6%
541611	Administrative Management and General Management Consulting Services	\$8,480,027	2.5%
424470	Meat and Meat Product Merchant Wholesalers	\$7,603,294	2.2%
561611	Investigation Services	\$6,941,374	2.0%
561320	Temporary Help Services	\$6,633,291	1.9%
561720	Janitorial Services	\$5,614,847	1.6%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	\$5,100,428	1.5%
423830	Industrial Machinery and Equipment Merchant Wholesalers	\$5,062,656	1.5%
562111	Solid Waste Collection	\$4,640,404	1.3%
488490	Other Support Activities for Road Transportation	\$4,271,513	1.2%
424490	Other Grocery and Related Products Merchant Wholesalers	\$3,844,348	1.1%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	\$3,818,698	1.1%
561210	Facilities Support Services	\$3,808,620	1.1%

State of Illinois Goods and Services Disparity Study 2022

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	\$2,884,228	0.8%
424120	Stationery and Office Supplies Merchant Wholesalers	\$2,834,807	0.8%
812331	Linen Supply	\$1,889,435	0.5%
541930	Translation and Interpretation Services	\$1,738,098	0.5%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	\$1,302,420	0.4%
541512	Computer Systems Design Services	\$1,194,273	0.3%
238290	Other Building Equipment Contractors	\$1,103,754	0.3%
541211	Offices of Certified Public Accountants	\$987,040	0.3%
324121	Asphalt Paving Mixture and Block Manufacturing	\$579,262	0.2%
423710	Hardware Merchant Wholesalers	\$555,525	0.2%
541620	Environmental Consulting Services	\$452,409	0.1%
237310	Highway, Street, and Bridge Construction	\$434,531	0.1%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	\$377,657	0.1%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	\$359,887	0.1%
238140	Masonry Contractors	\$303,178	0.1%
541511	Custom Computer Programming Services	\$125,675	0.04%
326299	All Other Rubber Product Manufacturing	\$99,161	0.03%
561730	Landscaping Services	\$93,490	0.03%
532283	Home Health Equipment Rental	\$78,154	0.02%
424910	Farm Supplies Merchant Wholesalers	\$69,828	0.02%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$65,394	0.02%
541110	Offices of Lawyers	\$64,850	0.02%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	\$41,486	0.01%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	\$30,336	0.01%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	\$27,622	0.01%
541310	Architectural Services	\$27,500	0.01%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	\$26,920	0.01%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$22,830	0.01%
424130	Industrial and Personal Service Paper Merchant Wholesalers	\$22,482	0.01%
518210	Data Processing, Hosting, and Related Services	\$14,463	0.004%
531390	Other Activities Related to Real Estate	\$12,550	0.004%
488510	Freight Transportation Arrangement	\$6,025	0.002%
424710	Petroleum Bulk Stations and Terminals	\$3,518	0.001%
<b>TOTAL</b>		<b>\$343,821,245</b>	<b>100.0%</b>

Source: CHA analysis of state of Illinois data

## D. The State of Illinois' Utilization of M/WBEs in its Product and Geographic Market

Tables 4-5 and 4-6 present data on the state's M/WBE utilization, measured in contract dollars and percentage of contract dollars.

**Table 4-5: Distribution of Contract Dollars by Race and Gender  
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
237310	\$0	\$0	\$0	\$0	\$198,584	\$198,584	\$235,947	\$434,531
238140	\$0	\$0	\$0	\$0	\$0	\$0	\$303,178	\$303,178
238210	\$1,840	\$7,000	\$0	\$0	\$0	\$8,840	\$13,990	\$22,830
238220	\$0	\$0	\$0	\$0	\$0	\$0	\$65,394	\$65,394
238290	\$79,207	\$0	\$0	\$0	\$0	\$79,207	\$1,024,547	\$1,103,754
324121	\$0	\$0	\$0	\$0	\$0	\$0	\$579,262	\$579,262
326299	\$0	\$0	\$0	\$0	\$0	\$0	\$99,161	\$99,161
423110	\$0	\$0	\$0	\$0	\$1,145,272	\$1,145,272	\$46,999,928	\$48,145,200
423120	\$0	\$0	\$0	\$0	\$0	\$0	\$26,320,821	\$26,320,821
423320	\$0	\$0	\$0	\$0	\$0	\$0	\$3,818,698	\$3,818,698
423450	\$3,871	\$0	\$282,449	\$0	\$0	\$286,320	\$91,336	\$377,657
423510	\$0	\$7,230	\$0	\$0	\$20,392	\$27,622	\$0	\$27,622
423610	\$0	\$0	\$0	\$0	\$0	\$0	\$41,486	\$41,486
423690	\$0	\$0	\$0	\$0	\$1,302,420	\$1,302,420	\$0	\$1,302,420
423710	\$0	\$0	\$0	\$0	\$263,055	\$263,055	\$292,470	\$555,525
423810	\$0	\$0	\$0	\$0	\$30,336	\$30,336	\$0	\$30,336

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
423820	\$0	\$0	\$0	\$0	\$0	\$0	\$5,100,427	\$5,100,427
423830	\$0	\$0	\$0	\$0	\$94,919	\$94,919	\$4,967,738	\$5,062,656
423850	\$0	\$0	\$0	\$0	\$26,920	\$26,920	\$0	\$26,920
423990	\$0	\$0	\$0	\$0	\$359,887	\$359,887	\$0	\$359,887
424120	\$2,834,807	\$0	\$0	\$0	\$0	\$2,834,807	\$0	\$2,834,807
424130	\$0	\$0	\$0	\$0	\$0	\$0	\$22,482	\$22,482
424410	\$0	\$0	\$0	\$0	\$0	\$0	\$20,040,484	\$20,040,484
424420	\$0	\$0	\$0	\$0	\$0	\$0	\$8,863,529	\$8,863,529
424470	\$0	\$0	\$0	\$0	\$0	\$0	\$7,603,294	\$7,603,294
424490	\$0	\$0	\$910,568	\$0	\$80,407	\$990,974	\$2,853,373	\$3,844,348
424690	\$0	\$0	\$0	\$0	\$6,707	\$6,707	\$53,927,071	\$53,933,777
424710	\$0	\$0	\$0	\$0	\$0	\$0	\$3,518	\$3,518
424720	\$0	\$0	\$0	\$0	\$154,291	\$154,291	\$2,729,936	\$2,884,227
424910	\$0	\$0	\$0	\$0	\$0	\$0	\$69,828	\$69,828
441110	\$0	\$0	\$0	\$0	\$0	\$0	\$76,291,227	\$76,291,227
484220	\$692,869	\$8,680,229	\$2,056	\$0	\$3,062,692	\$12,437,846	\$1,489,283	\$13,927,128
488490	\$25,890	\$643,607	\$81,640	\$0	\$0	\$751,137	\$3,520,377	\$4,271,513
488510	\$0	\$3,575	\$2,450	\$0	\$0	\$6,025	\$0	\$6,025
518210	\$14,463	\$0	\$0	\$0	\$0	\$14,463	\$0	\$14,463
531390	\$0	\$0	\$0	\$0	\$0	\$0	\$12,550	\$12,550
532283	\$0	\$0	\$0	\$0	\$0	\$0	\$78,154	\$78,154
541110	\$0	\$0	\$0	\$0	\$0	\$0	\$64,850	\$64,850
541211	\$234,962	\$0	\$0	\$0	\$35,365	\$270,327	\$716,713	\$987,040

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
541310	\$0	\$0	\$0	\$0	\$27,500	\$27,500	\$0	\$27,500
541511	\$0	\$125,675	\$0	\$0	\$0	\$125,675	\$0	\$125,675
541512	\$0	\$0	\$429,317	\$0	\$764,956	\$1,194,273	\$0	\$1,194,273
541611	\$523,790	\$218,187	\$0	\$0	\$3,056,786	\$3,798,763	\$4,681,264	\$8,480,027
541620	\$0	\$0	\$0	\$0	\$0	\$0	\$452,409	\$452,409
541930	\$0	\$1,031,981	\$0	\$0	\$706,117	\$1,738,098	\$0	\$1,738,098
561210	\$0	\$0	\$0	\$0	\$0	\$0	\$3,808,620	\$3,808,620
561320	\$5,763,229	\$0	\$0	\$0	\$610,657	\$6,373,886	\$259,405	\$6,633,291
561611	\$6,724,920	\$0	\$0	\$0	\$216,454	\$6,941,374	\$0	\$6,941,374
561720	\$4,934,380	\$0	\$0	\$0	\$0	\$4,934,380	\$680,466	\$5,614,846
561730	\$0	\$0	\$0	\$0	\$93,490	\$93,490	\$0	\$93,490
562111	\$0	\$0	\$0	\$0	\$0	\$0	\$4,640,404	\$4,640,404
811111	\$0	\$0	\$0	\$0	\$1,753	\$1,753	\$12,649,043	\$12,650,796
812331	\$0	\$0	\$0	\$0	\$0	\$0	\$1,889,435	\$1,889,435
<b>Total</b>	<b>\$21,834,226</b>	<b>\$10,717,483</b>	<b>\$1,708,480</b>	<b>\$0</b>	<b>\$12,258,959</b>	<b>\$46,519,149</b>	<b>\$297,302,096</b>	<b>\$343,821,245</b>

Source: CHA analysis of state of Illinois data

**Table 4-6: Percentage Distribution of Contract Dollars by Race and Gender  
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
237310	0.0%	0.0%	0.0%	0.0%	45.7%	45.7%	54.3%	100.0%
238140	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238210	8.1%	30.7%	0.0%	0.0%	0.0%	38.7%	61.3%	100.0%
238220	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238290	7.2%	0.0%	0.0%	0.0%	0.0%	7.2%	92.8%	100.0%
324121	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
326299	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423110	0.0%	0.0%	0.0%	0.0%	2.4%	2.4%	97.6%	100.0%
423120	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423320	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423450	1.0%	0.0%	74.8%	0.0%	0.0%	75.8%	24.2%	100.0%
423510	0.0%	26.2%	0.0%	0.0%	73.8%	100.0%	0.0%	100.0%
423610	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423690	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423710	0.0%	0.0%	0.0%	0.0%	47.4%	47.4%	52.6%	100.0%
423810	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423820	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423830	0.0%	0.0%	0.0%	0.0%	1.9%	1.9%	98.1%	100.0%
423850	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423990	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
424120	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
424130	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424420	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424470	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424490	0.0%	0.0%	23.7%	0.0%	2.1%	25.8%	74.2%	100.0%
424690	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424710	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%

State of Illinois Goods and Services Disparity Study 2022

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
424720	0.0%	0.0%	0.0%	0.0%	5.3%	5.3%	94.7%	100.0%
424910	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
441110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
484220	5.0%	62.3%	0.0%	0.0%	22.0%	89.3%	10.7%	100.0%
488490	0.6%	15.1%	1.9%	0.0%	0.0%	17.6%	82.4%	100.0%
488510	0.0%	59.3%	40.7%	0.0%	0.0%	100.0%	0.0%	100.0%
518210	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
531390	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
532283	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541211	23.8%	0.0%	0.0%	0.0%	3.6%	27.4%	72.6%	100.0%
541310	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
541511	0.0%	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
541512	0.0%	0.0%	35.9%	0.0%	64.1%	100.0%	0.0%	100.0%
541611	6.2%	2.6%	0.0%	0.0%	36.0%	44.8%	55.2%	100.0%
541620	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541930	0.0%	59.4%	0.0%	0.0%	40.6%	100.0%	0.0%	100.0%
561210	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
561320	86.9%	0.0%	0.0%	0.0%	9.2%	96.1%	3.9%	100.0%
561611	96.9%	0.0%	0.0%	0.0%	3.1%	100.0%	0.0%	100.0%
561720	87.9%	0.0%	0.0%	0.0%	0.0%	87.9%	12.1%	100.0%
561730	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
562111	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811111	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
812331	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
<b>Total</b>	<b>6.3%</b>	<b>3.1%</b>	<b>0.5%</b>	<b>0.0%</b>	<b>3.5%</b>	<b>13.4%</b>	<b>86.6%</b>	<b>100.0%</b>

Source: CHA analysis of state of Illinois data

## E. The Availability of M/WBEs for State of Illinois Contracts

### 1. The Methodological Framework

Estimates of the availability of M/WBEs in the state’s geographic and product market are a critical component of the state’s compliance with its constitutional obligation to determine whether it has a strong basis in evidence to support the use of race- and gender-conscious measures. The courts require that the availability estimates reflect the number of “ready, willing and able” firms that can perform specific types of work involved in the recipient’s prime contracts and associated subcontracts; general population is legally irrelevant.<sup>183</sup>

We applied the “custom census” approach, with refinements, to estimating availability. The courts and the National Model Disparity Study Guidelines<sup>184</sup> have recognized this methodology as 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 recognized by the courts, this comports with the remedial nature of contracting affirmative action programs by seeking to bring in businesses that have historically been excluded. Our methodology 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 state’s market area that have not been able to access the agency’s opportunities.
- 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

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183. 49 C.F.R. §25.45(c).

184. *National Disparity Study Guidelines*, pp.57-58. This was also the approach used in the successful defense of the Illinois Department of Transportation’s Disadvantaged Business Enterprise Program in the *Northern Contracting* case, discussed in Chapter II.

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.<sup>185</sup>

- Fourth, it has been upheld by every court that has reviewed it, including most recently in the successful defense of the Illinois State Toll Highway’s M/WBE program, for which we served as testifying experts.<sup>186</sup>

Using this framework, CHA utilized three databases to estimate availability:

1. The Final Contract Data File
2. The Master M/W/DBE Directory compiled by CHA
3. Dun & Bradstreet/Hoovers Database

First, we eliminated any duplicate entries in the geographically constrained FCDF. Some firms received multiple contracts for work performed in the same NAICS codes. Without this elimination of duplicate listings, the availability database would be artificially large. This list of unique firms comprised the first component of the Study’s availability determination.

To develop the Master Directory, we utilized the Illinois Unified Certification Program Directory, the City of Chicago’s M/WBE Directory, Cook County’s M/WBE Directory and the state’s Contract Data File. We limited the firms we used in our analysis to those operating within the state’s product market.

We next developed a custom database from Hoovers, a Dun & Bradstreet company, for minority- and woman-owned firms 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 state’s market area to form our custom Dun & Bradstreet/Hoovers Database. In the initial download, the data from Hoovers simply identified a firm as being minority-owned.<sup>187</sup> However, the company does keep detailed information on ethnicity

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

186. *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).

187. The variable is labeled: “Is Minority Owned” and values for the variable can be either “1” (for yes) or blank.

(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 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% 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 merged these three databases to form an accurate estimate of firms available to work on state contracts.

## 2. The Availability Data and Results

Tables 4-7 through 4-9 present data on:

1. The unweighted availability percentages by race, gender and by NAICS codes for the state's product market;
2. The weights used to adjust the unweighted numbers;<sup>188</sup> and
3. The final estimates of the weighted averages of the individual six-digit level NAICS availability estimates in the state'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 state spends its dollars.

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 state's contracting patterns.<sup>189</sup> 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%. However, if the state spends only one 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 state spent 25% of its contract dollars in NAICS Code 123456, then the same availability would carry a greater weight. For an

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188. These weights are equivalent to the share of contract dollars presented in the previous section.

189. <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

extended explanation of how unweighted and weighted availability are calculated, please see Appendix D.

To calculate the weighted availability for each NAICS code, we first determined the unweighted availability for each demographic group in each NAICS code, presented in Table 4-7. In the previous example, the unweighted availability for M/WBEs in NAICS Code 123456 is 60%. We then multiplied the unweighted availability by the share of the state’s spending in that NAICS code, presented in Table 4-8. This share is the *weight*. Using the previous example, where the state spending in NAICS Code 123456 was one percent, the component of M/WBE weighted availability for NAICS Code 123456 would be 0.006: 60% multiplied by one percent. We say “the component of M/WBE weighted availability for NAICS Code 123456” because this process is repeated for each NAICS code and then the components are summed to generate an overall weighted availability estimate. The results of this calculation are presented in Table 4-9.

**Table 4-7: Unweighted M/WBE Availability for State of Illinois Contracts**

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
237310	7.8%	10.1%	2.9%	0.2%	9.8%	30.8%	69.2%	100.0%
238140	2.8%	3.0%	0.2%	0.0%	4.0%	10.1%	89.9%	100.0%
238210	2.6%	2.1%	0.5%	0.1%	7.0%	12.3%	87.7%	100.0%
238220	1.4%	1.1%	0.3%	0.0%	3.9%	6.8%	93.2%	100.0%
238290	9.2%	7.0%	2.6%	0.0%	12.7%	31.4%	68.6%	100.0%
324121	2.5%	0.0%	2.5%	0.0%	7.5%	12.5%	87.5%	100.0%
326299	0.0%	0.0%	0.0%	0.0%	7.3%	7.3%	92.7%	100.0%
423110	0.6%	0.3%	0.0%	0.0%	5.1%	6.0%	94.0%	100.0%
423120	0.3%	1.2%	0.8%	0.0%	3.9%	6.2%	93.8%	100.0%
423320	1.0%	1.8%	1.2%	0.0%	6.6%	10.7%	89.3%	100.0%
423450	4.0%	1.4%	3.2%	0.0%	8.7%	17.3%	82.7%	100.0%
423510	1.5%	0.8%	0.7%	0.0%	6.0%	8.9%	91.1%	100.0%
423610	3.1%	2.3%	1.4%	0.1%	9.9%	16.9%	83.1%	100.0%
423690	1.0%	0.7%	1.5%	0.0%	7.1%	10.3%	89.7%	100.0%
423710	2.2%	1.0%	2.5%	0.0%	8.7%	14.4%	85.6%	100.0%
423810	0.0%	1.8%	0.3%	1.3%	6.1%	9.4%	90.6%	100.0%
423820	0.0%	0.5%	0.3%	0.0%	3.3%	4.0%	96.0%	100.0%
423830	0.4%	0.4%	0.4%	0.0%	4.8%	6.1%	93.9%	100.0%

State of Illinois Goods and Services Disparity Study 2022

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
423850	2.6%	2.0%	0.6%	0.0%	11.0%	16.3%	83.7%	100.0%
423990	0.9%	0.6%	0.3%	0.0%	4.2%	5.9%	94.1%	100.0%
424120	5.0%	1.4%	3.0%	0.0%	10.9%	20.2%	79.8%	100.0%
424130	2.6%	2.6%	0.9%	0.0%	12.1%	18.1%	81.9%	100.0%
424410	0.6%	0.5%	0.8%	0.0%	4.4%	6.3%	93.7%	100.0%
424420	4.7%	2.8%	2.8%	0.0%	3.7%	14.0%	86.0%	100.0%
424470	0.0%	0.0%	0.0%	0.0%	3.7%	3.7%	96.3%	100.0%
424490	2.0%	0.8%	1.2%	0.0%	9.0%	13.0%	87.0%	100.0%
424690	1.6%	1.9%	1.9%	0.0%	9.3%	14.6%	85.4%	100.0%
424710	1.7%	0.0%	0.8%	0.0%	5.0%	7.6%	92.4%	100.0%
424720	1.3%	1.5%	2.6%	0.0%	5.2%	10.5%	89.5%	100.0%
424910	0.0%	0.0%	0.1%	0.0%	2.7%	2.8%	97.2%	100.0%
441110	0.2%	0.1%	0.0%	0.0%	1.3%	1.6%	98.4%	100.0%
484220	8.6%	34.8%	2.4%	0.0%	15.0%	60.7%	39.3%	100.0%
488490	8.8%	8.8%	0.5%	0.0%	7.2%	25.3%	74.7%	100.0%
488510	1.6%	0.6%	0.7%	0.1%	7.0%	10.1%	89.9%	100.0%
518210	4.1%	1.1%	2.1%	0.1%	6.6%	14.0%	86.0%	100.0%
531390	16.8%	1.9%	1.9%	0.0%	16.8%	37.4%	62.6%	100.0%
532283	0.0%	0.0%	0.0%	0.0%	12.9%	12.9%	87.1%	100.0%
541110	0.5%	0.2%	0.1%	0.0%	4.7%	5.5%	94.5%	100.0%
541211	1.4%	0.4%	0.3%	0.0%	6.5%	8.6%	91.4%	100.0%
541310	2.3%	2.6%	2.2%	0.1%	9.0%	16.2%	83.8%	100.0%
541511	2.2%	0.7%	4.0%	0.0%	4.4%	11.3%	88.7%	100.0%
541512	4.1%	1.6%	4.9%	0.0%	7.0%	17.6%	82.4%	100.0%
541611	4.3%	1.2%	1.1%	0.1%	8.3%	15.0%	85.0%	100.0%
541620	3.9%	3.6%	2.6%	0.3%	10.5%	20.9%	79.1%	100.0%
541930	0.4%	7.2%	3.6%	0.0%	19.1%	30.2%	69.8%	100.0%
561210	12.0%	10.7%	4.0%	0.0%	9.3%	36.0%	64.0%	100.0%
561320	4.8%	2.3%	2.1%	0.0%	11.9%	21.0%	79.0%	100.0%
561611	11.5%	2.2%	0.5%	0.0%	9.5%	23.7%	76.3%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
561720	3.6%	1.0%	0.2%	0.1%	8.2%	13.1%	86.9%	100.0%
561730	1.1%	1.4%	0.1%	0.1%	3.4%	6.0%	94.0%	100.0%
562111	4.0%	6.5%	1.6%	0.0%	10.5%	22.6%	77.4%	100.0%
811111	0.2%	0.1%	0.1%	0.0%	1.8%	2.2%	97.8%	100.0%
812331	0.0%	2.9%	1.5%	0.0%	4.4%	8.8%	91.2%	100.0%
<b>Total</b>	<b>2.1%</b>	<b>1.5%</b>	<b>1.0%</b>	<b>0.0%</b>	<b>5.9%</b>	<b>10.5%</b>	<b>89.5%</b>	<b>100.0%</b>

Source: CHA analysis of state of Illinois data; Hoovers; CHA Master Directory

These unweighted estimates can be used by the state as the starting point for setting narrowly tailored Business Enterprise Program contract goals. The agency uses the B2Gnow<sup>®</sup> electronic data collection and monitoring system, and the goal setting module has been designed specifically to interface with our study methodology and results.

**Table 4-8: Distribution of the State of Illinois' Spending by NAICS Code (the Weights)**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
237310	Highway, Street, and Bridge Construction	0.1%
238140	Masonry Contractors	0.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	0.01%
238220	Plumbing, Heating, and Air-Conditioning Contractors	0.02%
238290	Other Building Equipment Contractors	0.3%
324121	Asphalt Paving Mixture and Block Manufacturing	0.2%
326299	All Other Rubber Product Manufacturing	0.03%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	14.0%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	7.7%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	1.1%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.1%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	0.01%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	0.01%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
423690	Other Electronic Parts and Equipment Merchant Wholesalers	0.4%
423710	Hardware Merchant Wholesalers	0.2%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.01%
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	1.5%
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.5%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.01%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.1%
424120	Stationery and Office Supplies Merchant Wholesalers	0.8%
424130	Industrial and Personal Service Paper Merchant Wholesalers	0.01%
424410	General Line Grocery Merchant Wholesalers	5.8%
424420	Packaged Frozen Food Merchant Wholesalers	2.6%
424470	Meat and Meat Product Merchant Wholesalers	2.2%
424490	Other Grocery and Related Products Merchant Wholesalers	1.1%
424690	Other Chemical and Allied Products Merchant Wholesalers	15.7%
424710	Petroleum Bulk Stations and Terminals	0.001%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	0.8%
424910	Farm Supplies Merchant Wholesalers	0.02%
441110	New Car Dealers	22.2%
484220	Specialized Freight (except Used Goods) Trucking, Local	4.1%
488490	Other Support Activities for Road Transportation	1.2%
488510	Freight Transportation Arrangement	0.002%
518210	Data Processing, Hosting, and Related Services	0.004%
531390	Other Activities Related to Real Estate	0.004%
532283	Home Health Equipment Rental	0.02%
541110	Offices of Lawyers	0.02%
541211	Offices of Certified Public Accountants	0.3%
541310	Architectural Services	0.01%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
541511	Custom Computer Programming Services	0.04%
541512	Computer Systems Design Services	0.3%
541611	Administrative Management and General Management Consulting Services	2.5%
541620	Environmental Consulting Services	0.1%
541930	Translation and Interpretation Services	0.5%
561210	Facilities Support Services	1.1%
561320	Temporary Help Services	1.9%
561611	Investigation Services	2.0%
561720	Janitorial Services	1.6%
561730	Landscaping Services	0.03%
562111	Solid Waste Collection	1.3%
811111	General Automotive Repair	3.7%
812331	Linen Supply	0.5%
<b>TOTAL</b>		<b>100.0%</b>

Source: CHA analysis of state of Illinois data

Table 4-9 presents the weighted availability results for each of the racial and gender categories. The aggregated availability of M/WBEs, weighted by the state’s spending in its geographic and industry markets, is 11.1%.

**Table 4-9: Aggregated Weighted Availability for State of Illinois Contracts**

Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
1.9%	2.6%	0.9%	0.0%	5.7%	11.1%	88.9%	100.0%

Source: CHA analysis of state of Illinois data; Hoovers; CHA Master Directory

### 3. Analysis of the Concentration of Contract Dollars among Firms

In addition to examining the level of M/WBE and non-M/WBE contract dollar utilization, another important dimension to a disparity analysis is an examination of any asymmetries between the NAICS codes where the agency spends large shares of its funds and the NAICS codes that provide M/WBEs’ and non-M/WBEs’ largest shares of their earnings. This analysis is important for two

reasons. First, to the extent the NAICS codes where the agency spends the largest shares of its funds align with the codes that provide the largest shares of non-M/WBE earnings AND these NAICS codes are different from the codes that provide large shares of M/WBE earnings, this indicates that M/WBEs do not enjoy the same position in the agency’s marketplace as non-M/WBEs. Second, if an asymmetry exists between agency spending and M/WBE earnings, then the high utilization of M/WBEs as a group will mask unequal opportunities at a more granular level. Consequently, a race- or gender-based remedial program may still be supportable. This section presents data to examine this issue.

Prior to presenting these data, it is important to emphasize three important findings: 1) the three NAICS codes that provide the most contract dollars to each M/WBE group capture a larger share of the overall state spending received by the group than the share of overall state spending captured by the top three NAICS codes for the state’s overall spend; 2) the three NAICS codes that provide the most contract dollars to M/WBEs are different from the three NAICS codes that provide the most contract dollars non-M/WBEs; and 3) when examining the leading NAICS codes for M/WBEs, the share of the groups’ overall earnings exceeds the share of non-M/WBEs’ overall earnings.

With respect to the first finding, Table 4-10 presents data on the share of the state’s contract dollars received by the top three NAICS codes for each demographic group. These shares are derived from the data presented in Tables 4-5 and 4-6. The three NAICS codes where the state spent most of its contract dollars capture 51.9% of all state spending. For each M/WBE group, the corresponding figure for the share of spending captured by the top three codes ranges between 96.6% (Hispanic) and 0.0% (Native American).

**Table 4-10: Comparison of the Share of the State of Illinois Spending Captured by the Top Three NAICS Codes for Each Demographic Group**

Demographic Group	Share of All State Spending in the Top Three NAICS Codes for Each Group
All	51.9%
Black	79.8%
Hispanic	96.6%
Asian	95.0%
Native American	0.0%
White Woman	60.5%
Non-M/WBE	59.6%

Source: CHA analysis of state of Illinois data

With respect to the second finding, Table 4-11 provides more detail on the data presented in Table 4-10. Table 4-11 lists the top three codes for each group and their corresponding share of the group’s total spending. It indicates that none of the top three codes where the state spends its dollars are represented among the top three codes for any of the M/WBE groups. In fact, as shown in Table 4-7, Blacks, Hispanics, and Asians did not receive any procurement dollars in these codes and White Women only received contracts in one of the three codes - NAICS code 423110 (Automobile and Other Motor Vehicle Merchant Wholesalers).

**Table 4-11: The Top Three State of Illinois Spending NAICS Codes for Each Demographic Group**

NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
<b>All</b>			
441110	New Car Dealers	22.2%	51.9%
424690	Other Chemical and Allied Products Merchant Wholesalers	15.7%	
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	14.0%	
<b>Black</b>			
561611	Investigation Services	30.8%	79.8%
561320	Temporary Help Services	26.4%	
561720	Janitorial Services	22.6%	
<b>Hispanic</b>			
484220	Specialized Freight (except Used Goods) Trucking, Local	81.0%	96.5%
541930	Translation and Interpretation Services	9.6%	
488490	Other Support Activities for Road Transportation	6.0%	
<b>Asian</b>			
424490	Other Grocery and Related Products Merchant Wholesalers	53.3%	95.0%
541512	Computer Systems Design Services	25.1%	
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	16.5%	
<b>Native American</b>			
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NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
<b>White Woman</b>			
484220	Specialized Freight (except Used Goods) Trucking, Local	25.0%	60.5%
541611	Administrative Management and General Management Consulting Services	24.9%	
423690	Other Electronic Parts and Equipment Merchant Wholesalers	10.6%	
<b>Non-M/WBE</b>			
441110	New Car Dealers	25.7%	59.6%
424690	Other Chemical and Allied Products Merchant Wholesalers	18.1%	
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	15.8%	

Source: CHA analysis of state of Illinois data

Tables 4-12 through 4-15 present data on the third finding: how the state spending varies across groups. These results illustrate the different levels of concentration of contract dollars among M/WBEs compared to non-M/WBEs. For each demographic group, we restate the three NAICS codes where the group received the largest share of the state’s spending (first presented in Table 4-11). Then, we present the weight for each code derived from the state’s overall spending. Finally, present the share of all group contract dollars and compare that share to the corresponding share received by non-M/WBEs.

Table 4-12 presents the three NAICS codes where Black firms received the largest share of their contract dollars. While these codes captured 79.8% of all Black contract dollars, the corresponding figure for non-M/WBEs was 0.3%.

**Table 4-12: Three NAICS Codes where Black Firms Received the Most Spending**

NAICS Code	NAICS Code Label	Weight	Share of Total Black Dollars	Share of Total Non-M/WBE Dollars
561611	Investigation Services	2.0%	30.8%	0.0%
561320	Temporary Help Services	1.9%	26.4%	0.1%
561720	Janitorial Services	1.6%	22.6%	0.2%
Total 3-code Share of Total Group Dollars			79.8%	0.3%

*Source: CHA analysis of state of Illinois data*

Table 4-13 presents the three NAICS codes where Hispanic firms received the largest share of their contract dollars. While these codes comprised 96.6% of all Hispanic contract dollars, the corresponding figure for non-M/WBEs was 1.7%.

**Table 4-13: Three NAICS Codes where Hispanic Firms Received the Most Spending**

NAICS Code	NAICS Code Label	Weight	Share of Total Hispanic Dollars	Share of Total Non-M/WBE Dollars
484220	Specialized Freight (except Used Goods) Trucking, Local	4.1%	81.0%	0.5%
541930	Translation and Interpretation Services	0.5%	9.6%	0.0%
488490	Other Support Activities for Road Transportation	1.2%	6.0%	1.2%
Total 3-code Share of Total Group Dollars			96.6%	1.7%

*Source: CHA analysis of state of Illinois data*

Table 4-14 presents the three NAICS codes where Asian firms received the largest share of their contract dollars. While these codes captured 95.0% of all Asian contract dollars, the corresponding figure for non-M/WBEs was 1.0%.

**Table 4-14: Three NAICS Codes where Asian Firms Received the Most Spending**

NAICS Code	NAICS Code Label	Weight	Share of Total Asian Dollars	Share of Total Non-M/WBE Dollars
424490	Other Grocery and Related Products Merchant Wholesalers	1.1%	53.3%	1.0%
541512	Computer Systems Design Services	0.3%	25.1%	0.0%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.1%	16.5%	0.0%
Total 3-code Share of Total Group Dollars			95.0%	1.0%

Source: CHA analysis of state of Illinois data

Table 4-15 presents the three NAICS codes where White woman firms received the largest share of their contract dollars. These codes comprise 60.5% of all White woman contract dollars; the corresponding figure for non-M/WBEs was 2.1%.

**Table 4-15: Three NAICS Codes where White Woman Firms Received the Most Spending**

NAICS Code	NAICS Code Label	Weight	Share of Total White Woman Dollars	Share of Total Non-M/WBE Dollars
484220	Specialized Freight (except Used Goods) Trucking, Local	4.1%	25.0%	0.5%
541611	Administrative Management and General Management Consulting Services	2.5%	24.9%	1.6%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	0.4%	10.6%	0.0%
Total 3-code Share of Total Group Dollars			60.5%	2.1%

Source: CHA analysis of state of Illinois data

The data presented in Tables 4-10 through 4-15 support the inference that regardless of any statistical disparities between contract utilization and weighted availability, the experiences of M/WBEs with respect to participation in the state’s procurements are significantly different than the experiences of non-M/WBEs. These results support the conclusion that while overall, M/WBEs have received fair opportunities to do work on state contracts, their work has been highly concentrated in a few codes. Race- and gender-con-

scious measures may still be supportable to ensure that minority and woman firms have equal opportunities to compete for all types of state contracts.

## F. Disparity Analysis of M/WBEs for State of Illinois Contracts

As required by strict constitutional scrutiny, we next calculated disparity ratios for each demographic group, comparing the group's total utilization compared to its total weighted availability.

A *disparity ratio* is the relationship between the utilization and weighted availability (as determined in the section above). Mathematically, this is represented by:

$$DR = U/WA$$

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% of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.<sup>190</sup> 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

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190. 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.").

probability that it resulted from random chance alone.<sup>191</sup> 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 percent represent disparities that are substantively significant. (See Footnote 190 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 4-16 presents the disparity ratios for each demographic group. The disparity ratios for Asians, Native Americans and White women were substantively significant. The disparity ratios for all groups are statistically significant at the 0.001 level.

**Table 4-16: Disparity Ratios by Demographic Group**

	Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE
Disparity Ratio	333.90%***	119.70%***	55.20%‡	0.00%‡	62.10%***‡	121.20%***	97.40%***

Source: CHA analysis of state of Illinois data

‡ Indicates substantive significance

\*\*\* Statistically significant at the 0.001 level

In order to get a better understanding of the disparity ratios for Blacks, Hispanics and M/WBEs overall, we examined more closely the six NAICS codes where the state spent 65.4% of its contract dollars. These five codes were selected because the share of state spending in these codes ranged from 22.0% to 5.8%. The next largest share was 4.1% and the remaining 48 NAICS codes accounted for just 34.6% of all state spending. For each NAICS code, we compared a demographic group’s utilization on state contract dollars to its unweighted availability. Table 4-29 presents this comparative data.

Most striking, was the lack of contract dollars received by M/WBEs in these five codes. Blacks, Hispanics, Asians, and Native Americans did not receive any con-

191. 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.

tracts in these five codes. White women only received a small share of the contracts in one of the NAICS codes 423110: 2.4%.

**Table 4-17: Comparing Utilization and Unweighted Availability in the Five NAICS Codes Where the State of Illinois Spends Most of Its Funds**

		Black	Hispanic	Asian	Native American	White Woman	M/WBE	Non-M/WBE	Total
<b>NAICS Code 441110; Weight 22.2%</b>									
Utilization	444110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Unweighted Availability		0.2%	0.1%	0.0%	0.0%	1.3%	1.6%	98.4%	100.0%
<b>NAICS Code 424690; Weight 15.7%</b>									
Utilization	424690	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Unweighted Availability		1.6%	1.9%	1.9%	0.0%	9.3%	14.6%	85.4%	100.0%
<b>NAICS Code 423110; Weight 14.0%</b>									
Utilization	423110	0.0%	0.0%	0.0%	0.0%	2.4%	2.4%	97.6%	100.0%
Unweighted Availability		0.6%	0.3%	0.0%	0.0%	5.1%	6.0%	94.0%	100.0%
<b>NAICS Code 423120; Weight 7.7%</b>									
Utilization	423120	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Unweighted Availability		0.3%	1.2%	0.8%	0.0%	3.9%	6.2%	93.8%	100.0%
<b>NAICS Code 424410; Weight 5.8%</b>									
Utilization	424410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Unweighted Availability		0.6%	0.5%	0.8%	0.0%	4.4%	6.3%	93.7%	100.0%

Source: CHA analysis of state of Illinois data

## G. Conclusion

This Chapter examined the state’s utilization of M/WBEs compared to non-M/WBEs; provided estimates of the availability of M/WBEs and non-M/WBEs to perform the types of goods and services utilized by the state in its geographic market area; and tested for whether there are significant disparities in the results of utilization compared to availability. Overall, we found that, compared to non-M/WBEs, minority- and woman-owned firms were concentrated in a different subset

of industries. Further, we found M/WBEs received very few contracting opportunities in the NAICS codes where the state spent large amounts of its funds.



# V. ANALYSIS OF DISPARITIES IN THE STATE OF ILLINOIS' MARKETPLACE

## 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.<sup>192</sup>

This Chapter explores the data and literature relevant to how discrimination in the State of Illinois economy affects the ability of minorities and women to fairly and fully engage in state of Illinois contract opportunities. Because CMS' Business Enterprise Program ("BEP" or "Program") covers the goods, services and information technology industries, we limit our discussion to those three industries. First, we analyze the rates at which Minority- and Woman-Owned Business Enterprises ("M/WBEs") in the Illinois economy form firms and their earnings from those firms. Then, we analyze state-wide data to see if M/WBE firms' share of all firms is greater than or less than their share of all sales and receipts and their share of all annual payroll. Next, we summarize the literature on barriers to equal access to commercial credit. Finally, we summarize the literature on barriers to equal access to human capital. All three 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 intervention.

A key element to determine the need for the state to intervene in its market through contract goals is an analysis of disparities independent of the state's intervention through its contracting affirmative action program.

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, dis-

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192. Arrow, Kenneth J., "What Has Economics to say about racial discrimination?" *Journal of Economic Perspectives*, 12, 2, (1998), 91-100.

parities in M/WBE earnings, and barriers to access to capital markets are highly relevant to a determination of whether market outcomes are affected by race or gender ownership status.<sup>193</sup> Similar analyses supported the successful legal defense of the Illinois Tollway's Disadvantaged Business Enterprise ("DBE") program from constitutional challenge in 2016.<sup>194</sup>

Similarly, the Tenth Circuit Court of Appeals also upheld the U.S. Department of Transportation's DBE program, and in doing so, stated that 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.<sup>195</sup>

Business discrimination studies and lending 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. In unanimously upholding the USDOT DBE Program, federal 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

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193. See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs.

194. *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); *see also 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."); *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) (holding that City of Chicago's M/WBE program for local construction contracts satisfied "compelling interest" standards using this framework).

195. *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).

owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.<sup>196</sup> As recognized by the Seventh Circuit Court of Appeals, “[e]vidence 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 Goods contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”<sup>197</sup>

This type of court-approved analysis is especially important for an agency such as the state of Illinois, which has been implementing a program for many years. The state’s remedial market interventions through the use of race- and gender-based contract goals may ameliorate the disparate impacts of marketplace discrimination in the state’s own contracting activities. Put another way, the program’s success in moving towards parity for minority and woman firms may be “masking” the effects of discrimination that, but for the contract goals, would mirror the disparities in M/WBE utilization in the overall economy.

To explore the question of whether firms owned by non-Whites and White women face disparate treatment in the state’s marketplace outside of agency contracts, we examined two data sets. The first data set was the U.S. Bureau of the Census’ *American Community Survey* (“ACS”), which provided data to analyze disparities using individual entrepreneurs as the basic unit of analysis.<sup>198</sup> With the ACS, we will address four basic questions:

1. What are the business formation rates for the different demographic groups? We ask this question to establish a basic baseline of business formation outcomes in the private sector.
2. What is the probability of a group forming a business once the analysis considers education, age, industry, and occupation? We want to explore the issue of demographic business formation difference once we statistically tease out possible non-demographic explanations for these differences.
3. Do business earnings vary by demographic group once the analysis considers education, age, industry, and occupation? This question explores the issue of demographic differences in the central business outcome (earnings) once we statistically tease out possible non-demographic explanations for these differences.
4. Do wages vary by demographic group once the analysis considers education, age, industry, and occupation? This question is similar to the third in examining wages instead of business earnings. It is important because

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196. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at \*64 (Sept. 8, 2005).

197. *Id.*

198. Data from 2016 - 2020 American Community Survey are the most recent for a five-year period.

economic research indicates that wage levels can impact the future business formation behavior of individual.

We used the state of Illinois (as we did in the previous chapter) as the geographic unit of analysis. We found disparities in wages, business earnings and business formation rates for minorities and women in all industry sectors in the state's marketplace.<sup>199</sup>

The second data set was the U.S. Bureau's Annual Business Survey ("ABS"). The ABS supersedes the more well-known Survey of Business Owners ("SBO"). The SBO was last conducted in 2012 and historically had been reported every five years. In contrast, the ABS was first conducted in 2017 and it is the Census Bureau's goal to release results annually. This study utilizes the 2018 ABS which contains 2017 data.<sup>200</sup> With the ABS data, six key variables are used in this analysis:

1. The number of all firms
2. The sales and receipts of all firms
3. The number of firms with employees (employer firms)
4. The sales and receipts of all employer firms
5. The number of paid employees
6. The annual payroll of employer firms

CHA examined these data in two ways: First, we calculated the minority- and woman-owned business share of each variable. Second, we calculated three disparity ratios for each grouping of minority- and woman-owned businesses and for the grouping of firms that are not non-White- or White woman-owned:

1. Ratio of sales and receipts share for all firms over the share of total number of all firms
2. Ratio of sales and receipts share for employer firms over the share of total number of employer firms
3. Ratio of annual payroll share over the share of total number of employer firms

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199. Possible disparities in wages is important to explore because of the relationship between wages and business formation. Research by Alicia Robb and others indicate 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, Woman-owned Firms, and High-tech Firms" (2013), [https://www.sba.gov/sites/default/files/files/rs403tot\(2\).pdf](https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf).

200. While there are more recent surveys, much of the data needed for this analysis were not present. CHA reached out to the Census Bureau via e-mail and its response (dated November 11, 2022) was that the 2018 ABS sampled approximately 850,000 firms, which allowed a more complete set of data to be released. In the ABS conducted in 2019-2022, the sample was reduced to 300,000 firms; consequently, the detailed statistics presented in the 2018 ABS could not be reproduced. The 2023 ABS will return to the 2018 sample size of 850,000.

We explored the data to see if an M/WBE's share of sales/receipts and payroll approximates its share of firms. For example, Black firms might represent 10% of all firms but the sales for Black firms might capture just 2% of the sales of all firms. The ratio of Black share of sales over Black share of firms would be .2% (2% divided by 10%), indicating that the sales levels for Black firms in the industry is less than one would expect given the number of Black firms in the industry. As this ratio approaches one, we interpret that as a sign of approaching parity.

Results of the analysis of the ABS data indicate that non-Whites and White women's share of all employer firms is greater than their share of sales, payrolls, and employees. This supports the conclusion that barriers to business success disproportionately affect non-Whites and White women.

## **B. Disparate Treatment in the State of Illinois' Marketplace: Evidence from the Census Bureau's 2016 - 2020 American Community Survey**

As discussed in the beginning of this Chapter, the key question is whether firms owned by non-Whites and White women face disparate treatment in the marketplace without the intervention of the Program (discussed in Chapter III). In this section, we used the Census Bureau's ACS data to explore this and other aspects of this question. One element asks if demographic differences exist in the wage and salary income received by private sector workers. Beyond the issue of bias in the incomes generated in the private sector, this exploration is important for the issue of possible variations in the rate of business formation by different demographic groups. 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, and thus reduce the likelihood of business formation.

The *American Community Survey Public Use Microdata Sample* ("PUMS") is useful in addressing these issues. 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 for years 2016 through 2020.<sup>201</sup> With this rich data

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201. Initially, the Census Bureau contacted approximately 3.5M households. For the analysis reported in this Chapter, we examined over 290,000 observations. For more information about the ACS PUMS, see <https://www.census.gov/programs-surveys/acs/>.

set, our analysis can establish with greater certainty any causal links between race, gender and economic outcomes.

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 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 allows 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 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 compare individuals in different industries, but of the same race and gender. We determine 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, we determine the statistical significance of the relationship between the dependent variable and independent variable. For example, the relationship between gender and wages might exist (*e.g.*, holding all other factors constant, women earn less than men), but we find that it is not statistically different from zero. In this case, we are not confident that there is not any relationship between the two variables. If the relationship is not statistically different from zero, then a variation in the independent variable has no impact on the dependent variable. 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% 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% 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% confident that the relationship is different from zero.<sup>202</sup>

In the following presentation of results, each sub-section 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 differentials); and the differences in business earnings received by a demographic group relative to White men (business earnings differentials). Because the ACS contained limited observations for certain groups in particular industries, we were unable to provide reliable estimates for business outcomes for these groups. However, there were always sufficient observations in the sample of wage earners in each group in each industry to permit us to develop reliable estimates. We developed these results using data from the U.S. Bureau of the Census’ ACS for the state of Illinois. The state of Illinois was also determined to be the geographic market in Chapter IV. Since the scope of this Report covers goods, services and informational technology, we analyzed those three sectors.

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202. Most social scientists do not endorse utilizing a confidence level of less than 95%. Appendix C explains more about statistical significance.

## 1. The Goods Industry in the State of Illinois

One method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. Table 5-1 presents these results. As stated above, the business formation rate represents the share of a population that forms businesses. When developing industry-specific rates, we examine the population that works in that particular industry and identify what share of that sub-population form businesses. For example, Table 5-1 indicates that 1.3% of Blacks form businesses in the Goods industry; this is less than the 4.7% business formation rate for White men. There were low numbers of Native American and Other firms in the ACS sample; consequently, reliable estimates of firm outcomes could not be made for these groups. In Table 5-1, this is indicated by the symbol “-----”.<sup>203</sup> Overall, this table indicates that White men have higher business formation rates compared to Blacks, Hispanics, and White women. Table 5-2 utilizes probit regression analysis to examine the probability of forming a business after controlling for important factors beyond race and gender.<sup>204</sup> This table indicates that Blacks, Hispanics, and White women are less likely to form businesses compared to similarly situated White men. The reduced probabilities of business formation ranged from 2.6% to 2.4%. The coefficients were statistically significant at the 0.05 level (for Blacks and Hispanics) and 0.01 level (for White Women).

With respect to the interpretation of the level of statistical significance of a result, as indicated in the latter part of the previous section, we explored whether the result of the regression analysis is statistically different from zero; if the finding is statistically significant, we also indicate the level of statistical confidence at which the result is accurate. Table 5-2 indicates that the probability that Hispanics form businesses is 2.6% less than the probability that White men form businesses, once we control for age, education, and occupation. The statistical significance of this result is at the 0.05 level, which means we are 95% statistically confident the result is true. If a result is non-zero but the result is not statistically significant, then we cannot rule out zero being the true result. Note: this does not mean the result is wrong, only that there is not a statistically significant level of confidence in the result.

Another way to measure equity is to examine how the wage and salary incomes and business earnings of particular demographic groups compare to White men. Multiple regression statistical techniques allowed us to examine the impact of race and gender on economic outcomes while controlling for other factors, such as education and age.<sup>205</sup> Tables 5-3 and 5-4 present these

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203. This symbol was used through the chapter when there were insufficient observations to establish reliable estimates.

204. Appendix B provides a “Further Explanation of Probit Regression Analysis.”

data on wage and salary incomes and business earnings respectively. Table 5-3 indicates that all M/WBE groups earn less than White men. Once again, all of these coefficients except for that for Other were statistically significant at the 0.001 level. Table 5-4 indicates that only the Hispanic coefficient was statistically significant.

**Table 5-1: Business Formation Rates  
Goods, 2016 - 2020**

Demographic Group	Business Formation Rates
Black	1.3%
Hispanic	1.1%
Native American	-----
Asian/Pacific Islander	5.9%
Other	-----
White Women	2.8%
M/WBE	2.3%
White Male	4.7%

Source: CHA calculations from the American Community Survey

**Table 5-2: Business Formation Probability Differentials for Selected Groups  
Relative to White Men, Goods, 2016 - 2020**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-2.6%*
Hispanic	-2.6%*
Native American	-----
Asian/Pacific Islander	1.4%
Other	-----
White Women	-2.4%**

Source: CHA calculations from the American Community Survey

\*\* Indicates statistical significance at the 0.01 level

\* Indicates statistical significance at the 0.05 level

205. See Appendix A for more information on multiple regression statistical analysis.

**Table 5-3: Wage Differentials for Selected Groups  
Relative to White Men, Goods, 2016 - 2020**

Demographic Group	Wages Relative to White Men (% Change)
Black	-33.2%***
Hispanic	-16.2%***
Native American	-157.0%*** <sup>a</sup>
Asian/Pacific Islander	-41.1%***
Other	-23.5%
White Women	-38.7%***

a. The proper way to interpret a coefficient that is less than negative 100% (e.g., the value of the coefficient Native Americans Women in Table 5-3), is the percentage amount non-M/WBEs earn that is more than the group in question. In this case, White Men receive business earnings 157% more than Native Americans in Goods industry.

Source: CHA calculations from the American Community Survey  
\*\*\* Indicates statistical significance at the 0.001 level

**Table 5-4: Business Earnings Differentials for Selected Groups  
Relative to White Men, Goods, 2016 - 2020**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-74.8%
Hispanic	-412.0%*
Native American	-----
Asian/Pacific Islander	-50.2%
Other	-----
White Women	-47.9%

Source: CHA calculations from the American Community Survey  
\* Indicates statistical significance at the 0.05 level

## 2. The Services Industry in the State of Illinois

Tables 5-5 through 5-8 present the analysis of data in the Services industries. Table 5-5 indicates that all M/WBE groups formed businesses at a lower rate

than White men. M/WBE business formation rates ranged from 5.6% (Others) to 2.2% (Blacks) while White men had a business formation rate of 7.8%. Examining the business formation probabilities (Table 5-6) - once again controlling for age education and gender – Blacks, Hispanics, Asians, and White women were less likely to form businesses compared to White men and these results were statistically significant. Table 5-7 present data on wage differentials: all coefficients for the wages for M/WBEs were statistically significant at the 0.001 level and they ranged from -36.3% to -10.1%. Business earnings – presented in Table 5-8 – indicate while M/WBE firms received less than White men only the coefficients for Blacks and White women were statistically significant.

**Table 5-5: Business Formation Rates  
Services, 2016 - 2020**

Demographic Group	Business Formation Rates
Black	2.2%
Hispanic	2.5%
Native American	-----
Asian/Pacific Islander	4.4%
Other	5.6%
White Women	3.8%
M/WBE	3.3%
White Male	7.8%

*Source: CHA calculations from the American Community Survey*

**Table 5-6: Business Formation Probability Differentials for Selected Groups  
Relative to White Men, Services, 2016 - 2020**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-3.9%***
Hispanic	-2.5%***
Native American	-----
Asian/Pacific Islander	-1.5%**
Other	0.1%
White Women	-2.1%***

Source: CHA calculations from the American Community Survey

\*\*\* Indicates statistical significance at the 0.001 level

\*\* Indicates statistical significance at the 0.01 level

**Table 5-7: Wage Differentials for Selected Groups  
Relative to White Men, Services, 2016 - 2020**

Demographic Group	Wages Relative to White Men (% Change)
Black	-36.3%***
Hispanic	-10.1%***
Native American	-34.7%***
Asian/Pacific Islander	-24.5%***
Other	-32.3%***
White Women	-32.8%***

Source: CHA calculations from the American Community Survey

\*\*\* Indicates statistical significance at the 0.001 level

**Table 5-8: Business Earnings Differentials for Selected Groups  
Relative to White Men, Services, 2016 - 2020**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-55.7%***
Hispanic	-15.3%
Native American	-----
Asian/Pacific Islander	-19.7%
Other	-81.2%
White Women	-34.3%***

Source: CHA calculations from the American Community Survey

\*\*\* Indicates statistical significance at the 0.001 level

### 3. The Information Technology Industry in the State of Illinois

Tables 5-9 through 5-12 present the analysis of data in the information technology industry. M/WBEs formed businesses in this industry at a lower rate than White men (see Table 5-9). Their business formation rates ranged from 5.0% to 2.4%; for White men, the business formation rate was 6.0%. Table 5-10 shows that White women were 3.7% less likely to form businesses compared to White men and this result was statistically significant at the 0.05 level. The coefficients for the wages for Blacks, Hispanics, Asians and White women (presented in Table 5-11) were statistically significant at the 0.001 level and they ranged from -42.9% to -11.0%. Table 5-12 indicates that business earnings for Hispanics were 162.0% less than White men; this result was statistically significant at the 0.05 level.

**Table 5-9: Business Formation Rates  
Information Technology, 2016 - 2020**

Demographic Group	Business Formation Rates
Black	5.0%
Hispanic	4.3%
Native American	-----
Asian/Pacific Islander	3.8%
Other	-----

Demographic Group	Business Formation Rates
White Women	2.4%
M/WBE	3.6%
White Male	6.0%

Source: CHA calculations from the American Community Survey

**Table 5-10: Business Formation Probability Differentials for Selected Groups Relative to White Men, Information Technology, 2016 - 2020**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	0.7%
Hispanic	-0.8%
Native American	-----
Asian/Pacific Islander	-2.2%
Other	-----
White Women	-3.7%*

Source: CHA calculations from the American Community Survey

\* Indicates statistical significance at the 0.05 level

**Table 5-11: Wage Differentials for Selected Groups Relative to White Men, Information Technology, 2016 - 2020**

Demographic Group	Wages Relative to White Men (% Change)
Black	-42.9%***
Hispanic	-24.8%***
Native American	9.5%
Asian/Pacific Islander	-11.0%***
Other	-24.1%
White Women	-23.8%***

Source: CHA calculations from the American Community Survey

\*\*\* Indicates statistical significance at the 0.001 level

**Table 5-12: Business Earnings Differentials for Selected Groups Relative to White Men, Information Technology, 2016 - 2020**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-82.6%
Hispanic	162.0%*
Native American	-----
Asian/Pacific Islander	18.2%
Other	-----
White Women	-102.0%

Source: CHA calculations from the American Community Survey

\*\* Indicates statistical significance at the 0.05 level

Overall, the data presented in the above Tables indicate that non-Whites and White women form businesses less than White men and their wage and business earnings are less than those of White men. These analyses support the conclusion that barriers to business success do affect non-Whites and White women.

### C. Disparate Treatment in the Central Management Services’ Marketplace: Evidence from the Census Bureau’s 2017 Annual Business Survey

We further examined whether non-Whites and White women have disparate outcomes when they are active in the State of Illinois. This question is operationalized by exploring if the share of business receipts, number of firms, and payroll for firms owned by non-Whites and White women is greater than, less than, or equal to the share of all firms owned by non-Whites and White women.

To answer this question, we examined the U.S. Bureau’s ABS. The ABS surveyed about 850,000 employer firms 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, sales and industry.<sup>206</sup> For this analysis, we examined firms in the State of Illinois. The State was the geographic unit of analysis because the ABS does not present data at the sub-state level.

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206. For more information on the Annual Business Survey see <https://www.census.gov/programs-surveys/abs/about.html>.

With these data, we grouped the firms into the following ownership categories.<sup>207,208</sup>

- 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 four 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 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. In addition to the ownership demographic data, the Survey also gathers information on the sales, number of paid employees, and payroll for each reporting firm.

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 sectors at the two-digit North American Industry Classification System (“NAICS”) code level, and therefore our sector definitions do not exactly correspond to the definitions used to analyze the state’s contract data in Chapter IV, where we are able to determine sectors at the six-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 two-digit data.

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207. Race and gender labels reflect the categories used by the Census Bureau.

208. 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.

We analyzed the ABS data on the Goods and Services (information technology is included in Services) industries. Table 5-13 presents information on which NAICS codes were used to define each sector.<sup>209</sup>

**Table 5-13: Two-Digit NAICS Code Definition of Sector**

ABS Sector Label	Two-Digit NAICS Codes
Goods	31,42, 44
Other Services	48, 52, 53, 56, 61, 62, 71, 72, 81

The balance of this Chapter reports the findings of the ABS analysis.

## 1. Goods Industry

Table 5-14 presents data on the percentage share that each group has of the total of each of the following four business outcomes:

1. The number of firms with employees (employer firms)
2. The sales and receipts of all employer firms
3. The number of paid employees
4. The annual payroll of employer firms

Panel A of Table 5-14 presents data for the four basic non-White racial groups:

1. Black
2. Hispanic
3. Asian
4. Native American

Panel B of Table 5-14 presents data for the following types of firm ownership:

- Non-White
- White women
- Not non-White/non-White women<sup>210</sup>

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

209. The two-digit NAICS code level did not allow us to define and analyze an information technology industry as we did with the ACS data.

210. 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.

owned by men and women are classified as equally owned by non-Whites and Whites.

Since the central issue is the possible disparate treatment of non-White firms and White woman firms, we calculate three disparity ratios each for Black, Hispanic, Asian, Native American, non-White, and White woman firm respectively (a total of 18 ratios), presented in Table 5-15:

- Ratio of sales and receipts share for all employer firms over the share of total number of all employer firms.
- Ratio of sales and receipts share for employer firms over the share of total number of employer firms.
- Ratio of annual payroll share over the share of total number of employer firms.

For example, the disparity ratio of sales and receipts share for all firms over the share of total number of all employer firms for Black firms is 21.5% (as shown in Table 5-15). This is derived by taking the Black share of sales and receipts for all employer firms (0.2%) and dividing it by the Black share of total number of all employer firms (0.8%) that are presented in Table 5-14.<sup>211</sup> If Black-owned firms earned a share of sales equal to their share of total firms, the disparity index would have been 100%. An index less than 100% 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% rule" that a ratio less than 80% presents a *prima facie* case of discrimination.<sup>212</sup> All of the 18 disparity ratios for non-White firms and White woman firms (presented in Table 5-15) are below this threshold.<sup>213</sup>

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211. Please note that while the numbers presented in Table 5-14 are rounded to the first decimal place, the calculations resulting in the numbers presented in Table 5-15 are based on the actual (non-rounded) figures. Therefore, the Black ratio presented in Table 5-11 of 21.5% is not the same figure as that which would be derived when you divided 0.2 by 0.8 (the numbers presented in Table 5-14).

212. 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 80%) 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.").

213. Because the data in the subsequent tables are presented for descriptive purposes, significance tests on these results are not conducted.

**Table 5-14: Demographic Distribution of Sales and Payroll Data – Aggregated Groups  
Goods, 2017**

	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
<b>Panel A: Distribution of Non-White Firms</b>				
Black	0.8%	0.2%	0.2%	0.2%
Hispanic	2.7%	0.5%	0.8%	0.7%
Asian	10.7%	1.3%	2.1%	1.4%
Native American	0.0%	0.0%	0.0%	0.0%
<b>Panel B: Distribution of All Firms</b>				
Non-White	14.2%	2.0%	3.1%	2.3%
White Women	13.7%	2.5%	4.6%	4.2%
Not Non-White/ Not White Women	72.1%	95.5%	92.3%	93.5%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CHA calculations from American Business Survey

**Table 5-15: Disparity Ratios – Aggregated Groups  
Goods, 2017**

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
<b>Panel A: Disparity Ratios for Non-White Firms</b>			
Black	21.5%	23.4%	18.4%
Hispanic	18.7%	30.7%	25.5%
Asian	12.1%	19.8%	13.3%
Native American	74.6%	46.1%	48.7%
<b>Panel B: Disparity Ratios for All Firms</b>			
Non-White	14.0%	22.1%	15.9%

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
White Women	18.1%	33.4%	30.9%
Not Non-White/Not White Women	132.5%	128.0%	129.7%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CHA calculations from American Business Survey

## 2. Other Services Industry

Tables 5-16 and 5-17 present the same analysis for the Other Services industry. Of the 18 disparity ratios for non-White firms and White woman firms presented in Table 5-17, 16 fall under the 80% threshold.

**Table 5-16: Demographic Distribution of Sales and Payroll Data – Aggregated Groups  
Other Services, 2017**

	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
<b>Panel A: Distribution of Non-White Firms</b>				
Black	1.9%	0.4%	1.0%	0.6%
Hispanic	7.1%	1.0%	1.8%	1.0%
Asian	9.2%	2.0%	3.6%	2.1%
Native American	0.0%	0.0%	0.0%	0.0%
<b>Panel B: Distribution of All Firms</b>				
Non-White	18.3%	3.5%	6.5%	3.8%
White Women	17.1%	3.9%	7.2%	4.7%
Not Non-White/Not White Women	64.6%	92.6%	86.3%	91.5%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CHA calculations from American Business Survey

**Table 5-17: Disparity Ratios – Aggregated Groups  
Other Services, 2017**

	Ratio of Sales to Number of Firms (All Firms)	Ratio of Sales to Number of Firms (Employer Firms)	Ratio of Payroll to Number of Employer Firms
<b>Panel A: Disparity Ratios for Non-White Firms</b>			
Black	24.0%	55.0%	33.2%
Hispanic	13.5%	25.7%	14.6%
Asian	22.1%	39.1%	23.1%
Native American	82.2%	300.1%	123.0%
<b>Panel B: Disparity Ratios for All Firms</b>			
Non-White	19.0%	35.7%	20.9%
White Women	22.9%	41.9%	27.6%
Not Non-White/Not White Women	143.3%	133.5%	141.5%
<b>All Firms</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CHA calculations from American Business Survey

### 3. Conclusion

Overall, the analysis of the ABS data presented in the above tables indicate that the non-White and White woman share of all employer firms is greater than their share of sales, payrolls, and employees. This supports the conclusion that barriers to business success disproportionately affect non-Whites and White women.

## D. Evidence of Disparities in Access to Business Capital

Capital is the lifeblood of any business. Participants in the anecdotal data collection universally agreed to this fundamental fact. The interviews with business owners conducted as part of this Study confirmed that small firms, especially minority- and woman-owned firms, had difficulties obtaining needed working capital to perform on state contracts and subcontracts, as well as expand the capacities of their firms. As demonstrated by the analyses of Census Bureau data, above, discrimination may even prevent firms from forming in the first place.

There are extensive federal agency reports and much 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.<sup>214</sup> The most recent research highlights the magnitude of the COVID-19 pandemic's disproportionate impact on minority-owned firms.

## 1. Federal Reserve Board Small Business Credit Surveys<sup>215</sup>

The Development Office of the 12 Reserve Banks of the Federal Reserve System has conducted Small Business Credit Surveys ("SBCS") to develop data on small business performance and financing needs, decisions, and outcomes.

### a. 2022 Report on Firms Owned by People of Color

This Report constitutes a follow-up to the *Small Business Credit Survey 2021 Report on Firms Owned by People of Color*,<sup>216</sup> which found that businesses owned by people of color often face more financial and operational challenges than their White counterparts and were frequently less successful at obtaining the funding necessary to weather the effects of the global COVID-19 pandemic. It finds that these disparities continue to persist. The Report contains results for employer firms with 1 to 499 employees other than the owners by four race/ethnicity categories: Asian or Pacific Islanders; Black or African American; Hispanic or Latino; and White.<sup>217</sup>

The Report found that while revenues and employment improved for some businesses, most firms, particularly those owned by people of color, had not yet recovered from the effects of the pandemic. Firms owned by people of color were more likely than White-owned firms to report declines in revenue and employment in the prior twelve months. Both Asian- and Black-owned firms were more than twice as likely as White-owned firms to be in poor financial condition at the time of the survey. Asian-owned firms were more likely than other firms to report weak sales as a financial challenge, while Black-owned firms were more likely than others to say that credit availability was a concern.

The Report also found that firms owned by people of color were more likely to seek pandemic-related financial assistance than White-owned firms. Firms were less likely to apply for the Paycheck Protection Program ("PPP")

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214. See, e.g., Evans, David S. and Jovanovic, Boyan, "An Estimated Model of Entrepreneurial Choice under Liquidity Constraints," *Journal of Political Economy*, Vol. 97, No. 4, 1989, pp. 808-827; David S. Evans and Linda S. Leighton, "Some empirical aspects of entrepreneurship," *The American Economic Review*, Vol. 79, No. 3, 1989, pp. 519-535.

215. 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).

216. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color>.

217. Findings for Native American-owned firms were omitted from the report because sample sizes were too small to make precise estimates for most measures.

in 2021 than in 2020; however, when they did apply, firms owned by people of color were less likely than White-owned firms to report receiving the full amount of funding for which they applied in the prior twelve months.<sup>218</sup>

While firms owned by people of color were more likely to apply for traditional financing than White-owned firms (excluding pandemic-related assistance programs in the prior twelve months), they were less likely to receive the funding sought. Compared to White-owned businesses, firms owned by people of color sought smaller amounts of financing. Among low-credit-risk applicants, firms owned by people of color were less likely than White-owned firms to receive all the financing they sought.

Applicant firms were more likely to seek loans, lines of credit, and cash advances at large or small banks than at nonbank lenders. However, firms owned by people of color were less likely than White-owned firms to be approved for financing. Regardless of the type of lender they applied to, firms owned by people of color were less likely than White-owned firms to be approved for the full amount of funding sought. Firms owned by people of color were half as likely as White-owned firms to be fully approved for a loan or line of credit at a small bank and almost a third as likely to be fully approved at a nonbank finance company.

#### **b. 2022 Small Business Credit Survey**

The 2022 Small Business Credit Survey (“2022 Survey”)<sup>219</sup> gathered insights about the COVID-19 pandemic’s continuing impact on small businesses, including workforce challenges, business performance, and credit conditions. The 2022 Survey yielded 10,914 responses from a nationwide convenience sample of small business firms with 1-499 full- or part-time employees across all 50 states and the District of Columbia. The 2022 Survey was fielded during September through November of 2021 and was the second survey conducted during the global pandemic.

The 2022 Survey found that the pandemic continues to significantly impact firms, with 77% reporting negative effects. While pandemic-related financial assistance programs, including the PPP, were widely used in 2020 and 2021, the 2022 Survey found a decline in their use in the 12 months prior to the Survey. Personal funds and cash reserves remain an important source of financial stability for small businesses, while financing approval rates continue to decline relative to pre-pandemic levels. Although two-

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218. The Report finds that in 2021, firms continued to rely on pandemic-related financial assistance, including the PPP, Economic Injury Disaster Loans (“EIDL”) and other federal, state, and local funding programs. EIDL and PPP loans were the most common.

219. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2022-sbcs-employer-firms-report>.

thirds of employer firms received pandemic-related financial assistance in the prior 12 months, firms were less likely to seek financial assistance than they were earlier in the pandemic. Approval rates on loans, lines of credit and cash advance applications declined for the second consecutive year. Other key findings include:

- More than half of firms were in fair or poor financial condition at the time of the Survey, and nearly all firms faced at least one operational or financial challenge in the prior 12 months.
- Firms owned by people of color, smaller firms, and leisure and hospitality firms were most likely to be in fair or poor financial condition.

Application rates for traditional financing were lower in 2021 than in prior years, and those who applied were less likely to receive the financing they sought. Firms owned by people of color, firms with fewer employees, and leisure and hospitality firms were least likely to receive the full amount of financing sought.

**c. 2021 Report on Firms Owned by People of Color**

**i. Overview**

The *2021 Report on Firms Owned by People of Color*<sup>220</sup> compiles results from the 2020 SBCS. The SBCS provides data on small business performance, financing needs, and decisions and borrowing outcomes.<sup>221,222</sup> The Report provides results by four race/ethnicity categories: White, Black or African American, Hispanic or Latino, and Asian or Pacific Islander. For select key statistics, it also includes results for 4,531 non-employer firms, which are firms with no employees on payroll other than the owner(s) of the business.

Patterns of geographic concentration emerged among small business ownership by race and ethnicity. This was important given the progressive geographic spread of the novel coronavirus throughout 2020 and variations in state government responses to limit its spread. The Report found that 40% of Asian-owned small employer firms are in the Pacific census division, and another 28% are in the Middle Atlantic. Early and aggressive efforts by the impacted states may have affected the revenue performance of Asian-owned firms in the aggregate given their

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220. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color>.

221. The SBCS is an annual survey of firms with fewer than 500 employees.

222. The 2020 SBCS was fielded in September and October 2020 and yielded 9,693 responses from small employer firms in all 50 states and the District of Columbia.

geographic concentration. Black-owned and Hispanic-owned small employer firms are more concentrated in the South Atlantic region, which includes states with a mix of pandemic responses. For example, while Florida lifted COVID-19 restrictions relatively quickly, the South Atlantic, including North Carolina, maintained more strict guidelines.

The Report found that firms owned by people of color continue to face structural barriers in acquiring the capital, business acumen, and market access needed for growth. At the time of the 2020 SBCS – six months after the onset of the global pandemic – the U.S. economy had undergone a significant contraction of economic activity. As a result, firms owned by people of color reported more significant negative effects on business revenue, employment, and operations. These firms anticipated revenue, employment, and operational challenges to persist into 2021 and beyond. Specific findings are, as follows:

**ii. Performance and Challenges**

Overall, firms owned by people of color were more likely than White-owned firms to report that they reduced their operations in response to the pandemic. Asian-owned firms were more likely than others to have temporarily closed and to have experienced declines in revenues and employment in the 12 months prior to the survey. In terms of sales and the supply chain, 93% of Asian-owned firms and 86% of Black-owned firms reported sales declines as a result of the pandemic. Relative to financial challenges for the prior 12 months, firms owned by people of color were more likely than White-owned firms to report financial challenges, including paying operating expenses, paying rent, making payments on debt, and credit availability. Black-owned business owners were most likely to have used personal funds in response to their firms' financial challenges. Nearly half of Black-owned firms reported concerns about personal credit scores or the loss of personal assets. By contrast, one in five White-owned firms reported no impact on the owners' personal finances. Asian-owned firms were approximately twice as likely as White-owned firms to report that their firms were in poor financial condition.

**iii. Emergency Funding**

The *Report* finds that PPP loans were the most common form of emergency assistance funding that firms sought during the period. Black-owned and Hispanic-owned firms were less likely to apply for a PPP loan. Only six in ten Black-owned firms actually applied. Firms owned by people of color were more likely than White-owned firms to report that they missed the deadline or were unaware of the program. Firms owned by people of color were less likely than White-owned firms to

use a bank as a financial services provider. Regardless of the sources at which they applied for PPP loans, firms that used banks were more likely to apply for PPP loans than firms that did not have a relationship with a bank. While firms across race and ethnicity were similarly likely to apply for PPP loans at large banks, White- and Asian-owned firms more often applied at small banks than did Black- and Hispanic-owned firms. Black-owned firms were nearly half as likely as White-owned firms to receive all of the PPP funding they sought and were approximately five times as likely to receive none of the funding they sought.

#### **iv. Debt and Financing**

Black-owned firms have smaller amounts of debt than other firms. About one in ten firms owned by people of color do not use financial services.

On average, Black-owned firms completed more financing applications than other applicant firms. Firms owned by people of color turned more often to large banks for financing. By contrast, White-owned firms turned more often to small banks. Black-owned applicant firms were half as likely as White-owned applicant firms to be fully approved for loans, lines of credit, and cash advances.

Firms owned by people of color were less satisfied than White-owned firms with the support from their primary financial services provider during the pandemic. Regardless of the owner's race or ethnicity, firms were less satisfied with online lenders than with banks and credit unions.

In the aggregate, 63% of all employer firms were non-applicants – they did not apply for non-emergency financing in the prior 12 months. Black-owned firms were more likely than other firms to apply for non-emergency funding in the 12 months prior to the survey. One-quarter of Black- and Hispanic-owned firms that applied for financing sought \$25,000 or less. In 2020, firms owned by people of color were more likely than White-owned firms to apply for financing to meet operating expenses. The majority of non-applicant firms owned by people of color needed funds but chose not to apply, compared to 44% of White-owned firms. Financing shortfalls were most common among Black-owned firms and least common among White-owned firms.

Firms of color, and particularly Asian-owned firms, were more likely than White-owned firms to have unmet funding needs. Just 13% of Black-owned firms received all of the non-emergency financing they sought in the 12 months prior to the survey, compared to 40% of White-owned firms. Black-owned firms with high credit scores were

half as likely as their White counterparts to receive all of the non-emergency funding they sought.

**v. Findings for Non-employer Firms**

Non-employer firms, those that have no paid employees other than the owner, represent the overwhelming majority of small businesses across the nation. In all, 96% of Black- and 91% of Hispanic-owned firms are non-employer firms, compared to 78% of White-owned and 75% of Asian-owned firms.<sup>223</sup>

Compared to other non-employer firms, Asian-owned firms reported the most significant impact on sales as a result of the pandemic. They were most likely to report that their firm was in poor financial condition at the time of the survey.

Compared to other non-employer firms that applied for financing, Black-owned firms were less likely to receive all of the financing they sought. Black-owned non-employer firms that applied for PPP loans were less likely than other firms to apply at banks and more often turned to online lenders. Among PPP applicants, White-owned non-employer firms were twice as likely as Black-owned firms to receive all of the PPP funding they sought.

**d. 2021 Small Business Credit Survey**

The 2021 SBCS<sup>224</sup> reached more than 15,000 small businesses, gathering insights about the COVID-19 pandemic's impact on small businesses, as well as business performance and credit conditions. The 2021 Survey yielded 9,693 responses from a nationwide convenience sample of small employer firms with between one and 499 full- or part-time employees across all 50 states and the District of Columbia. The 2021 Survey was fielded in September and October 2020, approximately six months after the onset of the pandemic. The timing of the 2021 Survey is important to the interpretation of the results. At the time of the 2021 survey, the PPP authorized by the Coronavirus Relief and Economic Security Act had recently closed applications, 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 2021 Survey findings highlight the magnitude of the pandemic's impact on small businesses and the challenges they anticipate as they navigate

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223. The Report notes that a future report will describe findings from the 2020 SBCS for non-employers in greater detail.

224. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report>.

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 declined sharply and those owned by people of color reported greater challenges. The most important anticipated financial 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% of Asian-owned firms, 77% of Black-owned firms, 66% of Hispanic-owned firms and 54% of White-owned firms reported this result.
- The share of firms that received all the financing sought to address the impacts of the pandemic varied by race: 40% of White-owned firms received all the funding sought, but only 31% of Asian-owned firms, 20% of Hispanic-owned firms and 13% of Black-owned firms achieved this outcome.

**e. 2018 Small Business Credit Survey**

The 2018 SBCS<sup>225</sup> focused on minority-owned firms. The analysis was divided into two types: employer firms and non-employer 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, five percent were Asian, ten percent were Black, six percent were Hispanic, and 79% 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.<sup>226</sup>

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225. Small Business Credit Survey, <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

226. *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.

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.<sup>227</sup> 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.<sup>228</sup>
- 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% of Black-owned firms reported that obtaining funds for expansion was a challenge, compared to 31% of White-owned firms.<sup>229</sup>
- Black-owned firms were more likely to report relying on personal funds of owner(s) when they experienced 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.<sup>230</sup>
- Black-owned firms reported more attempts to access credit than White-owned firms but sought lower amounts of financing. Forty percent of Black-owned firms did not apply because they were discouraged, compared to 14% of White-owned firms.<sup>231</sup>
- Low credit score and lack of collateral were the top reported reasons for denial of applications by Black- and Hispanic-owned firms.<sup>232</sup>

**ii. Non-employer firms<sup>233</sup>**

Queries were submitted to non-employer firms in the third and fourth quarters of 2018. Of the 4,365 firms in the unweighted sample, five percent were Asian, 24% were Black, seven percent were Hispanic, and 64% were White. Data were then weighted by age, industry, geographic location (census division and urban or rural location), and minority status.<sup>234</sup>

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227. *Id.* at 3.

228. *Id.* at 4.

229. *Id.* at 5.

230. *Id.* at 6.

231. *Id.* at 9.

232. *Id.* at 15.

233. *Id.* at 18.

234. *Id.* at 18.

Among the findings for non-employer firms relevant to discriminatory barriers were the following:

- Black-owned firms were more likely to operate at a loss than other firms.<sup>235</sup>
- Black-owned firms reported greater financial challenges, such as obtaining funds for expansion, accessing credit and paying operating expenses than other businesses.<sup>236</sup>
- Black- and Hispanic-owned firms submitted more credit applications than White-owned firms.<sup>237</sup>

**f. 2016 Small Business Credit Survey**

The 2016 Small Business Credit Survey<sup>238</sup> obtained 7,916 responses from employer firms with race/ethnicity information and 4,365 non-employer 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.<sup>239</sup> It also reported results from woman-owned small employer firms, defined as firms where 51% or more of the business is owned by women, and compared their experiences with male-owned small employer firms.

**i. The 2016 Small Business Credit Survey: Report on Minority-Owned Firms<sup>240</sup>**

The 2016 SBCS Report on Minority-Owned Firms provided results for White-, Black- or African American-, Hispanic-, and Asian- or Pacific Islander-owned firms.

***Demographics<sup>241</sup>***

The Report 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 in the healthcare and education industry sectors (24%). Asian-owned firms were concentrated in professional services and real estate (28%). Hispanic-owned firms were concentrated in non-manufacturing goods

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235. *Id.*

236. *Id.* at 19.

237. *Id.* at 20.

238. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

239. When the respondent sample size by race for a survey proved to be too small, results were communicated in terms of minority vis-à-vis non-minority firms.

240. <https://www.fedsmallbusiness.org/survey/2017/report-on-minority-owned-firms>.

241. 2016 SBCS, at 2.

production and associated services industry, including building trades and Goods (27%). White-owned firms were more evenly distributed across several industries but operated most commonly in the professional services industry and real estate industries (19%), and non-manufacturing goods production and associated services industry (18%).<sup>242</sup>

### ***Profitability Performance Index***<sup>243</sup>

After controlling for other firm characteristics, the Report 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-owned (57%) and Black-owned firms (42%). 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***<sup>244</sup>

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 Report 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 ten 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% of minority-owned firms received the entire amount sought compared to 68% of non-minority-owned firms, even among firms with comparably good credit scores.

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242. *Id.* Forty-two percent of Black-owned firms, 21% of Asian-owned firms, and 24% of Hispanic-owned firms were smaller than \$100K in revenue size compared with 17% of White-owned firms.

243. *Id.* at 3-4.

244. *Id.* at 8-9; 11-12; 13; 15.

Relative to financing approval, the Report 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.<sup>245</sup>

Low credit score and lack of collateral were the top reported reasons for denial of Black- and Hispanic-owned firms' applications. 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.

Forty percent of non-applicant Black-owned firms reported not applying for financing because they were discouraged (expected not to be approved), compared with 14% of White-owned firms. The use of personal funds was the most common action taken in response to financial challenges, with 86% of Black-owned firms, 77% of Asian-owned firms, 76% of White-owned firms, and 74% of Hispanic-owned firms using this as its source.

A greater share of Black-owned firms (36%) and of Hispanic-owned firms (33%) reported existing debt in the past 12 months of less than \$100,000, compared with 21% of White-owned firms and 14% of Asian-owned firms. Black-owned firms applied for credit at a higher rate and tended to submit more applications, compared with White-owned firms. Black-, Hispanic-, and Asian-owned firms applied for higher-cost products and were more likely to apply to online lenders compared to White-owned firms.

### ***Business Location Impact***<sup>246</sup>

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 experienced lower approval rates than minority-owned firms located in other zip codes.

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245. The share of minority-owned firms receiving at least some financing was lower across all financing products, compared with non-minority firms.

246. *Id.* at 17.

***Non-employer Firms***<sup>247</sup>

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 Small Business Credit Survey: Report on Woman-Owned Firms**<sup>248</sup>

The 2016 SBCS Report on Woman-Owned Firms provides results from woman-owned small employer firms where 51% or more of the business is owned by women. These data 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***<sup>249</sup>

The Report found that 20% of small employer firms were woman-owned, compared to 65% male-owned and 15% 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 services.<sup>250</sup>

***Profitability Challenges and Credit Risk Disparities***<sup>251</sup>

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

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247. *Id.* at 21.

248. <https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-WomenOwnedFirms-2016.pdf>.

249. 2016 SBCS, at 1-5.

250. 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; Goods; Wholesale Trade; Transportation and Warehousing (NAICS codes: 11, 21, 22, 23, 42, 48-49).

251. *Id.* at 6-7.

older than five years, credit risk was indistinguishable by the owner's gender.

#### ***Financial Challenges During the Prior Twelve Months***<sup>252</sup>

Woman-owned firms were more likely to report experiencing financial challenges in the prior twelve months: 64% compared to 58% 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.

#### ***Debt Differences***<sup>253</sup>

Sixty-eight percent of woman-owned firms had outstanding debt, similar to that of 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***<sup>254</sup>

Forty-three percent of woman-owned firms applied for financing. 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% compared to 78%).

#### ***Firms That Did Not Apply for Financing***<sup>255</sup>

Woman-owned firms reported being discouraged from applying for financing for fear of being turned down at a greater rate: 22% compared to 15% for male-owned firms. Woman-owned firms cited low credit 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.

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252. *Id.* at 8.  
253. *Id.* at 10.  
254. *Id.* at 16.  
255. *Id.* at 14.

### *Lender Satisfaction*<sup>256</sup>

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.

## **2. Small Business Administration Loans to African American Businesses (2020)**

As detailed in a 2021 article published in the *San Francisco Business Times*,<sup>257</sup> the number of loans to Black businesses through the SBA's 7(a) program<sup>258</sup> decreased 35% in 2020.<sup>259</sup> This was the largest drop in lending to any race or ethnic group tracked by the SBA. The 7(a) program is the SBA's primary program for financial assistance to small businesses. Terms and conditions, like the guaranty percentage and loan amount, vary by the type of loan. Lenders and borrowers can negotiate the interest rate, but it may not exceed the SBA maximum.<sup>260</sup>

Bankers, lobbyists, and other financial professionals attributed the 2020 decline to the impact of the PPP pandemic relief effort.<sup>261</sup> The PPP loan program provided the source of relief to underserved borrowers through a direct incentive for small businesses to keep their workers on payroll.<sup>262</sup> Approximately 5.2M PPP loans were made in 2020, as compared with roughly 43,000 loans made through the 7(a) program.

In a published statement to the *Portland Business Journal*, the American Bankers Association, an industry trade group, noted that the 2020 decline in SBA 7(a) loans to Black-owned businesses is not a one-year anomaly; it has been declining for years at a much faster rate than 7(a) loans to other borrowers. The 2020 data<sup>263</sup> reveal that the number of SBA loans made annually to Black

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256. *Id.* at 26.

257. SBA Loans to African American Businesses Decrease 35%, *San Francisco Business Times* (August 11, 2021) at: <https://www.bizjournals.com/sanfrancisco/news/2021/08/11/sba-loans-to-african-american-businesses-decrease.html>. Data were obtained through a Freedom of Information Act request.

258. Section 7(a) of the Small Business Act of 1953 (P.L. 83-163, as amended).

259. The total number of 7(a) loans declined 24%.

260. The SBA caps the maximum spread lenders can charge based on the size and maturity of the loan. Rates range from prime plus 4.5% to prime plus 6.5%, depending on how much is borrowed.

261. The Coronavirus Act, Relief, and Economic Security Act ("CARES Act"), required the SBA to issue guidance to PPP lenders to prioritize loans to small businesses owned by socially and economically disadvantaged individuals including Black-owned businesses. See 116-136, §1, March 27, 2020, 134 Stat. 281.

262. PPP loans were used to help fund payroll costs, including benefits, and to pay for mortgage interest, rent, utilities, workers protection costs related to COVID-19, uninsured property damage costs caused by looting or vandalism during 2020 as well as certain supplier costs and operational expenses.

businesses has declined 90% since a 2007 peak, more than any other group tracked by the SBA. In that interval, the overall number of loans decreased by 65%.

The nation's four largest banks (JP Morgan Chase, Bank of America, Citigroup, and Wells Fargo), which hold roughly 35% of national deposits, made 41% fewer SBA 7(a) loans to Blacks in 2020.<sup>264</sup>

PPP loans served as a lifeline during the pandemic for millions of businesses. However, industry experts maintained that PPP loans detracted from more conventional SBA lending efforts that year. Wells Fargo provided more than 282,000 PPP loans to small businesses nationwide in 2020, with an average loan size of \$50,000. Wells Fargo, the most active lender for Black businesses nationwide in 2020, saw its SBA loans to Blacks drop from 263 in 2019 to 162 in 2020. Bank of America, Chase, and Citigroup also reported fewer SBA loans to African American businesses in 2020.

While PPPs have been heralded for providing needed monies to distressed small and mid-size businesses, data reveals disparities in how loans were distributed.<sup>265</sup> An analysis in 2020 by the *Portland Business Journal*, found that of all 5.2M PPP loans, businesses in neighborhoods of color received fewer loans and delayed access to the program during the early critical days of the pandemic.<sup>266</sup> More recent analysis released by the Associated Press indicates that access for borrowers of color improved exponentially during the later rounds of PPP funding, following steps designed to make the program more accessible to underserved borrowers.

### 3. 2010 Minority Business Development Agency Report<sup>267</sup>

The 2010 Minority Business Development Agency 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 addi-

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263. The SBA denied the original request for information; however, the publication prevailed on appeal.

264. Data obtained by the *Business Journal* does not include information from lenders who made less than ten loans in 2020.

265. While PPP loans are administered by the SBA, they are disbursed primarily through banks.

266. Many industry experts have observed that businesses that already had strong relationships with lenders were the most successful in accessing PPP loans. The nation's long history of systemic racism in banking fostered disparities in PPP loan distribution. See Alicia Plerhoples, *Correcting Past Mistakes: PPP Loans and Black-Owned Small Businesses*, at <https://www.acslaw.org/expertforum/correcting-past-mistakes-ppp-loans-and-black-owned-small-businesses/>.

267. Robert W. Fairlie and Alicia Robb, *Disparities in Capital Access Between Minority and non-Minority Owned 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>).

tional 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.<sup>268</sup>

It also found, "the largest single factor explaining racial disparities in business creation rates are differences in asset levels."<sup>269</sup>

Some additional key findings of the Report include:

- Denial of Loan Applications. Forty-two percent of loan applications from minority firms were denied compared to 16% of loan applications from non-minority-owned firms.<sup>270</sup>
- Receiving Loans. Forty-one percent of all minority-owned firms received loans compared to 52% of all non-minority-owned firms. MBEs are less likely to receive loans than non-minority-owned firms regardless of firm size.<sup>271</sup>
- 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%. On average, non-minority-owned firms paid 6.4% in interest.<sup>272</sup>
- Equity Investment. The equity investments received by minority-owned firms were 43% 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% of the average of new equity investments in non-minority-owned firms. The differences were even larger for loans received by high sales firms.<sup>273</sup>

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268. *Id.* at 17.

269. *Id.* at 22.

270. *Id.* at 5.

271. *Id.*

272. *Id.*

273. *Id.*

#### 4. Federal Reserve Board Surveys 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 years 1993, 1998 and 2003.<sup>274</sup> 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.<sup>275</sup>

#### 5. 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.<sup>276</sup>
- According to the analysis of the data from the Kauffman Firm Survey, minority-owned firms' investments into their own firms were about 18% 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 own firms were about 36% lower compared to those of non-minority-owned firms.<sup>277</sup>
- 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.<sup>278</sup>

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274. <https://www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm>. These Surveys have been discontinued. They are referenced to provide some historical context.

275. 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).

276. See Bates, T., "Venture Capital Investment in Minority Business," *Journal of Money Credit and Banking* 40, 2-3 (2008).

277. Fairlie, R.W. and Robb, A, *Race and Entrepreneurial Success: Black-, Asian- and White-Owned Businesses in the United States*, (Cambridge: MIT Press, 2008).

278. *Id.*

## 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. A 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.<sup>279</sup> Black men have been found to face a “triple disadvantage” in that 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.<sup>280</sup>

Intergenerational links are also critical to the success of the businesses that do form.<sup>281</sup> Working in a family business leads to more successful firms by new owners. One study found that only 12.6% of Black business owners had prior work experiences in a family business as compared to 23.3% of White business owners.<sup>282</sup> 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.<sup>283</sup> The U.S. Department of Commerce has reported that the ability to form strategic alliances with other firms is important for success.<sup>284</sup> 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 firms owned by minorities and women to

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279. 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.

280. Hout, M. and Rosen, H. S., “Self-employment, Family Background, and Race,” *Journal of Human Resources*, Vol. 35, No. 4, 2000, pp. 670-692.

281. 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.

282. *Id.*

283. 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.

284. “Increasing MBE Competitiveness through Strategic Alliances” (Minority Business Development Agency, 2008).

have full and fair access to state contracts and associated subcontracts. This evidence supports the conclusion that absent the use of narrowly tailored contract goals, these inequities will create disparate impacts on minorities and women.

## VI. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN THE STATE OF ILLINOIS' MARKET

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities. This evidence is relevant to the question of whether Minority- and Woman-owned Business Enterprises (“M/WBEs”) continue to face discriminatory barriers to their full and fair participation in state of Illinois opportunities despite the successful operations of the state of Illinois’ Business Enterprise Program (“BEP” or “Program”) for M/WBEs, now overseen by the Commission on Equity & Inclusion.<sup>285</sup> 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 and achieve the objectives of the Program. As discussed in Chapter II, this type of anecdotal data has been held by the courts to be relevant and probative of whether an agency continues to have a need to use narrowly tailored M/WBE contract goals to remedy the effects of past and current discrimination and to 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.”<sup>286</sup> 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.<sup>287</sup> 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.”<sup>288</sup> “[W]e do not set out a categorical

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285. This report was originally procured when the BEP program was administered by the Department of Central Management Services (“CMS”). In 2022, the state legislature amended the BEP Act to move the administration of the program from CMS to the newly created Commission on Equity and Inclusion.

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

287. *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).

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.”<sup>289</sup>

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 Fourth Circuit 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.”<sup>290</sup> 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.”<sup>291</sup>

To explore this type of anecdotal evidence of possible discrimination against minorities and women in the state’s geographic and industry markets and the effectiveness of its current race-conscious and race-neutral measures, we conducted six small group business owner and stakeholder interviews, totaling 122 participants. We also received written comments. We met with a broad cross section of business owners from the state’s geographic and industry markets. Firms ranged in size from large, long established prime contracting and consulting firms to new market entrants. We sought to explore their experiences in seeking and performing prime contracts and subcontracts for the state, other government agencies, and in the private sector. We also elicited recommendations for improvements to the program.

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

In addition to the group interviews, we conducted an electronic survey of firms in the state’s market area about their experiences in obtaining work, marketplace conditions and the Program. Four hundred sixty-**SIX** recipients responded to the survey. The responses were similar to those in the interviews. Among minority- and woman-owned firms, 31.6% reported that they still experience barriers to equal contracting

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

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

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

291. *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).

opportunities; 24.4% said their competency was questioned because of their race or gender; and 17.8% indicated that they had experienced job-related sexual or racial harassment or stereotyping.

## A. Business Owner Interviews

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 by numerous participants.

We have also appended a summary of the anecdotal results of the numerous disparity studies we have conducted in Illinois. These studies are directly relevant and probative of the barriers to success that minority and woman entrepreneurs continue to face in the goods and services industries in the Illinois market.<sup>292</sup>

### 1. Discriminatory Attitudes

Many minority and female owners reported that they face negative assumptions and biases about their competency.

We get a label that's put on us because we're the BEP supplier. And going in the room immediately, it's as if I don't know what I'm doing after 43 years of doing it. And the primes just, they feel like "I have to do business with you".

One of the things I do not lead with when I'm talking to a prime contractor is that I'm a WBE. I don't even mention that until after I've talked to them about what my capabilities are.... Because that to me is, "And by the way, I have this certification and it may help you with your contracting goals." But as far as who the company is, we are not a woman-owned company, we are an engineering analytical consulting firm. And that's what we are. We have a certificate to be a woman-owned business that says who we are, but that is not what we are. And so, I think that is an important distinction that all of us should make when we approach our customers so that they know that we are capable individuals of doing the work. And that is probably one of the most important things that they need to know too, because they have to have some subs, but talking with the primes myself, and sometimes I don't disclose that WBE status until I have a very firm relationship with them to find out that

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292. Appendix E: Qualitative Evidence from Illinois Disparity Studies.

they have those kind of in their minds. And it's very discouraging. Very, very discouraging.

As a minority-owned business, even going into presentations, there's more fascination with, well, how did you even get to where you are as opposed to what's your capability? Learning more about your capabilities as a business owner. And it's very frustrating to have to go through this.

Another big challenge when you're an MBE is you have to work so hard to get in the room. And I think lot of times, even if you go on websites or you meet people at trade fairs, once it's determined that you're an MBE, they immediately direct you, "You need to go register on this portal" or "you need to go register on that portal." And a lot of times, you're at the mercy of a particular buyer, or you're at the mercy of someone hoping that they care to find a minority that can even bid for the business. So, a lot of times we don't have the advocacy that we need just to get in the room.

There're more questions asked of me. What school did you graduate from? What is your pedigree type questions.

We also don't try to advertise ourselves as an M or minority.

These programs, CMS, the disparity studies, all of stuff, I was under the impression was supposed to level the playing field, but it seems that there's always a way to get around it, and there is no playing field. We're just pretty much fighting hand-to-hand combat every day to get through this thing and try to grow our businesses.

They claim to want to level the playing field. I don't even feel some days that I'm in the stadium.

I try not to be the person to say, "Well, they're doing this, because I'm a man of color." I think that the state or whoever is involved in these contracts for the CMS or BEP, I think there should be a responsibility on someone to say, "Hey are you guys being represented or how's things going?" Just a little phone call every once in a while. A lot of times we get left out.

There's a huge disparity when it comes to minorities and women business owners. Being the only African American union [firm type] company in the state, I mean, I experience it on a daily basis. I'm so busy fighting all over the place, like an

octopus with tentacles. Well, I'm all over the place, I can't really stay focused on the task at hand. It's rough.

Sexism still is a barrier to the success of many woman owners.

The [architecture and engineering], it's male dominated. The last couple of years, I've seen more women in the industry at conferences, workshops, working, seeing their names on the list of people with projects, that we're making a dent, but not a very big dent.

Some owners resorted to making a White male the external face of the company.

I have done what other minority firms have done. I've hired White males to represent me on Salesforce. And that compromises me as an owner who wants to hire other minorities.

## **2. Obtaining prime contracts and associated subcontracts**

Having equal access to information about contracting opportunities and professional networks was mentioned by several entrepreneurs as barriers to fair chances to obtain state work.

When you're smaller, getting a heads up from the agency that, "Hey, we're going to be putting a solicitation on the street in a couple of weeks." All they have to say is, "I'm putting out a blanket contract for civil engineering." Right? And if you're interested, then you know the people to talk to and say, "Hey, I got this information that something's going to come out. Do you know, can I be part of your team?" And that way you have a reason to call your prime too. But the primes really do set their teams sometimes a year or two ahead of time.... The procurement people at all of these agencies are limited in what they can do. You're better off going to the DBE office or that route for them to channel you to the right people to talk to or introduce you to places versus procurement. Because then that could be perceived as a conflict and they're going to be less open with you.

The majority companies, a lot of times have heck they got frat brothers and family members who ran businesses or handed things down. But a lot of times, we don't have that. So, the biggest challenge I find is just to build a relationship or find an

advocate just to speak up on your behalf internally in meetings that you might not be invited to.

Contract goals were reported to be critical to M/WBEs' ability to get work.

If there isn't a goal, they're not going to call any of us.... If they don't need me, they're not calling. And they need me if they need to show the rainbow coalition on a team or they need a woman, otherwise they're not calling me.

You go through the motion of then looking on a job, almost like you're doing them a favor last minute, and you put together a proposal only for them to come back to you and say, "Well, I've only got this amount. Can you do it?"... You get the feeling with an experience like that, that it's a one and done. They'll go back to whoever they previously had been inviting or getting numbers from.

## **B. Anecdotal Survey of Illinois Firms**

To supplement the in-person interviews, we also conducted an anecdotal, electronic survey of firms on our Master M/WBE Directory; prime firms on the contract data file; and firms identified through our outreach efforts. We further solicited written comments. The survey was comprised of up to 45 closed- and open-ended questions and replicated the topics discussed in the business owner interviews. Questions focused on doing business in the Illinois market area, specifically barriers and negative perceptions, access to networks, information and experiences in obtaining work, and capacity development, as well as the BEP program.

The survey was emailed to 5,058 firm representatives and owners, six times from October 25, 2021, to November 29, 2021. The response period closed on December 27, 2021.

Four-hundred sixty-six gross responses were received. After accounting for incomplete and non-relevant responses, usable responses equaled 350 for a net response rate of 6.9%.<sup>293</sup>

### **1. Respondents' Profiles**

Table 6-1 presents the race and gender distribution of survey respondents.

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293. Percentage results have been rounded to one decimal place to increase readability.

**Table 6-1: Distribution of Industry and Race and Gender of Survey Respondents**

Firm Ownership	Commodities <sup>a</sup>	General Services <sup>b</sup>	Construction or supplier of construction materials for construction contracts	Construction-related Professional Services <sup>c</sup>	Total
African American	12	70	10	22	115
Hispanic	5	20	17	9	51
Asian Pacific/ Subcontinent Asian American	3	16	2	4	25
Native American/ Alaska Native	0	0	0	0	0
Non-Minority Women	22	63	35	21	141
<b>M/WBE Total</b>	<b>42</b>	<b>170</b>	<b>64</b>	<b>56</b>	<b>332</b>
Publicly Held, Non- M/WBE Total	8	5	5	0	18
<b>Respondents Total</b>	<b>50</b>	<b>175</b>	<b>69</b>	<b>56</b>	<b>350</b>

*a. Janitorial and maintenance supplies laboratory equipment, office, telecommunications and computer equipment, road maintenance and landscaping supplies*

*b. Accounting, IT, telecommunications, financial, advertising, marketing, legal, insurance, printing and freight services*

*c. Engineering, architecture, surveying, inspection*

Chart 6-1: General services firms accounted for 51.2%, construction or supplier of construction materials firms accounted for 22.9%, construction-related professional services firms accounted for 13.3% and commodities firms accounted for 12.7% of minority and woman survey responses.

**Chart 6-1: Respondent Type of Work**

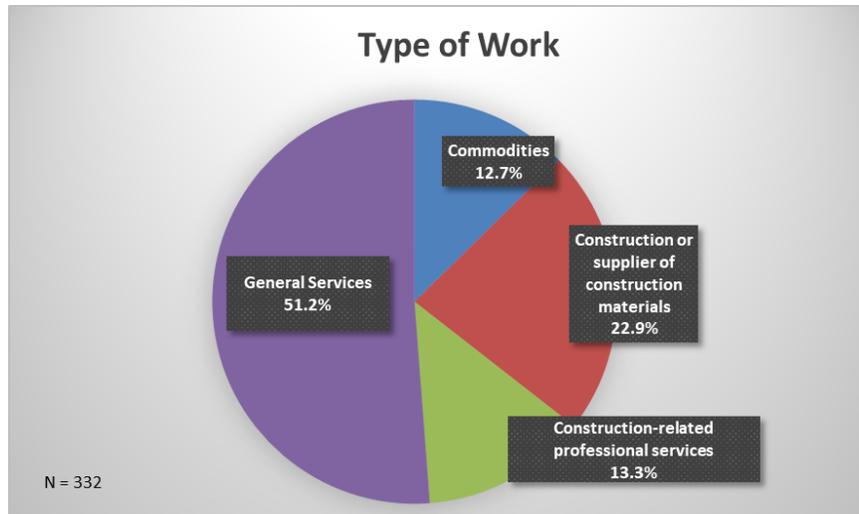
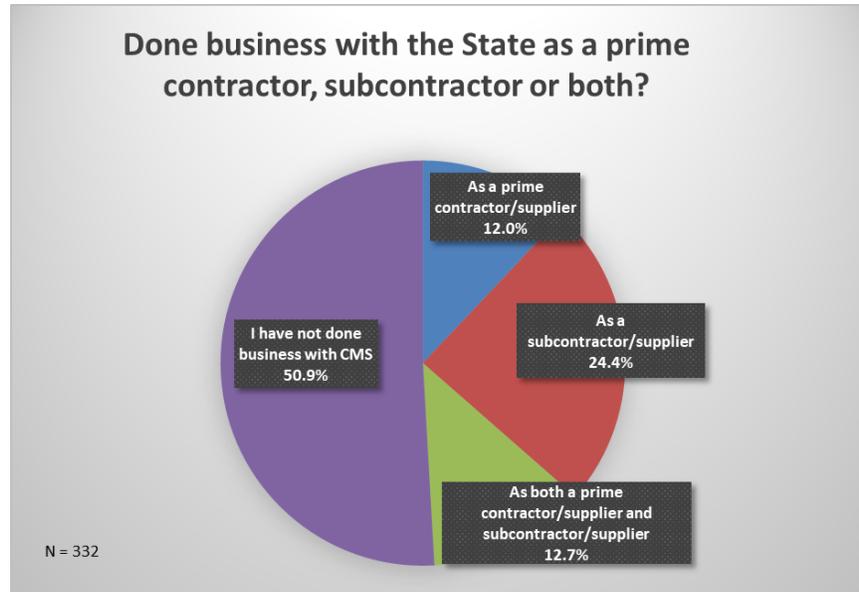


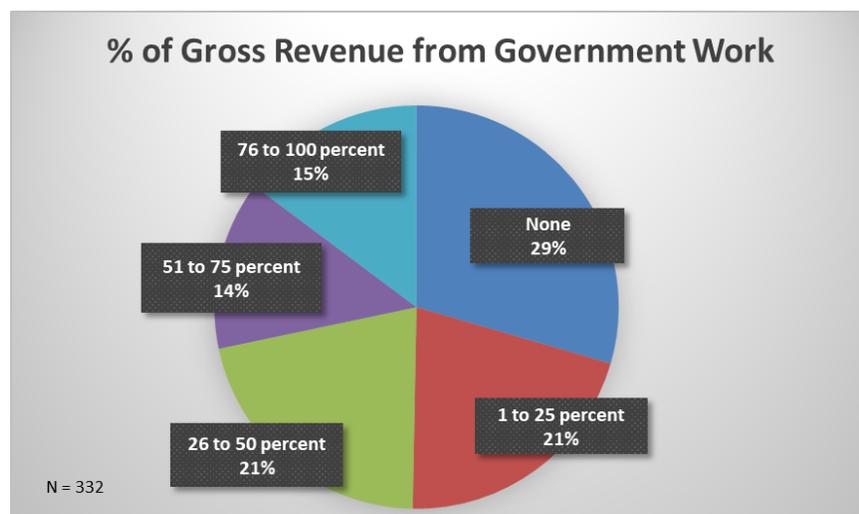
Chart 6-2: Among M/WBEs, 12.0% of the firms had worked on state projects only as a prime contractor or consultant; 24.4% had worked only as a subcontractor; 12.7% had worked as both a prime contractor or consultant and as a subcontractor or subconsultant; and 50.9% had not done business with the state. Ninety percent of the firms were certified under the Program, Cook County or the City of Chicago as a BEP, MBE, WBE or Disadvantaged Business Enterprise. Over 75% (75.6%) were certified with other government agencies, such as the Illinois Department of Transportation, METRA or the Small Business Administration.

**Chart 6-2: Respondent Contractor Status with the State of Illinois**



*Chart 6-3:* Seventy-one percent of the respondents reported that some of their revenue was derived from government work. Twenty-one percent of the firms reported that up to 25% was from government contracts; 21% reported between 26% and 50%; 14% reported between 51% and 75%; and 15% reported between 76% and 100%. Government work did not contribute to the gross revenue of 29% of the firms.

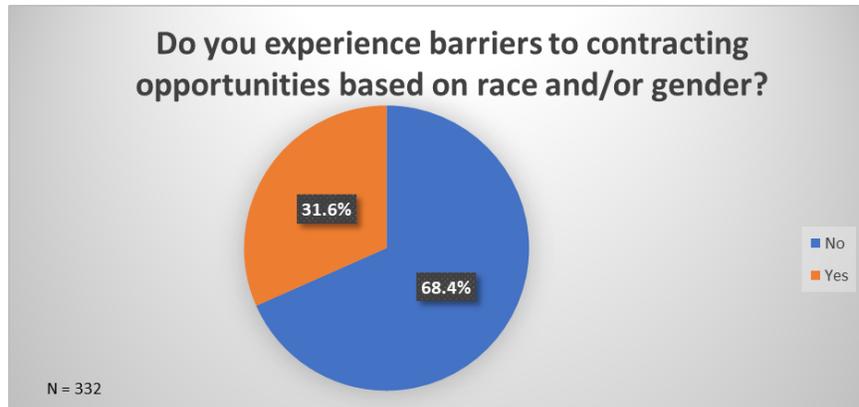
**Chart 6-3: Respondent Contractor Revenue from Government Work**



## 2. Discriminatory Barriers and Perceptions

*Chart 6-4:* A little over 30% (31.6%) of the respondents reported that they had experienced barriers to contracting opportunities based on their race and/or gender.

**Chart 6-4: Barriers to Contracting Opportunities Based on Race and Gender**



*Chart 6-5:* Almost a quarter (24.4%) answered “Yes” to the question, “Is your competency questioned based on your race and/or gender?”.

**Chart 6-5: Negative Perception of Competency Based on Race or Gender**

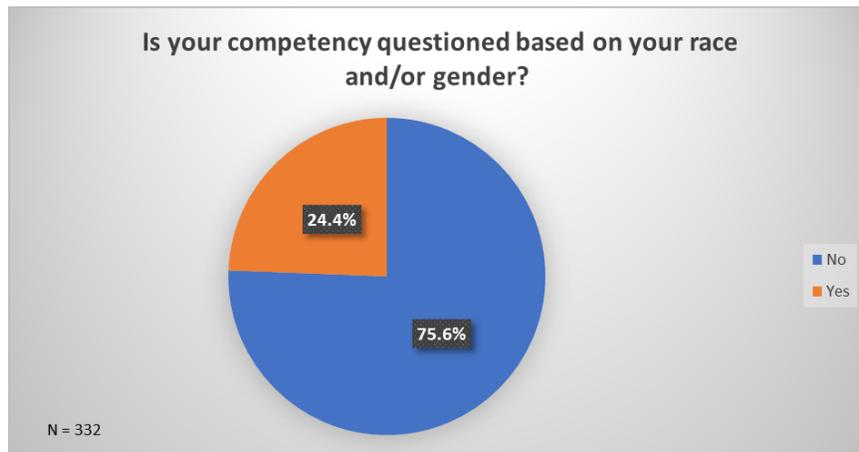


Chart 6-6: Almost one fifth (17.8%) indicated that they had experience job-related sexual or racial harassment or stereotyping.

**Chart 6-6: Industry-Related Sexual or Racial Harassment or Stereotyping**

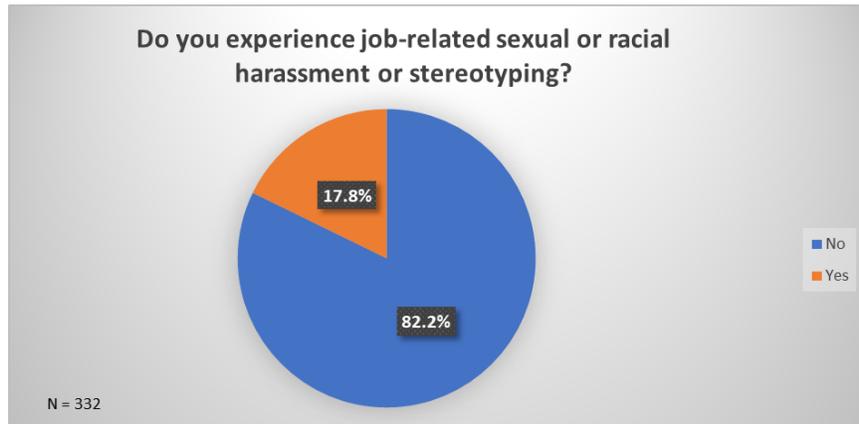
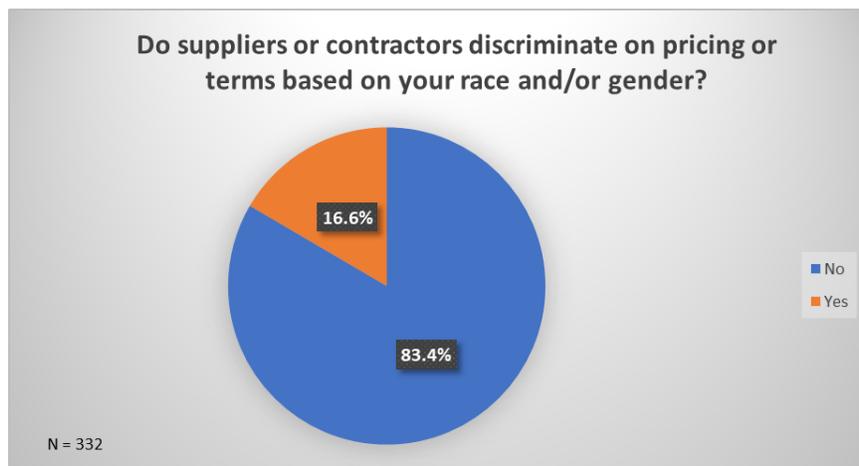


Chart 6-7: Nearly one fifth (16.6%) of respondents said they experienced discrimination from suppliers or subcontractors because of their race and/or gender.

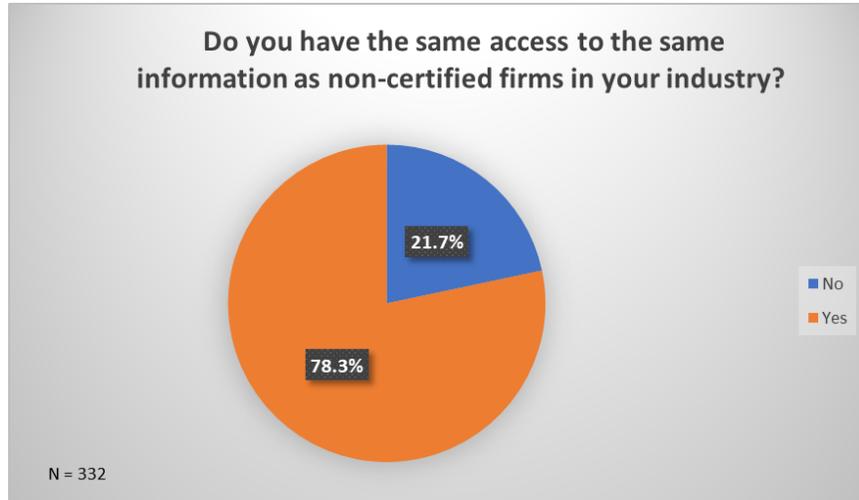
**Chart 6-7: Supplier Pricing and Terms Discrimination Based on Race and Gender**



### 3. Access to Formal/Informal Business and Professional Networks

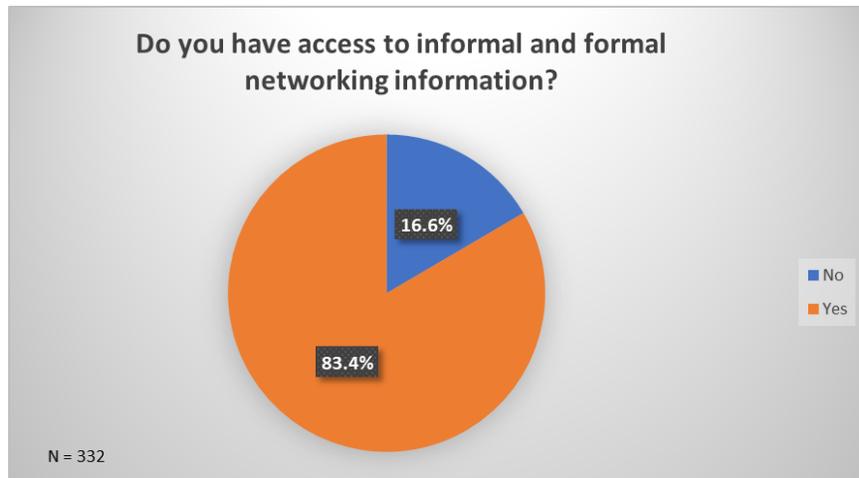
*Chart 6-8:* Over a fifth (21.7%) of M/WBE respondents reported that they did not have equal access to the same information as non-certified firms in their industry.

**Chart 6-8: Access to the Same Information as non-Certified Firms**



*Chart 6-9:* Almost 17% (16.6%) of M/WBE respondents indicated that they do not have access to informal and formal networking information.

**Chart 6-9: Access to Informal and Formal Networking Information**



#### 4. Access to Financial Supports

Chart 6-10: Among M/WBEs, 5.7% reported challenges in their efforts to obtain bonding. In comparison, none of the non-M/WBEs reported difficulty with obtaining bonding.

Chart 6-10: Barriers to Obtaining Bonding

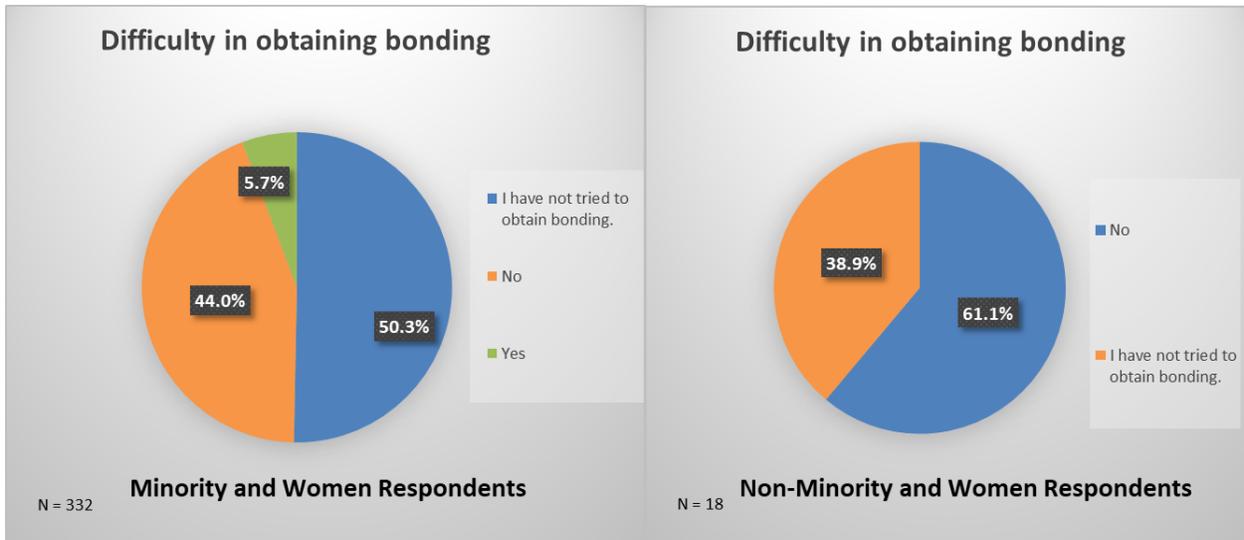


Chart 6-11: Almost a quarter (23.2%) of M/WBEs reported experiencing barriers in their efforts to obtain financing and loans. In comparison, none of the non-minority firms reported such difficulties.

Chart 6-11: Barriers to Obtaining Financing and Loans

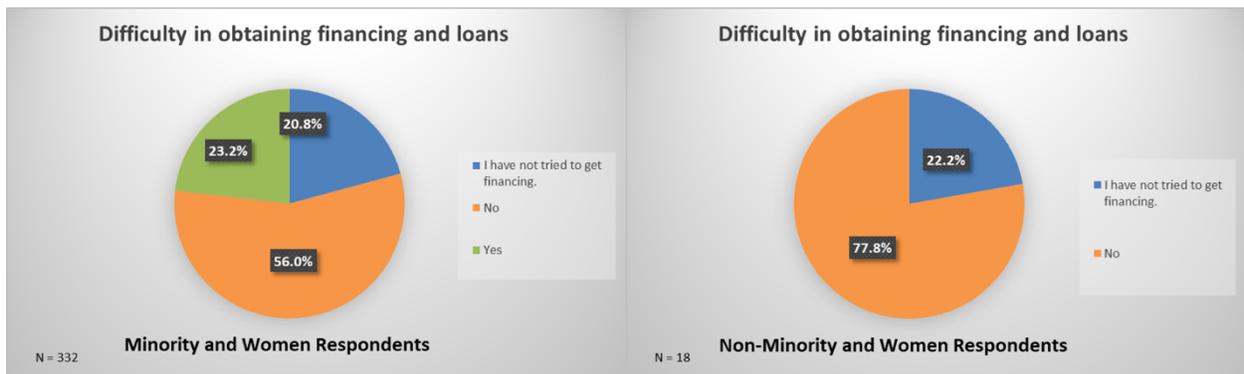
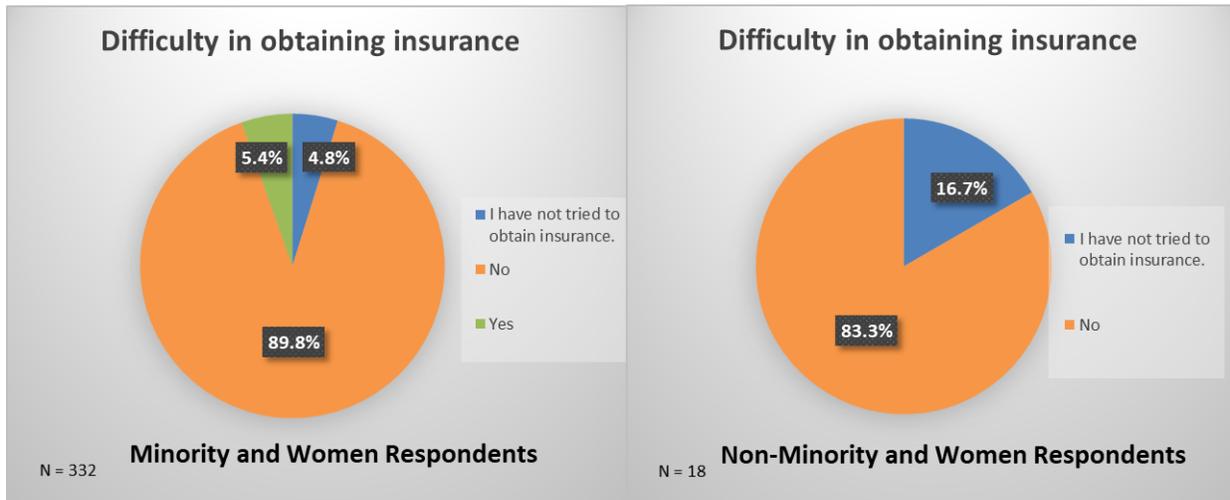


Chart 6-12: Among M/WBEs, 5.4% reported experiencing barriers to obtaining insurance. Non-minority firms did not report any difficulties.

Chart 6-12: Barriers to Obtaining Insurance



## 5. Obtaining Work on an Equal Basis

Chart 6-13: Almost two-thirds (62.7%) of M/WBEs reported that they are solicited for state or other government projects with M/WBE goals.

Chart 6-13: Solicitation for State of Illinois or Government Projects with Race- and Gender-Conscious Goals

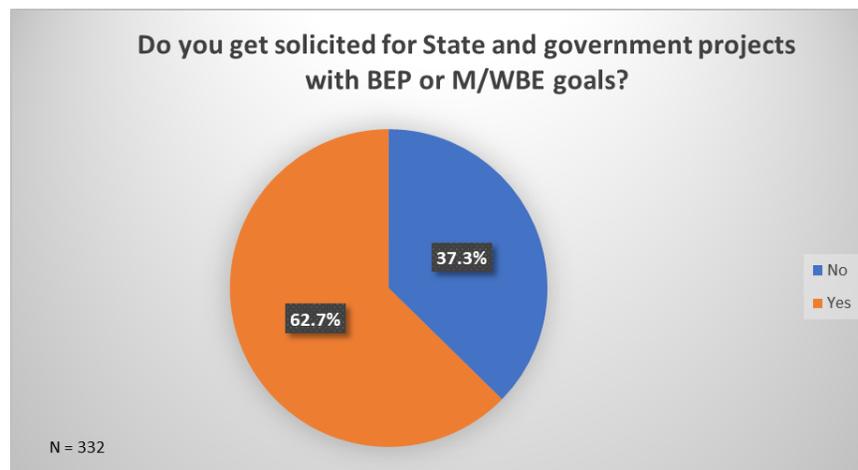


Chart 6-14: Over 50% (53.9%) reported that they are not solicited for private projects or projects without goals.

**Chart 6-14: Solicitation for Private Projects or Projects Without Goals**



## 6. Capacity for Growth

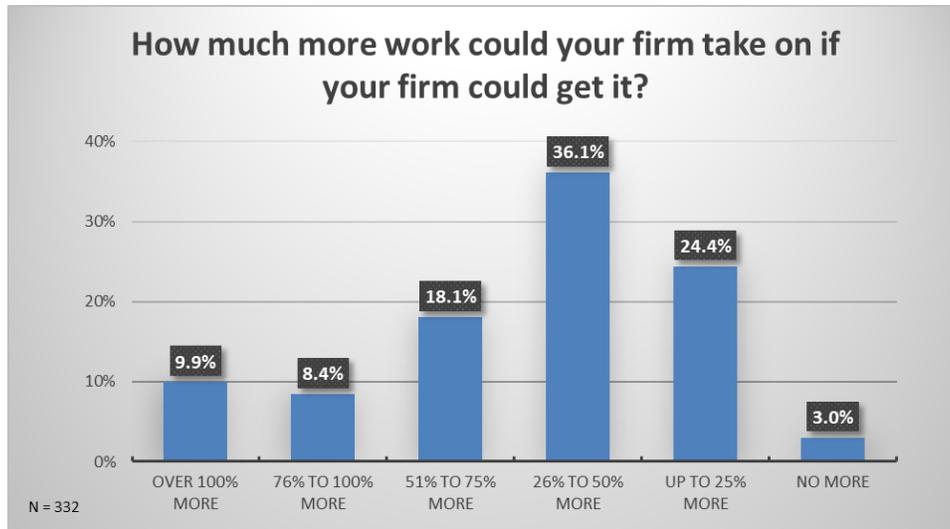
Chart 6-15: A majority of M/WBEs (55.5%) reported that their firm’s contract size was either well or slightly below the amount they are qualified to perform.

**Chart 6-15: Firm Contract Size vs. Contract Amounts Qualified to Perform**



Chart 6-16: Three fifths (60.5%) of minority and female respondents reported that they could take on up to 50% more work if it were offered. Over a quarter (26.5%) could take on 50% to 100% more work, and 9.9% reported they could more than double the amount of their work.

**Chart 6-16: Capacity for More Work**



## 7. Prompt Payment

Chart 6-17: Of the contractors who reported doing work for the state, only 52.4% said that the state paid them promptly. Prime contractors were reported to pay only slightly more quickly. Of the contractors doing subcontracting work, 55.8% of BEP respondents reported that prime contractors paid promptly within 30 days.

**Chart 6-17: Prompt Payment within 30 Days**

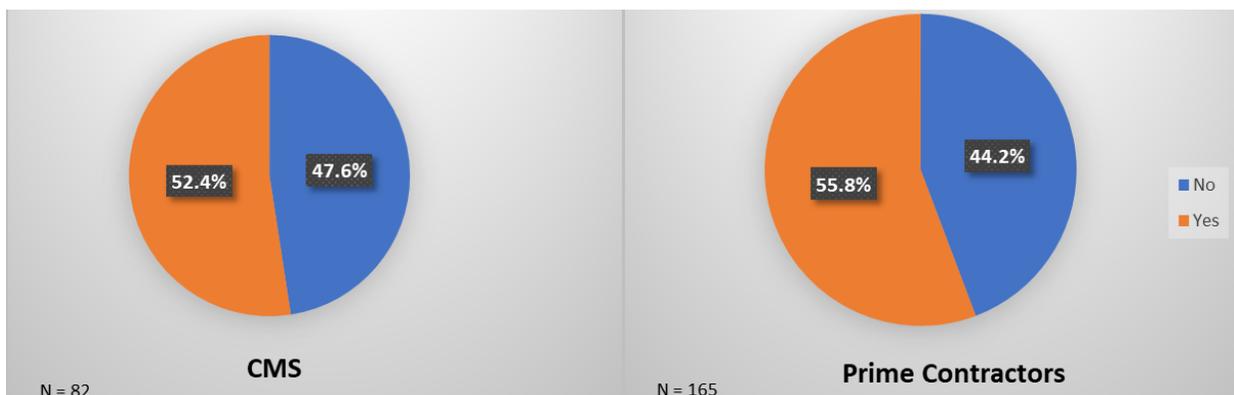
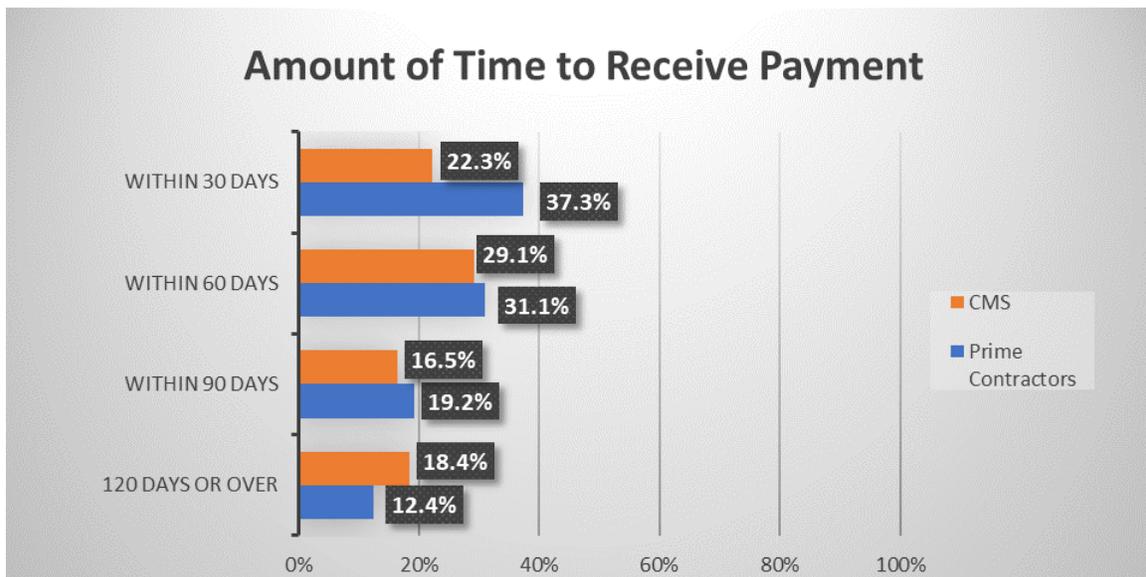


Chart 6-18: Of contractors performing work for the state, 51.4% reported receiving payment within 60 days; 16.5% were paid within 90 days; and 18.4% were paid in 120 days or later. Prime vendors were reported to pay on a slightly quicker schedule. A little more than two-thirds (68.4%) said prime vendors paid within 60 days; 19.2% reported they were paid within 90 days; and 12.4% reported they were paid within 120 days or later.

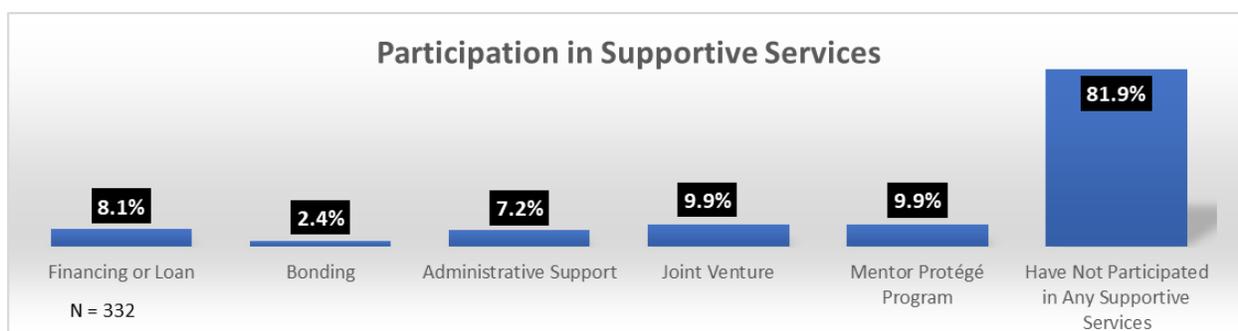
**Chart 6-18: Amount of Time to Receive Payment**



## 8. Capacity Development and Participation Incentives

*Chart 6-19:* Less than 20% (18.1%) of M/WBE respondents reported they had participated in any of the programs. Over eight percent (8.1%) had participated in financing or loan programs and a little over two percent (2.4%) had accessed bonding support programs. Slightly under 8% (7.2%) had received support services such as assistance with marketing, estimating, information technology. Just under 10% (9.9%) had joint ventured with another firm and 9.9% had participated in a mentor-protégé program.

**Chart 6-19: Participation in Supportive Services**



## C. Written Survey Responses

The survey also included open-ended response questions. These responses were consistent with information provided in the business owner interviews and closed-ended questions. Responses to these questions have been categorized and are presented below.

### 1. Systemic racial exclusion

Many minorities reported that fair opportunities to compete for contracts were not available because of systemic racial barriers.

Being a minority company even with experience I am turned down twice as much even with the same level of experience as non-minority contractors.

As a small Hispanic company, I often am not considered for services.

I hired a white male Intern to work for me this year, and while supervising his work, I noticed the ease at which he would get information from companies (particularly other white men at

the end of his call, that I would dare not receive, but have been told we can't give out that information).

As lobbyist, [I see] many African Americans get only short-term assignments rather than yearly contracts that most white lobbyist are offered.

[Discrimination is] deep seeded [sic] and systemic.

The entire process is systemically racist and biased. Only insider "minority" firms get the opportunities to participate in getting some "real" money!

Being looked at as another Puerto Rican.

You are overlooked until something becomes a "black" problem and the white establishment wants/needs your help to overcome it.

## **2. Negative perceptions of competency and professionalism**

Many minority respondents reported their credentials and competency are routinely questioned.

A higher standard is held for MBEs to prove themselves, and relationships are approached with skepticism and resentment. Often locked out by scale and piggybacks.

Many majority companies lack the understanding the minority company can do and complete the job.

There is never a time when it's [competency is] not questioned. It's part of minority business biases and disparity.

[We are] never [considered] good enough.

[As an African American male, I am asked] how did you get this job, where did you come from?

I [an African American male and] have been questioned about who actually puts together the bids that my company submits. I guess the assumption was that I was not capable of doing this myself.

MBEs are viewed as sub-par.

[As an African American woman, I am viewed as] not being skilled or qualified.

Our experience with stereotyping consists of doubts related to our firm's competency and requirements of the scope of services. The value and worth of our services are questioned.

Recently a prime contractor questioned my ability and authority managing my workforce.

The stigma that minority contractors are automatically going to deliver a lesser product.

I feel [doubts about my competency] is based on both race and gender.

Although I have had worked with a company for over 25 years, some would question my design work without merit.

Assumptions are made that we don't own our own provider network and that we don't have the necessary capabilities to handle business. We frequently deal with this when dealing with benefits consultants and brokers.

Because we are an MBE/DBE people expect for us to provide bad service or to not be as good as the "white" owned businesses.

[As an African American firm] it's the norm... we are always asked to do more and prove our skillset more than our counterparts in the same industry.

[We are a Hispanic/Latino-owned firm.] We are not accepted as subject matter experts. Others called to verify information.

Often time not being viewed as capable of doing the work.

Some companies assume that based on our race/gender that we are not as knowledgeable.

I know I am usually required to compete at a higher level of competency.

It takes numerous proposal submissions (about 10-15) from our firm [which is Hispanic-owned] to be considered an eligible and competent vendor.

Yes, [as an African American firm] we are asked to prove ourselves, especially if our business models are not brick and mortar oriented. Value creation is not brick and mortar only, as most distributors know.

Anytime I work for IDOT it is always questioned.

[We are an African American firm.] At first sight [our competency is questioned], but if they give us a chance to interact those fears quickly fade and we are able to build trust and provide solid solutions to their inquiries.

People have been positively surprised at my competence.

A person with disabilities had also experienced negative assumptions about his capabilities.

People do not believe that I am running my own business based off the bias of my disability. I am considered not qualified all the way, hold my certifications and licenses of my own.

### **3. Discriminatory attitudes and behaviors**

Many minority and woman respondents reported instances of implicit bias that affect their ability to obtain work.

A black person is not what is typically expected when we walk into an office to discuss a potential IT project. I have had situations where the person was honest and said that they would not have thought that I was a black person from talking on the phone with them. Had another situation where the person said they had an urgent need for our services over the phone and invited me to come to their office, when I got there the following day, they basically escorted me back out the door and said they no longer had a need!

Being a woman, an African American, the odds are against me.

Stereotyping yes.... [I am an African American business owner and] it is usually not assumed that I am the owner.

The persons making the final decision on these contracts, prefer someone that looks like them. It is difficult to navigate to get over this issue.

[I am an African American woman and have been subjected to] the usual discriminatory practices.

As stated above many people assume you can only represent African Americans or represent African American interest.

Small, African American, Woman Owned company is not appealing to many although we have been in business over 40 years.

[We are an African American firm and] many primes do not wish to work with us. Many manufacturers choose not to work with us. Many procurement officers and contract officer representatives give us a harder time.

Stereotyping. We have experienced certain customers or people onsite who deny shaking hands with the crew because of their race, or also assumptions that the owner does not understand or can come to agreements because his English is not "perfect".

It's as if once its known that you are certified, certain info is held back or diluted.

When operating as a sub for white vendors: 1) work expectations excessive, 2) shifting cost post contract award, 3) canceling minority contracts after contract awarded.

We have been on job sites where the race of our employees became a factor in how they were spoken to and treated.

Everyone has some type of subconscious bias. It's how our brains are wired. There's no such thing as "color blind" unless you've medically been diagnosed as such. I have often had people make remarks (that they intend as compliments) like, "wow, you speak very well" or "It's so good to do business with a firm that's responsive and does good work. I can't tell you the number of times we reach out to firms on the M/WBE list and they don't return calls or perform well". Those types of statements reflect underlying bias. They are "surprised" at my responsiveness and the quality of my firm's work, based on preconceived notions of how "most" MBEs they've encountered in the past have done business. I don't see this as necessarily unique to me as a minority woman business owner. I see it as, it's just how humans respond to other humans that are different than them in some way. And it's how we tend to "group" categories of people based on past experience. It is technically stereotyping. But I've never felt "harassed".

Subtle discriminatory attitudes and behavior were common.

While the barriers aren't outwardly blatant, they are presented using innocuous terms like "scalability and capacity". These are

safe words that are used to hide behind when what should be known is that minority owned businesses have to overcome inherent perceptions, and preconceived notions about inability to handle large national or regional projects.

These questions are difficult, because if they occur no company is being blatant about gender or race being an issue.

It is possible but we are not told directly that we are excluded based on being woman owned.

I would say yes [to my competency being questioned], but no proof of it.

It's typically not expected for a person of color to own an IT company. A lot of times I have experienced reverse racism, if there is a decision maker that is a person of color, if they are insecure in their position, will typically not vote for us to do the job as they do not want to be viewed as siding with someone from their own race.

Sublim[inal] institutionalized discrimination.

Rarely is there blatant, obvious forms of "discrimination". More commonly, it's about subtle, sometimes nonverbal signs that make you FEEL a certain way. For example, in a meeting with predominately males, as a woman you might not be asked questions directly, or people might respond to your suggestions differently than everyone else's. Or, there might be a coldness or dismissive attitude or verbal response to the "brown" person in the room but a more inviting response to everyone else.

It is more of what is not said and is not done.

It's more that it's not asked. They don't take the time to ask about our competency.

At times on jobsite, [I experience as Hispanic woman] racial harassment for bidding/estimating and am stereotyped as a women owner.

[I am a Hispanic woman.] My prime consultant had a PM that would call me names, disparage me in emails and purposely not tell me about our ongoing projects and accuse me of refusing to work.

Often once I've gotten a contract, I'm expected to play the stereotypical role of "mammy" or my bosses "aunt jemima"

type. I've also often being ask to be the girlfriend for several government buyers over the course of my career at times by the buyer or a friend of the buyer gave me the message as a pre-requisite to getting a contract. Once I refused to go along, the contract was never signed.

#### **4. Gender bias and barriers**

Woman respondents reported experiencing sexist attitudes about their competency, skill and professionalism.

A job was taken away because I had just had a baby.

In the workplace not being compensated as my male counterpart. Being excluded from decisions that I should weigh in on. Not being recognized for results but seeing my male counterpart be recognized. Being overlooked on the job site when I was the lead. I could go on and on.

My business tends to be very male-dominated and people occasionally question my abilities.

Women are not treated equally in the business world. I do not believe the business world takes us seriously. Yet!

Perceived as too small, less capable of because I'm a woman.

When negotiating with a developer, I was specifically asked if I could do the work or if I just had the certification. The work ultimately went to a firm in their old boys' network.

Potential clients have a hard time seeing our value, or even trying to see - they assume we're not qualified and will only be an expense and not a value add.

As a female [general contractor] you are stereotyped on your knowledge and capabilities.

[I experience] more [stereotyping] from my own profession and competition saying that we can't attend to the project because 'we have children', we are a small firm and can't produce. Then we show everyone that we can. But the talk from our own competition gets back to us from loyal clients.

As a woman-owned mechanic repair, males do not think I know what I am doing until we start talking, then they realize I do know repair work.

It's subtle and most people disregard my expertise and experience because they assume as a woman, I do not possess the skills.

[My competency is not questioned] at the office at all but many times there's the assumption that I'm not the lead.

Often times men don't believe the work that I do or challenge my abilities.

Being a woman owner, it's often assumed I have a male running my business.

Competency recently called into question. Gender-related.

The University group that signs off on our work seems to scrutinize our work more than the competition. On a recent job, they wanted us to complete warranty work after the warranty period. They said, "expect us to require this warranty on projects". They admitted that this was the first time they were requiring it.

I have not seen any WOSB [woman-owned small business] state set-aside contracts in my company's NAICS classification even though there are many at the federal level. I interpret this to mean that the State of Illinois may question women's ability to effectively compete, win, and fulfill state contracts.

I often receive remarks from male-prime contractors such as "I thought you were President and had authority", "your men are doing what you ask."

Once we establish that we actually know what we are doing then it is not doubted. But, if the person who we are talking with has a level of insecurity, then they are threatened that we know more. So, we have to alter our speech to compliment them and still get our point across. A man in the same position would be seen as confident and intelligent or assertive or a go-getter. We have to present information in a different way.

Not vocally but, again [as an African American woman], [I am] not valued as a partner.

During interrogatories, very specific technical and legal (security) questions that were not posed to other vendors were posed to me [as a woman-owned company].

It is not clear question, but in many instances, being a woman owned business, plus small business and minority on top, decisions in contract opportunities are clearly skewed more to large agencies with more male representation. We [are a woman-owned firm and] did have a mechanical engineering firm who refused to allow us on their approved bidders list. They would not provide a reason as to why we were not adequate. It took over 10 years to resolve the issue and my correspondence had to basically claim discrimination in order to be permitted on the approved list. We were finally allowed on this year.

[As a woman-owned firm I have experienced] stereotyping of ethnicity with employees and subcontractors.

Some reported incidents of sexual harassment and hostile behavior.

I experienced sexual harassment from a banker at Fifth Third Bank.

In the past, a federal program officer in charge of our contract made repeated comments about who was I dating and his right to have an affair, I was sitting next to him and he laid his head in my lap.

Not wanting to pay fair, being told they don't like to work with women owned firms, bullied to get paid on time and on jobs.

One WBE noted improvement over the years.

Not as much anymore, but it used to be quite often. Sexual harassment was quite prevalent during my younger years. I have lots of stories.

## **5. Access to networks**

Many minority and woman business owners felt excluded from formal and informal networks.

As a Black female that doesn't have any "inside" connections, my firm is viewed as a non-competitive business from an experienced minority. That however isn't true, but what I've experienced.

The informal networking is what counts most. It is very hard to come by and can take years to develop. In some cases, you just

have to last long enough to get noticed on someone else's terms.

As a small, young studio, I have a hard time finding information and breaking into the old boy network.

This comes more from the men in our organization - there is still a tendency for them to be able to develop closer relationships with other professionals in the industry.

I have not been asked or approached about becoming a member of the organizations that large contract firms are members of.

Deviated contracts are given to networks of white males only. The network only allows membership by member recommendation. Keeping the clubs exclusive.

There are significant barriers to interrupting old established relationships!!!

There are certain "circles" where information and opportunities are shared, and those circles typically do not include minorities and rarely include women. I know this from decades of working in the professional environmental/engineering/sustainability consulting world and having personal relationships with Senior, C-Suite white males who were kind enough to give me a glimpse into their world, and occasionally brought me to a meeting so I could observe and see what happens at this higher level of private groups and deal making.

It's not the documentation, it's the telephone calls that are lacking.

[Not] finding out about work on a timely basis, breaking into the old boys club, forming the right relationships.

Non-certified firms have different access to information than we do and we don't get access unless they bring us in.

It's not what you know, but who you know.

We are not on the same distribution lists.

Vital information is not willingly shared.

We have no relationships with the inner circle.

The only access is a constant barrage of emails.

[Not] finding out about opportunities is a barrier. Not being a part of the union is a barrier.

It's harder to get on committees and move forward without connections.

Others reported lack of access to decision-makers puts them at a further disadvantage relative to their non-BEP counterparts.

It's difficult to discern whether we do or do not have the same access to information as non-certified firms in our industry. Our firm has, however, experienced stereotyping when we ask for further information on a bid. These encounters inform us that our firm is not to ask certain questions related to a bid. I may be told "I'm breaking RFP terms and conditions, a non-certified firm would just be told 'Yes' or 'No'". Thus, we are not afforded a space of inquiry and exploration of information.

The relationship with decision makers is non-existent.

There is always someone inside who feeds info to the desired vendor.

There is always an excuse, cancellation or a reason that new, small firms cannot get a sizable contract in order to grow their business! Either the entity that puts out the RFP has some company in mind they want to give the contract to, or they have some personal connection through family, etc. that they steer the business to. The other case is when the company that was awarded the contract has an owner that used to work for the government and/or agency and knows the process and how to work around the system! It isn't fair, and it should be investigated by the ethics department.

We do not have access to network with public sector decision makers within the state government. State-wide networking symposiums are not available. Whereas with our local government, the City of Chicago, we do have access to public sector vendors.

Some noted their exclusion from networks was exacerbated during the COVID pandemic.

Due to COVID, information networking has been diminished.

I work from my home since Covid so more difficult.

COVID-19 threw everything for a loop but I am unsure how to access Industry Days.

A few M/WBE firms reported they had adequate access to information and networking.

Yes. State and Local offices of supplier diversity do provide networking opportunities.

I believe I have better information than non-certified firms as I get open bid project notifications.

## **6. Impact of Affirmative Action Contract Goals**

Some minority and woman respondents felt that prime bidders often use them only to meet affirmative action goals.

Difficult to get foot in door for non-MBE work. Used only on MBE work.

[Our] only opportunities to be used is on state projects that require BEP goals. We do not get contacted or invited to negotiate any contracts or non-competitive contracting opportunities.

If it were not for the WBE requirements, we would not be asked on teams. We get asked again because we do good work, but the initial ask and introduction would not happen without the requirement. We would appreciate a SBE requirement too - open to any gender, race, diversity status - that would support any small or emerging business.

I have repeatedly been approached to be on a prime's team and they want to use my firm's qualifications to win the job, and then they give my firm a minimal (thousands) amount of work on the large (millions) contract that they won using the combined qualifications.

Some M/WBEs reported that they were listed on utilization plans but then were not used on the project.

Often prime contractors will contact my company as a "good faith effort" for "proof" to State that they've reached out to a DBE/WBE. They never reach back to actually hire my company.

In my experience, prime vendors don't value our services--our experience or knowledge. They only partner with us to meet

the goal until it's awarded. Then we don't have an opportunity to participate.

## **7. Financial barriers to opportunities**

Many M/WBEs reported discriminatory obstacles when trying to obtain financing, bonding and insurance that impact their ability to compete on an equal basis. The barriers to access commercial credit and the very high cost of obtaining funds to run or expand their businesses were reported. Small and new firms face particularly large challenges.

When it comes to obtaining loans or lines of credit with financial institutions I've been asked in meetings if I was married and if my husband works for my company. I say that I am a widow then I was rejected for the line of credit.

Prior from bank - did not want to lend sufficient capital to the firm, higher interest rate than others were charged, and repeated requests to talk to my husband rather than me (the business owner). I've since been able to switch banks and don't feel this is an issue currently.

After two years of service and no problems, [my insurance company] came to me and demanded/required I take the language "procurement diversity in architecture and engineering" off of my website--which is a core service I provide. Then they raised their rates.

Being a small Minority Company I have ALWAYS experienced barriers in this industry including governmental with PPE loans and grants that are extremely hard for small businesses to obtain. It's not a fair playing field not by far.

Being able to obtain funding as a minority company is difficult.

It's very difficult getting loans and lines of credit to grow the business even when your credit qualifies, and you can show proof that the business is growing and it still isn't enough.

Because we don't have the capital, funds, cash, the buying power that the big noncertified contractors have, we pay more because they are buying 20 projects to our one or two.

I need access to Black and Minority owned banks that know how to work with small minority businesses. My bank is too big and to have [sic] address these issues and loss of opportunities in the past.

Banks will not & do not help with signed contracts for sub-contracting opportunities.

Can get loans but higher price rates.

Commercial banks don't give loans to small black businesses.

Even the SBA gave me so many problems trying to get a loan where so many fraudulent people received many millions of dollars. I know personally about 2 dozen people who gotten 40k or more from the government and NEVER had a business and I've been in business for 8 years.

I was also denied a loan and line of credit with the reason I had delinquent payments when this wasn't the case it was just a generic reason to deny my loan from the bank which was structural racism.

It has taken over 10 years to get an SBA loan, all other companies do not want to take the risk on an MBE construction company.

It seems as if I am required to have the physical assets of the amount of money I'm requesting. I do have contracts that greatly exceed the amounts I am requesting.

It took me over 8 months to receive a loan from the SBA, can you imagine how long it would take me in the private banking circuit?

Most often the problem for our firm is getting financing and operation loans. Government work does not pay quickly and often we have a difficult time waiting for the payments and have to turn down work until we are paid. We essentially have to fund the work until it is paid and being a smaller firm that makes day to day operations difficult. Larger more established firms have larger pockets.

My business does not get the same opportunity with banking institution as a non-black, female gets. I have asked banks and lending companies for a chance and have not received a fair chance, while my counterparts receive and the have the same credit issues and less time in business.

My business partner has a near 800 credit score and when trying to secure a loan from a bank, the interest rate was still very high in my opinion, then they continued to suggest that we could get a much better rate if we apply for a loan targeted

specifically for minorities with less than stellar credit. That was great that they had that option for minorities, but we had no need for that because my partners credit was stellar.

There is no access to capital or funding opportunities for minority, woman-owned businesses.

We were awarded a government contract and financing agents still would not provide us any kind of loans.

When we won a contract with [state agency] in the amount of \$1.3M, we could not get loan to fulfil the contract. I had to withdraw money from my retirement to fulfil the contract.

Being a woman of color and self-employed, financial institutions are reluctant to deal with you. They request things of us that are not requested of others. They make it as hard as possible. No matter our financial situation.

The cost and difficulty in obtaining bonding and insurance are barriers to taking on business.

Small bonding limits and high percentages [have been barriers.]

Again, it will cost us more. Bonding is based on cash flow which for us can be terrible and insurance is numbers. If I have 10 employees and one gets hurt, 10% of my employees have been hurt and my company is more of a risk, whereas if a company has 100 employees and one gets hurt, only 1% of their employees are hurt. 10%, 1%, who has the greater risk, who will pay the most!

Because of our size it can be tough to get bonding. We do not have a bonding facility.

Minority companies are Not Bondable for as much as needed for some jobs there are barriers.

Bonding capacity and loans/banking [have been barriers].

Bonding by its nature is a complicated thing. I have tried to get bonded to bid on state contracts, but have hit roadblocks, primarily firms not understanding how to provide bonding for my industry or not being able to do it quickly enough in order to respond to a contract opportunity. I tend to skip contracts that require it and believe there would be a better way, e.g., for the state to acquire independent bonding when it contracts a BEP

firm to do the work, instead of placing the burden on the small company.

I believe that I am always required to pay higher bonding rates than my competition.

Bonding is based upon credit score, equity and financing which limits us from being able bid larger scale projects.

There are plenty of competitors (male owned) who receive preferable pricing to us and that too is unjustifiable.

Bonding projects is difficult due to the MBE/DBE equity constraints.

Cash flow and bonding have always been an issue. As the 100% owner I have to lien all my personal assets to obtain bonding.

Slow payments by government entities and prime contractors further disadvantaged M/WBE firms.

I am a small business these larger corporations want all this work done, no one pays on-time it be over 90 days before I get paid and I still have to maintain my office and keep payroll going. They do not care that I am a small business. But they pay the bigger corporations and do not ask them to wait and/or short change them. When it comes to pricing, they will make sure you walk away with nothing and wants the employee to work for under minimum wage.

It is hard to finance the projects and even more difficult when the payment process is delayed and our cash flow suffers tremendously creating bad debts (late fees, union liquidated damages) etc.

We have been told that we must pay a 2.5% fee on our invoices to the contractor to receive payment. 3) We have signed LOI's to send to the state and barely received 30% of the LOI, 4). Excessively delayed payments, 5) Contract dollars denied with no explanation until an invoice is presented... And it goes on and on.

## **8. Barriers to equal contract terms**

Several minority and woman respondents reported they are charged higher pricing by suppliers than non-M/WBE firms.

Vendors has described our firm as a greater risk because we are a minority firm, therefore charging us more.

Can't directly prove but generally always asked to be COD, and generally pay higher for products.

I have been asked to pay for supplies in full up front.

We have not been offered favored terms by suppliers ever. We are rarely offered Net 30.

Higher interest, low limit terms, higher prices, lower quality of provisions.

They give me higher quotes or bids at the last minute.

Many reported pressure to reduce pricing or compensation relative to their White male counterparts based on their M/WBE status.

Having contract terms change at the last minute after proposals have been evaluated and awarded. Not sure if it is directly related to gender, but we feel pushed around and sometimes taken advantage of from larger partners.

There's an expedition [sic] that as a small firm we're cheaper.

In the black community there is a lack of information in-terms of entrepreneurship and even when minorities do get into the entrepreneurship space, often times we are paid much less than our counterparts. When we first started in transportation the first 4 years, our broker paid us significantly less than our other subcontractors we actively worked with. It wasn't until we left and the pandemic struck leaving them needing subcontractors, they were finally willing to provide a much-deserved increase.

The perception [is] that black businesses must reduce prices to do business.

As a BEP firm, primes expect our rates to be significantly lower than the same rates they are asking.

Because we are an MBE/DBE everyone believes we are a "premium" cost compared to the white owned companies and that our fees for operating are not valid.

Contractors are always using pricing as a reason why they do not accept our bid proposal. I have several emails where

general contractors state that our pricing is higher than the low bidder.

Contractors will ask me to lower my price and pay my white, male counterparts double.

Higher pricing is an ongoing issue especially when they don't want to work with minority female contracting.

I have spoken with 2 white male friends inside of 2 companies a few years ago who inadvertently told me they were paying \$175/hour for change management while the most companies were wanting to pay me was \$70/hour, and one other colleague making \$125 for project management and the most they wanted to pay me was \$60-80. This is just the way things have been and continue to be, although I managed to get \$110/hr. on a PM contract because the company was desperately in need of a PM with HR skill set so they hired me on the spot.

Primes have asked me to reduce pricing in the past, with no understanding (or regard) for the reality that as a firm with multimillion contracts, they have the luxury of having a larger denominator in their multiplier, allowing them to show slightly lower hourly rates. And they often don't charge all of their direct labor but, instead, spread hours over multiple clients or overhead accounts. I know this because I worked for some of the largest firms in my industry for over 10 years before starting my own business. When you're a small business, you can't really play those 'games'.

They have a profit margin limit as to what they will pay regardless of performance. This puts BEP companies in a position that you could potentially lose money if everything does not go right.

They low-ball our percentage offered in order to discourage us from wanting to complete the process. Time is money and a lot of time goes into preparing the RFP bid, just to be insulted with pennies for our participation with the prime!

No one has ever said I am not going to pay you because you are male and black, but my mentor is a Caucasian male and we started around the same time with the same amount [sic] of vehicles, yet he was making significantly more than me.

We are always bullied to come down on pricing and then I find out others on same job are being paid more.

We are regularly told we are "too expensive," although we know other (male-owned) firms charge as much or more than we do, often for less thorough work.

Bid shopping was a problem reported by several M/WBEs.

We feel our pricing is used to give opportunity to others to match.

We are a subcontractor. We have been told by several firms that our pricing is routinely shared just prior to bid time with our competitor. We have even been told that they have raised their bid price to just below ours after finding out our price. This is kind of a Good Ole boy network tactic to get them projects.

We have had contractors to hire us to develop, test, and execute programs that are extremely successful, then in the RFP to continue the services eliminate our firm and give the contract to a white firm taking our ideas, theory, and work, and upon appeal the decision we were told that we were not awarded the new contract because of our capacity as a small minority business.

We later learn that our deals lost based on pricing were awarded at a higher price; have had experiences with our proposal details being shared with other bidders who win using our [intellectual property].

## **D. Conclusion**

Consistent with other evidence reported in this Study, the business owner and stakeholder interviews and the survey results strongly suggest that minorities and women continue to suffer widespread discriminatory barriers to full and fair access to contracts and associated subcontracts in the state of Illinois' market area. Many M/WBEs reported negative perceptions and assumptions about their competency that reduced their ability to conduct business. Minorities and women still face challenges related to stereotyping, hostile environments, racism and sexism. BEPs had reduced opportunities to obtain contracts, less access to formal and informal networks, and greater difficulties in securing financial support relative to non-BEPs in their industries. A large number indicated that they were working well below their capacity.

Anecdotal evidence may "vividly complement" statistical evidence of discrimination. While not definitive proof that the state 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 state's evidentiary basis to continue the use of race- and gender-conscious measures.





## VII. RECOMMENDATIONS FOR THE STATE OF ILLINOIS BUSINESS ENTERPRISE PROGRAM

The quantitative and qualitative data in this study provide a thorough examination of the evidence of the experiences of minority- and woman-owned business enterprises (“M/WBEs”) in the state of Illinois’ geographic and industry markets for goods and services contracts for the agencies included in the study. As required by strict constitutional scrutiny, we analyzed evidence of the state’s utilization of M/WBEs as a percentage of all firms as measured by dollars spent, as well as M/WBEs’ experiences in obtaining goods and services contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the state with the evidence necessary to determine whether there is a strong basis in evidence for the continued use of race- and gender-conscious goals for its Business Enterprise Program (“BEP” or “Program”), and if so, how to narrowly tailor its remedies.

The state has implemented an aggressive and successful program for decades. Utilization of M/WBEs has exceeded availability for most groups. This is the outcome of setting goals, conducting outreach, and enforcing requirements. The results have been exemplary for most groups.

However, evidence beyond the state’s achievements strongly suggests these results reflect the success of the Program in countering discrimination in the state of Illinois’ contracting markets. Further, we found that although M/WBEs as a whole received ample dollars on state jobs, opportunities were concentrated amongst a small group of subindustries that are of relatively low importance to overall state purchasing. Outside of state and local government contracts, M/WBEs face large disparities in opportunities for public sector and private sector goods and services contracts in the state’s area markets, as well as discrimination in the access to business capital. Our disparity studies for other Illinois and Chicago area governments support the conclusion that the current effects of past discrimination and ongoing bias would be barriers to state work in the absence of affirmative action remedies. M/WBEs reported instances of bias and discrimination, and that they receive little work without the use of contract goals.

These results are the type of evidence that the state can consider in evaluating whether there is a continuing need for race- and gender-conscious remedies and, if so, how to narrowly tailor such remedies. The recommendations that follow are based upon these findings.

We recognize that many of our recommendations, both race- and gender-neutral and race- and gender-conscious, will require more staff and technical resources to be devoted to the Program.

## **A. Augment Race- and Gender-Neutral Measures**

The courts require that governments use race- and gender-neutral approaches to the maximum feasible extent to address identified discrimination. This is a critical element of narrowly tailoring the Program, so that the burden on non-M/WBEs is no more than necessary to achieve the state’s remedial purposes. Increased participation by M/WBEs through race- and gender-neutral measures will also reduce the need to set BEP contract goals. We therefore suggest the following enhancements of the state’s current efforts, based on the business owner interviews and survey responses, input of state staff, and national best practices for contracting affirmative action programs.

### **1. Pay Promptly and Ensure Prime Vendors Promptly Pay Subcontractors**

Slow payment by the state was a major criticism. 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.

### **2. Develop Virtual Training Tools for State Staff and Vendors**

The state should create targeted training videos for all aspects of the Program. These should include certification criteria and processes, contract goal setting, good faith efforts, standards and processes, commercially useful function reviews and other bid submission documents, compliance monitoring, substitution requests and working with the various contracting agencies. This is especially important since the Program has been moved from the Department of Central Management Services (“CMS”) to the Commission on Equity and Inclusion (“CEI”). Vendors and agency staff will need guidance about the roles and responsibilities of the new Commission, which unlike CMS, will have limited contracting opportunities.

### **3. Conduct Increased Outreach**

Many M/WBEs requested assistance with penetrating the network of the state’s buyers and other officials with procurement responsibilities. Regular

“meet and greets” with specific agencies with contracting authority would be helpful to assist these small firms to learn about upcoming opportunities and meet important agency staff. This is important now that CMS no longer manages the Program and CEI does not have many contract opportunities.

It is also important to focus on the subindustries where M/WBEs have received few, if any, state dollars. These are provided in Table 4-10 through Table 4-15. For example, while Black-owned firms did well in Investigation Services, Temporary Help Services and Janitorial Services, they received no contract dollars in many other codes. To uncover any barriers and elicit ideas for broader sub-industry participation, we suggest meetings with firms certified in the areas in which the state spends significant dollars, but in which M/WBEs do not participate. The state should also consider conducting early and targeted outreach about specific solicitations to expand the areas in which M/WBE obtain state work.

#### **4. Increase Prime Contract Opportunities**

While certified firms no longer experience disparities in access to state contracts overall, contracts for prime work are either out of reach for most M/WBEs (especially Black contractors), or too risky for them to take on. We recommend the state place special emphasis on reducing barriers to prime awards.

One race- and gender-neutral method to reduce barriers would be to “unbundle” contracts. State goods and services projects are often very large and complex. Not surprisingly, contract size is a disincentive to small firms to submit bids or proposals. 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 state work. In conjunction with reduced experience and insurance 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.

Another important component of supporting prime contracting by minority and woman firms is adopting experience requirements for specific solicitations that are no greater than necessary to protect the state’s interests. Agencies should review these requirements to ensure that BEP firms are not unfairly disadvantaged and that there is adequate competition for projects.

## B. Continue to Implement Narrowly Tailored Race- and Gender-Conscious Measures

The Program has been very successful in providing opportunities for minority and woman firms on state goods and services contracts. As reported in Chapter IV, utilization has been significantly higher than availability for all groups except for Native Americans, Asians and White women. When we examined whether firms were concentrated within an industry or between industries by race or gender however, a picture emerged of starkly unequal outcomes for M/WBEs compared to non-M/WBEs.

Further, as documented in Chapter V, when examining outcomes in the wider economy, it is clear that M/WBEs do not yet enjoy full and fair access to opportunities to compete. Data from the Census Bureau's *Survey of Business Owners* indicate very large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms. Similarly, data from the Census Bureau's *American Community Survey* ("ACS") indicate that Blacks, Hispanics 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. The results of numerous small business credit surveys reveal that M/WBEs, especially Black-owned firms, suffer significant barriers to business financing. There are also race-based barriers to the development of the human capital necessary for entrepreneurial success.

Our interviews with individual business owners and stakeholders and the results of our survey further buttress the conclusion that race and sex discrimination remain persistent barriers to equal contracting opportunities. Many minority and female owners reported that they still encounter barriers based on their race and/or gender and that without affirmative intervention to increase opportunities through contract goals, they will continue to be denied full and fair chances to compete.

In our judgment, the state's utilization of M/WBEs is primarily the result of the operations of its Program, not the cessation of discrimination in the overall economy. Without the use of contract goals, the state may become a "passive participant" in the market failure of discrimination.

We therefore recommend that the state use narrowly tailored race- and gender-based measures.

## 1. Use the Detailed Study Availability Data to Set BEP Contract Goals

As discussed in Chapter II, the state’s constitutional responsibility is to ensure that its Program implementation is narrowly tailored to its geographic and procurement marketplace. Using study data will provide transparency and defensibility, as well as reduce requests for goal reductions or full waivers.

Defensible contract goal setting involves four steps:

1. Weight the estimated dollar value of the scopes of the contract by six-digit North American Industry Classification System (“NAICS”) codes, as determined during the process of creating the solicitation.
2. Determine the unweighted availability of M/WBEs in those scopes, as estimated in the disparity study.
3. Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
4. Adjust the resulting percentage based on current market conditions and progress towards the annual goals.

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 state should then review the result considering other factors, such as the entry of new firms into the Program, other current projects that may impact availability, progress towards meeting the annual goal, any unique aspects to the scopes, or other relevant factors. Any adjustment to the calculated goal must be fully documented. Written policies explaining the contract goal setting steps should be widely disseminated so that all contracting actors understand the methodology.

The B2Gnow<sup>®</sup> electronic data collection and monitoring system already employed by the state contains a module developed to utilize the study data as the starting point for defensible goal getting. We have worked extensively with this system’s vendor to develop this simple, defensible methodology. By employing the B2Gnow<sup>®</sup> 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.

This targeted contract goal setting methodology eliminates the need for “categorical” exemptions to the Program and the administrative burden of determining those exemptions. Only contracts for personal services, utilities, real estate acquisition and intergovernmental agreements would be exempt for contract goal setting. It may turn out that individual contracts either have no

M/WBE availability or there are no subcontracting opportunities, but this approach is grounded in the specifics of the contract, not a guess about what should be subject to a contract goal.

We further urge the state to bid some contracts without goals that it determines have significant opportunities for M/WBE participation, or that involve scopes of work with high utilization, in light of the high participation of M/WBEs during the study period. These control contracts can illuminate whether certified firms are used, or even solicited, in the absence of goals. The development of some “unremediated markets” data, as held by the courts, including the Seventh Circuit Court of Appeals, will be probative of whether the Program remains needed to level the playing field for minorities and women. The legal standard is that an agency must use race-neutral methods to the “maximum feasible extent” and the outcomes of “no goals” contracts will illuminate how effective race-neutral measures are in achieving non-discriminatory outcomes.

## **2. Adopt Narrowly Tailored Program Eligibility Standards and Processes**

As discussed in Chapter II, the federal courts have held that strict constitutional scrutiny requires that race- and gender-conscious remedies be limited to socially and economically disadvantaged individuals. The failure to adopt limits on the size of the firm, as measured in gross receipts, and the personal net worth of the owner, have proved to be fatal in litigation, including in the Seventh Circuit Court of Appeals. We suggest the following revisions.

### **a. Revise the Business Size Standard for Program Eligibility**

The current Program adopts a size limit of \$75M in an applicant firm’s gross receipts, regardless of industry, for program eligibility. It does not appear that this amount is averaged over some period of time. We were unable to unearth any legislative history that supports this amount, which has been raised over the life of the Program.

The City of Chicago updated its size and personal net worth tests in 2021 based upon the disparity study we conducted. The size limits were raised to 150% of the U.S. Small Business Administration standards<sup>294</sup> and the time over which gross receipts are averaged was raised from five years to seven years. We suggest that the state consider this approach. While the size limits vary by six-digit NAICS code, these national numbers do not fully reflect the costs of doing business in the Chicago and Illinois marketplace. Firms somewhat above these thresholds are still not able to fully compete with

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294. 13 C.F.R. part 131.

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. While still relatively small by comparison to major companies, these higher limits will permit minority and woman businesses to compete for larger subcontracts and prime contracts, as well as to make inroads into the market for privately financed projects. To bring further rigor and defensibility to the Program, we recommend that the BEP Council's ability to grant "exceptions" to the certification standards be eliminated. This subjective and potentially arbitrary approach is unlikely to survive legal scrutiny, as it will permit firms that are not owned, managed and controlled by socially or economically disadvantaged individuals or that are not small, to participate.

**b. Adopt a Personal Net Worth Standard for Program Eligibility**

The courts are also clear that there must be limits on the personal net worth of the owner of the applicant firm to ensure that the Program is narrowly tailored to assist only economically disadvantaged individuals. We suggest that the state adopt the PNW limit of the City of Chicago's program, currently \$2,379,729.54. This amount should be adjusted every February by the change in the Consumer Price Index.

Further, the state could follow the City's approach to determining which assets should be included in the test. The need for liquidity, especially given the slow pay by the state 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 firms in the Illinois market. We therefore suggest that the state count only assets that are fully liquid, that is, cash on hand and in brokerage accounts of marketable securities. The classes of assets not subject to the calculation would include 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.

**3. Ensure Complete and Timely Contract Monitoring**

Many M/WBEs reported that while the state conducts 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 agencies conduct commercially useful function and prompt payment reviews, would alleviate con-

cerns about the actual operations of the Program after contracts have been awarded.

## **C. Develop Performance Measures for Program Success**

The state should develop quantitative performance measures for M/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. Possible benchmarks might be:

- Increased bidding by certified firms as prime vendors.
- Increased prime contract awards to certified firms.
- Increased M/WBE size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which BEP firms are awarded prime contracts and subcontracts.

The state mandated, by statute, that a disparity study be conducted and we suggest this approach be continued, assuming no change in the federal case law governing M/WBE programs. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, the state must ensure that they are narrowly tailored.

# 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;  $\beta_1$ ,  $\beta_2$  and  $\beta_3$  are coefficients, and  $\mu$  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 state of Illinois, the analysis was limited to data from Illinois. The coefficient for the new variable showed the impact of being a member of that race or gender in the metropolitan area.



# APPENDIX B:

## FURTHER EXPLANATION OF THE PROBIT REGRESSION ANALYSIS

Probit regression is a special type of regression analysis. 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 fall 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;  $\beta_1$ ,  $\beta_2$ , and  $\beta_3$  are coefficients, and  $\mu$  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 variables’ coefficients, in the standard model, the interpretation is fairly straight-

forward: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.<sup>295</sup> 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.

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295. 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 State of Illinois 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.<sup>296</sup> 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.

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296. 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
<b>TOTAL</b>	<b>40</b>	<b>45</b>	<b>53</b>	<b>12</b>	<b>48</b>	<b>1230</b>	<b>1428</b>

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%
CCCCCC	2.1%	2.1%	3.8%	0.6%	3.6%	87.9%	100.0%
<b>TOTAL</b>	<b>2.8%</b>	<b>3.2%</b>	<b>3.7%</b>	<b>0.8%</b>	<b>3.4%</b>	<b>86.1%</b>	<b>100.0%</b>

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%
CCCCCC	\$2,000.00	44.4%
<b>TOTAL</b>	<b>\$4,500.00</b>	<b>100.0%</b>

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 the 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
<b>TOTAL</b>	<b>0.028</b>	<b>0.029</b>	<b>0.037</b>	<b>0.008</b>	<b>0.034</b>	<b>0.864</b>

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 ILLINOIS DISPARITY STUDIES

In addition to the anecdotal data collected for this study and provided in the Qualitative chapter of this report, Colette Holt & Associates has conducted several studies in Illinois over the last several years that shed light on the experiences of minority- and woman-owned firms in the Chicago area and overall Illinois marketplace. 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 886 individuals.

This summary of anecdotal reports provides an overview of the following disparity studies:<sup>297</sup> the Chicago Park District 2022 ("CPD"); Cook County, Illinois 2022 ("Cook County 2022");<sup>298</sup> Metropolitan Water Reclamation District of Greater Chicago 2021 ("MWRD 2021"); the City of Chicago 2021 ("City of Chicago");<sup>299</sup> the Chicago Transit Authority 2019 ("CTA"); the Regional Transportation Authority 2016 ("RTA"); the Northeast Illinois Regional Commuter Railroad Corporation doing business as Metra 2016 ("Metra"); the Illinois State Toll Highway Authority 2015 ("Tollway"); the State of Illinois Department of Central Management 2015 ("CMS"); Cook County, Illinois 2015 ("Cook County 2015"); Metropolitan Water Reclamation District of Greater Chicago 2015 ("MWRD 2015"); and Pace Suburban Bus 2015 ("Pace").

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297. Copies of these studies can be accessed at the following links: CPD <http://www.mwbelaw.com/wp-content/uploads/2022/09/Chicago-Park-District-Disparity-Study-2022.pdf>; Cook County 2022 <http://www.mwbelaw.com/wp-content/uploads/2022/10/Cook-County-Study-Report-2022.pdf>; MWRD 2021 <https://mwrdd.org/sites/default/files/documents/Metropolitan%20Water%20Reclamation%20District%20of%20Greater%20Chicago%20Disparity%20Study%202021.pdf>; City of Chicago <http://www.mwbelaw.com/wp-content/uploads/2021/11/City-of-Chicago-Disparity-Study-for-Construction-Contracts-2021.pdf>; CTA <http://www.mwbelaw.com/wp-content/uploads/2019/12/Chicago-Transit-Authority-Disparity-Study-2019.pdf>; RTA <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-RTA-Availability-Study.pdf>; Metra <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-Metra-Availability-Study.pdf>; 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>; Cook County 2015 <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-Cook-County-Illinois-Disparity-Study.pdf>; Pace <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Pace-Chicago-Suburban-Bus-Disparity-Study.pdf>; MWRD 2015 <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-The-Metropolitan-Water-District-of-Greater-Chicago-Disparity-Study.pdf>.

298. The Cook County Study also included responses from a written survey of 447 respondents.

299. The City of Chicago Study also included responses from a written survey of 115 respondents.

## 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 women 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 small firms in general 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 County 2015, page 129, interview)

Just this past year, a colleague of mine had a GC say, "do we want quality, or do we want diversification". The reality is, this is what is thought out there. (MWRD 2021, page 173)

People assume MBE means low quality or inability to perform. (Cook County 2022, page 287, survey)

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 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. (City of Chicago, page 129, survey)

There is a stigma [to being an MBE]. Quite frankly, when we go after projects, I have to remind the client we have more people in Chicago than [large engineering firm], and yet you're looking at them as though they're [name], and we are bigger than [name] in Chicago. But that's not what you're seeing. There's a ton of firms that are significantly smaller than us, who they expect us to sub to. And we have more experience, more people. And to be honest with you, I often say, "I don't have a Black engineering degree." There was no minority engineering or business degree, there wasn't any of that, right? I got the

same one as everybody else. And yet somehow my experience is different. Somehow my engineering experience is less there even though I have all the same qualifications, I've worked on all the same projects. My team has worked on all the same stuff, quite frankly, our staff work for the vast majority of these larger engineering firms that we're competing against now. And they were the smartest people in the world when they worked for [name], and I of a sudden they worked for [name] firm, and they clearly are stupid. (MWRD 2021, page 173)

The construction community is a bunch of good old boys, that are multi-generational. (MWRD 2021, page 176)

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)

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. (City of Chicago, page 131, survey)

[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 provider 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)

We were having problems when we first became an MBE, we used to hear MBE had a reputation of not performing like the outside markets.... It's just a stigma that MBEs can't perform like the market leaders. (CPD, page 179)

As a black female, I am often condescended to and disregarded as a professional with a proven track record of excellence. (Cook County 2022, page 286, survey)

I have not been an MBE because I didn't want the stigma associated with some of the MBEs.... I do send some of my Caucasian project managers to some units. I will say and even though my company is 75% minority and women out of my 40 to 50 employees, I have to do that because there is a stigma

associated.... You have to perform at a 50% higher rate, even though we don't get the good jobs, because they go to the large companies. Whether their construction or consulting, or services and goods, it's hard to compete in that environment. (MWRD 2021, page 173)

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. (City of Chicago, page 107, interview)

As an MBE, there is a stereotype that we are not a competent firm which is why primes don't want to allow us the margin to operate our businesses because they think they have to do our work. I pride my company on the self-performed work we do. (Cook County 2022, page 287, survey)

There is a mindset that's kind of like, hey, you guys should be happy to be in the program and sort of be happy with what we're giving you.... It is something that's specific to being a minority, or, in my case, being both, minority and woman. Because I know men who are White males who are friends of mine, who run firms, who run everything from a million dollar to multimillion-dollar, to hundreds of millions of dollar firms. They don't have these conversations. (CPD, page 179)

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)

Unfortunately, it is business as usual in Chicago. I have to fight to death for opportunities my non-diverse competitors take for granted. I doubt I will see this change in my lifetime. (Cook County 2022, page 285, survey)

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 2015, page 132)

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. (City of Chicago, page 129, survey)

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)

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. (City of Chicago, page 130, survey)

[Large prime contractors] try one to two M's or W's, that may not be all that great, and they lump us all together as "second rate". When they may try 7-8 substandard White guy companies, and they don't think anything of it. They just keep looking for someone else. (MWRD 2021, pages 173-174)

Being a black woman owned business, I tend to only get conversions from those customers and clients that look like me. (Cook County 2022, page 285, survey)

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.

I have experiences [sexual harassment] on job sites where the majority of staff are men. Cat calling and inappropriate comments and touching. Event labor is mostly male dominated sector which poses some of the issues especially for younger females in authority roles. (Cook County 2022, page 293, survey)

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)

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. (City of Chicago, page 110, interview)

They're never outwardly abusive [in current times], but it's subtle. I'll show up with my field manager. I'm an African American woman. He's a White man. They always address him first and assume he's the owner of the company. And then when they realize that, okay, no, he's not the owner, I should be addressing her they still ask him the technical questions, even though I'm there to do the bid, he's just an add-on to hold the tape measure. You know? So, it's still hard to get taken seriously in this day and age. And especially as a women in the [construction].... And the biggest comment I get is, "My plumber doesn't look like you." And I'm like, "Well, I'm glad

because I don't have a twin." It's still hard. It's still an initial hurdle to get over. (CPD, page 180)

At least yearly, one of the first questions asked to me is "What does your husband do?". Although benign, it implies that I certainly cannot be running a construction company. So right off the bat, they think I am unqualified. That is the assumption they are going in with. (MWRD 2021, page 174)

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. (City of Chicago, page 107, interview)

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 County 2015, page 131, interview)

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 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. (City of Chicago, page 112, interview)

In negotiations, people think that women aren't savvy businesspeople and that I'll just do this for nothing. (CMS, page 125)

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. (City of Chicago, page 109, interview)

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)

My male colleagues will often get return phone calls or answers even when I am the appropriate one to receive this information. Sexism is very institutionalized and many men I interact with don't even appear to know that they are sexist with their verbal language, body language and/or voice tone. (Cook County 2022, page 290, survey)

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 that 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. (City of Chicago, page 108, interview)

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 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. (City of Chicago, page 109, interview)

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)

I have been told [as a Black women] through a trade union that they would do "everything they [could] to make me fail, and if I told they would call me a liar." I have been told to "watch my tone" as a GC by an architect, and when I asked him to clarify, there was no reasoning. My family business has been terminated for convenience on two award-winning projects. The list is exhaustive. (Cook County 2022, page 289, survey)

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. (City of Chicago, page 132, survey)

I have been mistaken for many different roles within my company. Oddly enough, no one 'mistakes' me for the owner (that is unless they 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. (City of Chicago, page 133, survey)

Sometimes, MBE/WBE companies are thought of as a necessary evil and not necessarily a true partner, and extra burdens are put on us so we don't bid on the projects. Like, long times to pay, getting beat upon material prices, waiting till the last minute to ask us to bid are the artificial barriers that are put in place, that seem neutral on the surface, but it's really because people don't want to work with us. (CPD, page 181)

## **2. Access to Business and Professional Networks**

Minority and woman respondents reported difficulty in accessing networks and fostering relationships necessary for professional success. These barriers 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 County 2015, page 132, interview)

I see that primes get access to bids well before they hit the market. This is an unfair advantaged as they already know how to bid the job and usually have a way of negotiating the job well before. (Cook County 2022, page 294, survey)

There's certainly a lot of stuff that they do that we could do as a prime, but we don't get invited. (MWRD 2021, page 175)

There are systematic ways that they are keeping out younger minority- and women-owned firms. It's the same 15 firms in suburban school districts that keep getting the work over and over again. (CPD, page 181)

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. (City of Chicago, page 134, survey)

[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)

I have found it very difficult to penetrate the long, legacy relationships established by prime contractors, and others, in the materials supply chain. They simply do not interact/ interface with honest intentions to do business. (Cook County 2022, page 293, survey)

[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)

No, we are not part of the old boys' network, so we miss out on fraternization between the client and vendors. (City of Chicago, page 131, survey)

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. ... 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 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. (City of Chicago, page 111, interview)

It always goes back to relationships.... We're all in the trust business. (MWRD 2015, page 134)

Yes, I have been informed that my competitors were colluding on price to ensure they were within a certain range and lower than me. We also are discriminated against by limiting the number of direct distributor agreements we have. (Cook County 2022, page 299, survey)

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. (City of Chicago, page 112, interview)

Legacy partnerships that well-established contractors have with manufacturers, suppliers, and customers. We have a major challenge in getting opportunities due to these relationships

and are constantly undermined. (Cook County 2022, page 294, survey)

We are “used” to just check a box for the big boys who don’t want us in the circle of friends – so they waste our time dangling a carrot in front of us, when they are most often projects already “let”. (Cook County 2022, page 297, survey)

Thus far, it has seemed more like something larger companies do to just meet a quota. We haven’t found firms that are actually willing to help move the revenue meter. (Cook County 2022, page 296, survey)

### **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 M/W/DBE 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 equal opportunity.

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)

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 doors for you. (City of Chicago, page 114, interview)

I have reached out to primes, but most give me the cold shoulder. When a prime does put me on a bid (we didn’t win it) they’ve told me, that they are only putting me on for the M/WBE credit. (Cook County 2022, page 296, survey)

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)

If you asked me what the detriment is to minorities is we've only been doing this for some people have been doing it for two years, five years, 10 years. Just the knowledge itself takes five to 10 years to get. Capital, the access to capital takes another five or 10 years. So, that's why these companies are multi-generational. It is a situation that we want to boost up our DBE firms. We've got to start giving them projects for them, that they can get experience on, that they can start showing the bonding companies, that they have the ability to do a project. (MWRD 2021, page 176)

The minute there's not a goal, those primes walk away, and they go back to the old boys' network. (Pace, page 121)

By being certified with the 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. (City of Chicago, page 136, survey)

Always denied because I do not have backing from a majority company that wants to use minorities [sic] as a pass through. (City of Chicago, page 140, survey)

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. (City of Chicago, pages 114-115, interview)

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 it had not been for the WBE requirement, we would not be doing the work that we are doing. When I launched my firm, what put my firm in large scale projects was the [agency] requirement for WBE participation on projects and we were awarded a [project] contract. With the [project] in our portfolio, I was not relegated to tiny local projects. WBE allows us to compete, what keeps us successful is that once we have proven our talent, we are asked back. But we still need to be allowed to compete and the WBE does invite us at least to the game. (CPD, page 181)

Most of the [G]eneral C[ontractor]s out there that are non-minorities would rather this program go away. (City of Chicago, page 115, interview)

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 2015, 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)

Our competition pushes us out of the [industry] competition because they are not required to have WBE or MBE diversity. (CPD, page 181)

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 County 2015, page 133, interview)

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 County 2015, page 131, interview)

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 County 2015, page 133, interview)

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%.... 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)

Don't ever start to compete against your primes, it's a different ball game. And it's interesting because [name] and [name] will fight tooth and nail on a project in the morning, and then partner with each other on the afternoon on a different project like nothing ever happened. But you got a minority firm competing against you in the morning, they will be shunned for years and will never want to do any work with you again. I've learned that personally. I have one client come to one of my teammates, I mean, one of my employees and say, "Oh, I heard you're going after this big project as a prime and we're going on the other side." He expected them to say, good luck. He said,

“You just remember you work for me over here.” So, I told him, “You tell the client, he remembers that he works for me over here. And he works for me over here,” since we’re going to play that game. But that’s what’s literally been told. So, once you decide that you’re going to come out on your own and actually be a big boy, the prejudice, it gets significantly worse because as long as you’re a small minority firm that we can keep in a box, and we can keep you where we want you to be, and you do what we say do, and you don’t ask us to see the client, and we’ll just give you the work, and you just be happy taking this 20%, you’re fine. When you start to compete, they bring out the big guns. He’ll fight the client, because the client still thinks you’re little and the clients think they too big, so you literally in this limbo area of how do I reposition the firm to get work? (MWRD 2021, page 175)

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)

There’s the expectation that minority firms are never supposed to grow beyond a certain level that you’re put in that box, you stay there comfortably and everything is good. The minute you start to spread your wings, there are issues and biases you have to be confronted with. I mean, too often, when we decided to go after a much bigger project than say, one of our goals this year, is that we want to go after a \$10 million feed project. And as we’ve started to assemble teams, everybody’s whispering, oh, what does he think he’s doing? Where does he think he’s going to go with this? But the expectation is that you’re not supposed to strive to do anything bigger than what has been offered to you in an MBE or DBE program. So yeah, the stigma is still very prevalent. How dare you want to grow your firm big? What are you doing? (MWRD 2021, pages 175-176)

Many respondents indicated that M/WBEs who could access public contracts and subcontracts 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 sat 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)

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. (City of Chicago, page 116, interview)

The program is still much needed. As we all know it takes a long time to bid these jobs. Manhours 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." (City of Chicago, page 114, interview)

It's been a very difficult task tapping into the Chicago market. Almost makes you want to just shut down and leave. I understand why a lot of businesses do at this point. (MWRD 2021, page 176)

We only get calls because we are [a] black minority firm and do not get considered to work on projects that are privately funded. (City of Chicago, page 140, survey)

