

City of Kansas City, Missouri Public School System Disparity Study 2016



About the Study Team

Colette Holt & Associates (“CHA”) is a national law and consulting firm specializing in disparity studies, affirmative action contracting programs, expert witness services, compliance monitoring and strategic development related to inclusion, diversity and affirmative action. Founded in 1994, it is led by Colette Holt, J.D., a nationally recognized attorney and expert. In addition to Ms. Holt, the firm consists of Steven C. Pitts, Ph. D., who serves as the team’s economist and statistician, Robert C. Ashby, J.D., former Deputy Counsel at the US Department of Transportation, who serves as special counsel, and Ilene Grossman CHA Firm Administrator. CHA is certified as a Disadvantaged Business Enterprise, Minority-Owned Business Enterprise and a Woman-Owned Business Enterprise by numerous agencies.

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I. EXECUTIVE SUMMARY

Colette Holt & Associates (CHA) was retained by the Kansas City Public Schools (KCPS or District) to perform a study to determine the availability of Minority- and Women-Owned Business Enterprises (M/WBEs) in its market area; its utilization of and evaluate its M/WBE program. The District was part of a study consortium consisting of the City of Kansas City, Missouri, Jackson County, Missouri, and the Kansas City Area Transportation Authority. The objective was to meet the requirements of strict constitutional scrutiny applicable to M/WBE programs and national best practices. We analyzed purchase order and contract data for calendar years 2008 through 2013.

A. Study Methodology and Data

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

We determined the availability of M/WBEs in KCPS' geographic and industry market area. We further analyzed disparities in the wider 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 gathered anecdotal data on M/WBEs' experiences with the agency's small business inclusion programs. We examined race- and gender-based barriers throughout the economy through focus groups with business owners and stakeholders.

Based on the results of these extensive analyses, we make recommendations for the District's adoption of a narrowly tailored race and gender-conscious contracting affirmative action program.

B. Study Findings

1. KCPS' Supplier Diversity Procurement Program

The District first adopted a Minority Owned Business Enterprise and Women Owned Business Enterprise Participation policy in its Business & Finance Division Procurement Services Procedures for Fiscal Year 2011-2012.

KCPS next adopted a Supplier Diversity Procurement Program (SDPP) policy in 2015. The SDPP seeks to ensure MBEs, WBEs, Veteran Business Enterprises (VBE), Service-Disabled Veteran Business Enterprises (SDVBEs), Historically Underutilized Business Zone (HUBZone) Businesses under the HUBZone Empowerment Act,¹ and Small Business Concerns under the U.S. Small Business Administration's 8(a) program have the maximum practicable opportunity to participate and compete for KCPS purchases and contracts.

The SDPP does not alter current purchasing policies and procedures. Further, competitive opportunities for firms in the Program must be commensurate with the merits of their offerings and their proven affiliations and/or demonstrated performance.

KCPS accepts certifications from the City of Kansas City, Missouri; the State of Missouri; the U.S. Small Business Administration; National Minority Supplier Development Council; Women's Business Enterprise National Council; National Women Business Owners Corporation; and other state certifications.

KCPS' current overall goals are as follows:

¹ P.L. 105-135 (1997).

Classification	Construction	Professional and Other Services	Materials and Supplies
Minority	15%	5%	5%
Women	10%	5%	5%
Veteran	3%	3%	3%
HUBZone	3%	3%	3%
Service-Disabled Veteran	3%	3%	3%
Small Business Concern (8(a))	3%	3%	3%

Goals may vary per project.

To administer the Program, a contract compliance monitoring and reporting system is to be developed. The SDPP document provides that compliance may be demonstrated through the utilization of certified firms or by making a documented “good faith” effort to do so.

The District has developed SDPP language for bid documents. Bidders/offerors are to make good faith efforts to meet the overall goals. If “diverse firms” are utilized, the Supplier Diversity Utilization Form must be submitted with the bid. If diverse firms are not utilized, the Bidder/Offeror must submit the Request for Waiver with Good Faith Efforts with the bid.

2. Business Owners’ Experiences with KCPS’ Contracting Activities and throughout the Wider Economy

To explore the impacts of KCPS’ policies and procedures and the experiences of firms in seeking work throughout the wider economy, we interviewed 56 individuals about their experiences and solicited their suggestions for changes. Most comments pertained to the City of Kansas City, Missouri, which has had a robust M/WBE program for many years. However, a few individuals had experience with attempting to obtain work on District contracts.

Access to information about contracting opportunities: To the extent participants had even tried to obtain work with KCPS, they reported it was extremely difficult to access information about upcoming District contracts and make connections with other firms.

Small business assistance services: Many M/WBEs welcomed additional assistance for their businesses. Majority contractors also noted the need for supportive services and more financial assistance to M/WBEs. Many participants mentioned assistance with obtaining bonding and financing as a major priority. The inability to obtain working capital and surety bonds for construction contracts were major barriers to working on KCPS projects.

Mentor-protégé programs: Mentor-protégé type efforts, where a small firm would be paired with a larger firm, were welcomed.

Small business set-asides: A popular recommendation was the use of small business set-asides, whereby only certified small businesses would be eligible to submit a bid or proposal. This would increase opportunities for M/WBEs and small firms to obtain work as District prime vendors, not just function as subcontractors or subconsultants. Participants suggested that KCPS follow the model of the City of Kansas City, Missouri’s programs.

Contract size: “Unbundling” contracts into smaller jobs would also assist firms to be awarded prime contracts

3. Utilization, Availability and Disparities in KCPS' Markets

Strict constitutional scrutiny requires that a local government limit its race-based remedial program to firms doing business in its product and geographic markets. CHA therefore analyzed all directly awarded KCPS-funded contracts during the Study period. The Final Contract Data File for analysis contained a total award amount of \$180,487,497.87 representing 177 contracts to primes; of this amount, 13 associated subcontracts received \$1,493,029. The Final Contract Data File was used to determine the geographic and product markets for the analysis, to estimate the utilization of M/WBEs on those contracts, and to calculate M/WBE availability in the District's marketplace.

We first determined the District's product market. Tables A and B present the NAICS codes, the label for each NAICS code, and the industry percentage distribution of spending across NAICS codes, for contracts with and contracts without subcontracting opportunities, respectively.

Table A presents the distribution of the number of contracts and the amount of contract dollars across all industry sectors. Chapter IV provides tables disaggregated by dollars paid to prime contractors and dollars paid to subcontractors.

Table A: Industry Percentage Distribution of All Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	24.8%	24.8%
485410	School and Employee Bus Transportation	21.7%	46.5%
524114	Direct Health and Medical Insurance Carriers	12.9%	59.4%
424490	Other Grocery and Related Products Merchant Wholesalers	9.2%	68.6%
423420	Office Equipment Merchant Wholesalers	4.9%	73.5%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.7%	76.2%
561720	Janitorial Services	2.5%	78.6%
238160	Roofing Contractors	2.1%	80.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.7%	82.4%
562910	Remediation Services	1.4%	83.8%
541110	Offices of Lawyers	1.2%	85.1%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.2%	86.3%
236210	Industrial Building Construction	1.1%	87.4%
524210	Insurance Agencies and Brokerages	1.1%	88.4%
541310	Architectural Services	1.1%	89.5%
541330	Engineering Services	1.1%	90.6%
TOTAL			100.00%²

Source: CHA analysis of KCPS data.

For the purposes of this study, we used 6 counties spanning Missouri and Kansas: Buchanan, Cass, Clay, and Jackson Counties in Missouri; and Johnson, and Wyandotte Counties in Kansas. These counties were used because they represented the geographic market for the government of the City of Kansas City, Missouri, upon

² Agency spending across another 38 NAICS codes comprised 9.4% of all spending.

which the District relies for certification of M/WBEs. We therefore used these counties as the geographic market for further analysis.

The next step was to determine the dollar value of KCPS' utilization of M/WBEs in its market area, as measured by payments to prime firms and associated subcontractors and disaggregated by race and gender. To fill in the agency's missing records for payments to all subcontractors, we contacted the prime vendors to describe in detail their contract and associated subcontracts, including race, gender and dollar amount paid to date, which were often further incomplete. We further developed a Master D/M/WBE Directory based upon lists solicited from government agencies and private organizations. We used the results of this extensive data collection process to assign minority or woman status to the ownership of each firm in the analysis that was otherwise unclassified.

Table B presents the distribution of contract dollars by all industry sectors. Chapter IV provides detailed breakdowns of these results.

Table B: Distribution of Contract Dollars by Race & Gender (share of total dollars)

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,980,366	\$1,980,366
236220	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$44,792,719	\$44,792,719
238160	\$0	\$0	\$0	\$0	\$0	\$42,564	\$42,564	\$3,835,215	\$3,877,779
238210	\$0	\$0	\$0	\$0	\$0	\$403,448	\$403,448	\$4,380,380	\$4,783,828
238220	\$0	\$15,000	\$0	\$0	\$15,000	\$658,817	\$673,817	\$1,500,748	\$2,174,565
238310	\$0	\$0	\$0	\$666,386	\$666,386	\$0	\$666,386	\$638,914	\$1,305,300
238990	\$0	\$0	\$0	\$0	\$0	\$231,326	\$231,326	\$1,583,647	\$1,814,973
423420	\$2,050,000	\$0	\$0	\$0	\$2,050,000	\$0	\$2,050,000	\$6,872,167	\$8,922,167
424490	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,515,453	\$16,515,453
484220	\$0	\$0	\$0	\$0	\$0	\$1,215,289	\$1,215,289	\$1,790,000	\$3,005,289
485410	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$39,135,933	\$39,135,933
524114	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$23,299,712	\$23,299,712
524210	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,958,105	\$1,958,105
541110	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$2,186,051	\$2,186,051
541310	\$28,500	\$588,682	\$0	\$0	\$617,182	\$32,000	\$649,182	\$1,279,792	\$1,928,974
541330	\$84,121	\$886,676	\$0	\$0	\$970,797	\$38,200	\$1,008,997	\$903,500	\$1,912,497
561720	\$99,726	\$0	\$0	\$0	\$99,726	\$85,332	\$185,058	\$4,262,633	\$4,447,691
562910	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$2,555,564	\$2,555,564
TOTAL	\$2,262,347	\$1,490,358	\$0	\$666,386	\$4,419,091	\$2,706,976	\$7,126,068	\$159,470,899	\$166,596,966

Source: CHA analysis of KCPS data.

Using the "custom census" approach to estimating availability and the further assignment of race and gender using the Master Directory and other sources, we determined the aggregated availability of M/WBEs, weighted by KCPS' spending in its geographic and industry markets, to be 18.3 %. Table C presents the weighted availability data for all product sectors combined for the racial and gender categories.

Table C: Aggregated Weighted Availability

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
TOTAL	6.0%	1.6%	1.0%	1.2%	9.8%	8.5%	18.3%	81.7%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

To meet the strict scrutiny requirement that the District consider evidence of disparities to establish its compelling interest in remedying discrimination in its market area, we next calculated disparity ratios for total M/WBE utilization compared to the total weighted availability of M/WBEs, measured in dollars paid. A “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80 percent of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.³ A 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. A more in depth discussion of statistical significance is provided in Appendix C.

Chi-square tests were performed on the disparity ratios to determine the statistical significance of the result. For M/WBEs as a group, all disparities were substantively and statistically significant for all sectors combined.

**Table D: Disparity Ratios by Demographic Group,
All Sectors**

Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE
23.3%‡	56.3%‡	0.0%‡	32.4%‡	27.4%‡	18.9%‡	23.5%‡**	117.2%***

Source: CHA analysis of KCPS data.

‡ Indicates substantive significance

** Indicates statistical significance at the 0.01 level

4. Analysis of Economy-Wide Race and Gender Disparities in KCPS’ Market

We explored the Census Bureau data and literature relevant to how discrimination in the Kansas City area wider economy affects the ability of minorities and women to fairly and fully engage in KCPS’ prime contract and subcontract opportunities.

We analyzed the following data and literature:

- 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.
- Data from the Census Bureau’s American Community Survey (“ACS”) indicate that Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men.
- The 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.

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. Taken together with anecdotal data and the results of other local area disparity studies, this is the type of proof that addresses whether, in the absence of M/WBE contract goals, KCPS will be a passive participant in the discriminatory systems found throughout Missouri. These economy-wide analyses are relevant and probative to whether the agency may continue to employ narrowly tailored race- and gender-conscious measures to ensure equal opportunities to access its contracts and associated subcontracts.

³ See U.S. Equal Opportunity Employment 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.”).

5. Qualitative Evidence of Race and Gender Barriers in KCPS' Market

In addition to quantitative data, the courts look to anecdotal evidence of firms' marketplace experiences to evaluate whether the effects of current or past discrimination continue to impede opportunities for M/WBEs such that race-conscious measures are supportable. To explore this type of anecdotal evidence, we interviewed 56 participants. Most reported that, while progress has been made in reducing barriers on the basis of race and gender, significant inequities remain obstacles to full and fair opportunities. M/WBE contract goals remain necessary to level the playing field.

- *Discriminatory attitudes and negative perceptions of competence:* Many minority and female owners reported that agencies and other firms display negative attitudes about the competency and professionalism of minorities and women. The assumption is that minority firms are less qualified. Women faced continuing sexist remarks and conduct.
- *Obtaining work on an equal basis:* There was unanimous agreement that annual and contract goals remain necessary to level the playing field and equalize opportunities. M/WBEs sought the right to compete on a fair and equal basis. Without goals, M/WBEs believed they would be shut out of the District's and the overall Kansas City area market. Only a handful of Kansas City area large firms apply the same process for private sector work as they do for government projects with goals. Minorities who spoke up about discrimination faced retaliation. Prime contracts were especially difficult to obtain. M/WBEs that did receive prime contracts sometimes felt they were subjected to a double standard. Some WBEs reported that unions were another source of discrimination.

6. Recommendations for a Minority- and Women-Owned Business Enterprise Program for KCPS

The Study's results support the determination that KCPS has a strong basis in evidence to implement a race- and gender-conscious Program and adopt a revised M/WBE policy and procedures. The study period was prior to the implementation of the Supplier Diversity Policy, and so provides a picture of the results without the use of any race- and gender-conscious contracting policies. The record—both quantitative and qualitative—establishes that M/WBEs in the District's market area continue to experience significant disparities in their access to its contracts and private sector opportunities and to those factors necessary for business success. These findings support the inference that discrimination remains a barrier to full and fair opportunities for all firms, and in the absence of contract goals, M/WBEs suffered significant disparities on KCPS-funded jobs. Without the use of contract goals to level the playing field, the District would likely function as a “passive participant” in the “market failure” of discrimination.

Based on this evidence, we make the following recommendations.

Adopt a M/WBE Program Policy and Procedures: The Study results fully support KCPS' compelling interest in utilizing narrowly tailored race- and gender-conscious remedies to ensure equal opportunities for its prime contracts and associated subcontracts. A program based upon the Study should have the following elements:

- Annual aspirational MBE/WBE goals for overall agency spending based on the weighted availability of the Study, presented in Chapter IV.
- A methodology for setting contract specific MBE and WBE goals.
- Narrowly tailored certification requirements.
- Program implementation policies and procedures, such as counting bidders' participation towards goals; criteria to determine whether a certified firm is performing a commercially useful function; contract performance standards such as when and how a certified firm may be substituted during performance; contract closeout evaluation tests; sanctions for non-compliance; and staff job descriptions and evaluation policies. It is critical that sufficient resources be put to the new Program; policies without enforcement will be inadequate to remediate the discriminatory barriers found in the Report.

Implement an electronic data collection and monitoring system: The system should have at least the following functionality: full contact information for all firms; contract/project-specific goal setting, using the data from this study; utilization plan capture; contract compliance for certified and non-certified prime contract and

subcontract payments; spend analysis of informal expenditures; program report generation; and import/export integration with existing systems.

Focus on reducing barriers to prime contracting opportunities: Unbundle projects into less complex scopes and lower dollar values. Reduce experience, insurance and bonding requirements, where possible.

Adopt a small business setaside: Set aside some smaller contracts for bidding only by small, local firms as prime contractors.

Increase vendor communication and outreach to M/WBEs and small firms: Conduct more outreach for KCPS contracts, with a focus on industries in which M/WBE have received few opportunities. Provide annual contracting forecasts of larger contracts.

Partner with other agencies to provide bonding, financing and technical assistance programs: Work with other Kansas City area agencies, especially the City of Kansas City, Missouri on innovative programs such as the City-sponsored financing assistance program with Lead Bank and Corner Stone Financial.

Provide training to KCPS staff with contracting responsibilities or vendor interface: Conduct training on compliance with the program. Reaffirm the District's commitment to supplier diversity and the program, and encourage all departments to buy into the values and objectives of the program.

Conduct regular M/WBE program reviews: KCPS should conduct a full and thorough review of the evidentiary basis for the Program approximately every five to seven years. A sunset date is also required by the courts.

Develop Performance Measures for Program Success: KCPS should develop quantitative performance measures for overall success of its programs. These could include progress towards meeting the overall, annual MBE and WBE goals; tracking good faith efforts waivers; increased bids/proposals from certified firms; increased variety of types of contracts awarded to M/WBE prime vendors and subcontractors; graduation from the programs, etc.

II. LEGAL STANDARDS FOR KANSAS CITY PUBLIC SCHOOL'S MINORITY-AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM

A. Summary of Constitutional Standards

To be effective, enforceable, and legally defensible, a race-based program for the Kansas City Public Schools ("KCPS" or "District") contracts must meet the judicial test of constitutional "strict scrutiny." Strict scrutiny is the highest level of judicial review and consists of two elements:

- The government must establish its "compelling interest" in remedying 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.
- Any remedies adopted must be "narrowly tailored" to that discrimination, that is, the program must be directed at the types and depth of discrimination identified.⁴

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

- Statistical evidence of the underutilization of minority firms by the agency and/or throughout the agency's geographic and industry market area compared to their availability in the market area. These are as disparity indices, comparable to the type of "disparate impact" analysis used in employment discrimination cases.
- Anecdotal evidence of race-based barriers to the full and fair participation of minority firms in the market area and in seeking contracts with the agency, comparable to the "disparate treatment" analysis used in employment discrimination cases.⁵ Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, etc.

The narrow tailoring requirement has been met through the satisfaction of five factors to ensure that the remedy "fits" the evidence:

- The efficacy of race-neutral remedies at overcoming identified discrimination.
- The relationship of numerical benchmarks for government spending to the availability of minority- and women-owned firms and to subcontracting goal setting procedures.
- The congruence between the remedies adopted and the beneficiaries of those remedies.
- Any adverse impact of the relief on third parties.
- The duration of the program.⁶

In *Adarand v. Peña*,⁷ the Court extended the analysis of strict scrutiny to race-based federal enactments such as the Disadvantaged Business Enterprise ("DBE") program for federally-assisted transportation contracts.⁸ Just as in the local government context, the national government must have a compelling interest for the use of race and the remedies adopted must be narrowly tailored to the evidence relied upon.

In general, courts have subjected preferences for Women-Owned Business Enterprises ("WBEs") to "intermediate scrutiny." Gender-based classifications must be supported by an "exceedingly persuasive justification" and be "substantially related" to the objective.⁹ However, appellate courts have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE

⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁵ *Id.* at 509.

⁶ *United States v. Paradise*, 480 U.S. 149, 171 (1987).

⁷ *Adarand v. Peña*, 515 U.S. 200 (1995).

⁸ While the limitation of the DBE program's benefits to firms owned by "socially and economically disadvantaged" persons is facially race-neutral, the Eighth Circuit and other courts have held that "the program is subject to strict judicial scrutiny, no doubt because the statute employs a race-based rebuttable presumption to define this class of beneficiaries and authorizes the use of race-conscious remedial measures." *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 969 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

⁹ *Cf. United States v. Virginia*, 518 U.S. 515 (1996).

program.¹⁰ Therefore, we advise that the District evaluate gender-based remedies under the strict scrutiny standard.

Classifications not based on race, ethnicity, religion, national origin or gender are subject to the lesser standard of review of “rational basis” scrutiny, because the courts have held there are no equal protection implications under the Fourteenth Amendment for groups not subject to systemic discrimination.¹¹ In contrast to strict scrutiny of government action directed towards persons of “suspect classifications” such as racial and ethnic minorities, rational basis means the governmental action must only be “rationally related” to a “legitimate” government interest. Thus, preferences for persons with disabilities, veterans, etc. may be enacted with vastly less evidence than race- or gender-based measures to combat historic discrimination.

Unlike most legal challenges, the defendant has the initial burden of producing “strong evidence” in support of a race-conscious program.¹² 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.¹³ “[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.”¹⁴ A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”¹⁵ For example, in the challenge to the Minnesota and Nebraska DBE programs, the Eighth Circuit held that “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 highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.”¹⁶ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.¹⁷ A plaintiff cannot rest upon general criticisms of studies or other evidence; it must carry the case that the government’s proof is inadequate to meet strict scrutiny, rendering the legislation or governmental program illegal.¹⁸

There is no need of formal legislative findings of discrimination,¹⁹ nor “an ultimate judicial finding of discrimination before [a local government] can take affirmative steps to eradicate discrimination.”²⁰

To meet strict scrutiny, studies have been conducted that 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 women-owned firms and their actual utilization compared to white male-owned businesses. Quality studies also examine the elements of the agency’s programs to determine whether they are sufficiently narrowly tailored. The following is a detailed discussion of the parameters for conducting studies leading to defensible programs that can establish the State’s compelling interest in remedying discrimination and developing narrowly tailored initiatives.

¹⁰ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007) (“*Northern Contracting III*”).

¹¹ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹² *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).

¹³ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941 (2001) (“*Adarand VII*”); *W.H. Scott Construction Co., Inc. v. City of Jackson, Mississippi*, 199 F.3d 206, 219 (5th Cir. 1999).

¹⁴ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997).

¹⁵ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989, *cert. denied*, 540 U.S. 1027 (2003) (10th Cir. 2003).

¹⁶ *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.”).

¹⁷ *Engineering Contractors II*, 122 F.3d at 916; *Coral Construction Co. v. King County*, 941 F.2d 910 921 (9th Cir. 1991).

¹⁸ *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works II*, 36 F.3d at 1522-1523; *Webster*, 51 F. Supp. 2d at 1364; *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

¹⁹ *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999).

²⁰ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 2003).

B. City of Richmond v. J.A. Croson Co.

City of Richmond v. J.A. Croson Co. established the constitutional contours of permissible race-based public contracting programs. Reversing long established law, the Supreme Court for the first time extended the highest level of judicial examination from measures designed to limit the rights and opportunities of minorities to legislation that benefits these historic victims of discrimination. Strict scrutiny requires that a government entity prove both its “compelling interest” in remedying identified discrimination based upon “strong evidence,” and that the measures adopted to remedy that discrimination are “narrowly tailored” to that evidence. However benign the government’s motive, race is always so suspect a classification that its use must pass the highest constitutional test of “strict scrutiny.”

The Court struck down the City of Richmond’s Minority Business Enterprise Plan that required prime contractors awarded City construction contracts to subcontract at least 30 percent of the project to Minority-Owned Business Enterprises (“MBEs”). A business located anywhere in the country which was at least 51 percent owned and controlled by “Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut” citizens was eligible to participate. The Plan was adopted after a public hearing at which no direct evidence was presented that the City had discriminated on the basis of race in awarding contracts or that its prime contractors had discriminated against minority subcontractors. The only evidence before the City Council was: (a) Richmond’s population was 50 percent Black, yet less than one percent of its prime construction contracts had been awarded to minority businesses; (b) local contractors’ associations were virtually all White; (c) the City Attorney’s opinion that the Plan was constitutional; and (d) general 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 illegal conduct:

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment... [I]f the City could show that it had essentially become a “passive participant” in a system of racial exclusion...[it] could take affirmative steps to dismantle such a system.²¹

Strict scrutiny of race-based remedies is required to determine whether racial classifications are in fact motivated by either notions of racial inferiority or blatant racial politics. This highest level of judicial review “smokes out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.²² It further ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The Court made clear that strict scrutiny seeks to expose racial stigma; racial classifications are said to create racial hostility if they are based on notions of racial inferiority.²³

Race is so suspect a basis for government action that more than “societal” discrimination is required to restrain racial stereotyping or pandering. The Court provided no definition of “societal” discrimination or any guidance about how to recognize the ongoing realities of history and culture in evaluating race-conscious programs. The Court simply asserted that:

[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.... [A]n amorphous claim that there has been past discrimination in a

²¹ 488 U.S. at 491-92.

²² 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 decision maker for the use of race in that particular context.”).

²³ 488 U.S. at 493.

particular industry cannot justify the use of an unyielding racial quota. It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination.²⁴

Richmond's evidence was found to be lacking in every respect. 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, Richmond 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, whereas a local government is further constrained by the Amendment's Equal Protection Clause.

In the case at hand, the City has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in City construction projects. The City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the City has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary."²⁵

The foregoing analysis was applied only to Blacks. The Court then emphasized that there was "absolutely no evidence" 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."²⁶

Having found that Richmond had not presented evidence in support of its compelling interest in remedying discrimination—the first prong of strict scrutiny—the Court went on to make two observations about the narrowness of the remedy—the second prong of strict scrutiny. First, Richmond had not considered race-neutral means to increase MBE participation. Second, the 30 percent quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.²⁷ Further, Justice O'Connor rejected the argument that individualized consideration of Plan eligibility is too administratively burdensome.

Apparently recognizing that the opinion might be misconstrued to categorically 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

²⁴ *Id.* at 499.

²⁵ *Id.* at 510.

²⁶ *Id.*

²⁷ See *Grutter*, 529 U.S. at 336-337 (quotas are not permitted; race must be used in a flexible, non-mechanical way).

individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.²⁸

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.²⁹ 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.³⁰

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

[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 (.67%). There were no statistics presented regarding 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*.³¹

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 subcontracting goals based upon the availability of MBEs to perform the scopes of the contract in the government's local market area. In contrast, the DBE Program avoids these pitfalls. Part 26 "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."³²

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 Kanas City Public Schools' Minority- and Women-Owned Business Enterprise Program

It is well established that disparities in 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

²⁸ 488 U.S. at 509 (citations omitted).

²⁹ *Id.* at 502.

³⁰ See, e.g., *Northern Contracting III*, 473 F.3d at 723.

³¹ *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").

³² *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983, 994 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

critical to their success will meet strict scrutiny. Discrimination must be shown using statistics and economic models to examine the effects of systems or markets on different groups, as well as by evidence of personal experiences with discriminatory conduct, policies or systems.³³ 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.³⁴

Croson's admonition that “mere societal” discrimination is not enough to meet strict scrutiny does not apply 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.”³⁵

Nor must the District 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.”³⁶ 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 Denver projects with M/WBE goals but refused to use them on private projects without goals.

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

1. Define KCPS' Market Areas

The first step is to determine the market areas in which the District 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.³⁷ The District 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.³⁸

A commonly accepted definition of geographic market area for disparity studies is the locations that account for at least 75 percent of the agency's contract and subcontract dollar payments.³⁹ Likewise, the accepted approach is to analyze those detailed industries that make up at least 75 percent of the prime contract and subcontract payments for the Study period.⁴⁰

2. Examine Disparities between M/WBE Availability and KCPS' Utilization of M/WBEs

Next, the study must estimate the availability of minorities and women to participate in KCPS' contracts and its history of utilizing M/WBEs as prime contractors and associated subcontractors. The primary inquiry is whether there are statistically significant disparities between the availability of M/WBEs and the utilization of such firms on District contracts.

³³ *Adarand VII*, 228 F.3d at 1166 (“statistical and anecdotal evidence are appropriate”).

³⁴ *Id.*

³⁵ *Concrete Works IV*, 321 F.3d at 976.

³⁶ *Id.* at 977.

³⁷ *Croson*, 488 U.S. at 508.

³⁸ *Concrete Works II*, 36 F.3d at 1520 (to confine data to strict geographic boundaries would ignore “economic reality”).

³⁹ “*Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*,” Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, p. 49 (“National Disparity Study Guidelines”).

⁴⁰ *Id.* at pp. 50-51.

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.⁴¹

This is known as the "disparity ratio" or "disparity index." 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.⁴² An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission's "80 percent" rule that a ratio less than 80 percent presents a *prima facie* case of discrimination.⁴³

The first step is to calculate the availability of minority- and women-owned firms in the government's geographic and industry market area. 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.⁴⁴

There is no requirement to control for firm size, area of specialization, and whether the firm has bid on agency projects. While it may be true that M/WBEs are smaller in general than white male firms, most construction firms are small and can expand and contract to meet their bidding opportunities. Importantly, size and experience are not race- and gender-neutral variables: "M/WBE construction firms are generally smaller and less experienced *because of discrimination*."⁴⁵ To rebut this inference, a plaintiff must proffer its own study showing that the disparities disappear when such variables are held constant and that controlling for firm specialization explained the disparities. Additionally, *Croson* does not "require disparity studies that measure whether construction firms are able to perform a *particular contract*."⁴⁶

KCPS need not prove that the statistical inferences of discrimination are "correct." In upholding Denver's M/WBE Program, the Tenth Circuit 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.⁴⁷

Nor must KCPS 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.⁴⁸

Next, the v 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.

⁴¹ *Croson*, 488 U.S. at 509; see *Webster*, 51 F.Supp.2d at 1363, 1375.

⁴² *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 Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990).

⁴³ 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 F.3d at 914.

⁴⁴ *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at *70 (Sept. 8, 2005) (IDOT's custom census approach was supportable because "discrimination in the credit and bonding markets may artificially reduce the number of M/WBEs").

⁴⁵ *Concrete Works IV*, 321 F.3d at 983 (emphasis in the original).

⁴⁶ *Id.* at 987-88 (emphasis in the original).

⁴⁷ *Id.* at 971.

⁴⁸ *Id.* at 973 (emphasis in the original).

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.⁴⁹

Similarly, statistical evidence by its nature cannot identify the individuals responsible for the discrimination.⁵⁰

3. Examine the Results in KCPS' Unremediated Markets

The results of contracts solicited without goals or with only voluntary efforts such as were applied to the vast majority of the District's contracts during the study period are an excellent indicator of whether discrimination continues to impact opportunities in public contracting. Evidence of race and gender discrimination in relevant "unremediated"⁵¹ markets provides an important indicator of what level of actual M/WBE participation can be expected in the absence of government mandated affirmative efforts to contract with M/WBEs.⁵² As the Eleventh Circuit has acknowledged, "the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market."⁵³ If M/WBE utilization is below availability in unremediated markets, an inference of discrimination may be supportable. The courts have held that the virtual disappearance of M/WBE participation after programs have been enjoined or abandoned strongly indicates substantial barriers to minority subcontractors, "raising the specter of racial discrimination."⁵⁴ Unremediated markets analysis addresses whether the government has been and continues to be a "passive participant" in such discrimination, in the absence of affirmative action remedies.⁵⁵ The court in the challenge to the City of Chicago's M/WBE program for construction contracts held that the "dramatic decline in the use of M/WBEs when an affirmative action program is terminated, and the paucity of use of such firms when no affirmative action program was ever initiated," was proof of the City's compelling interest in employing race- and gender-conscious measures.⁵⁶ Evidence of unremediated markets "sharpens the picture of local market conditions for MBEs and WBEs."⁵⁷

Therefore, if M/WBEs are "overutilized" because of the entity's program, that does not end the study's inquiry. Where the government has been implementing affirmative action remedies, M/WBE utilization reflects those efforts; it does not signal the end of discrimination. Any M/WBE "overutilization" on projects with goals goes only to the weight of the evidence because it reflects the effects of a remedial program. For example, Denver presented evidence that goals and non-goals projects were similar in purpose and scope and that the same pool of contractors worked on both types. "Particularly persuasive" was evidence that M/WBE participation declined significantly when the program was amended in 1989; the utilization of M/WBEs on City projects had been affected by the affirmative action programs that have been in place in one form or another since 1977.

4. Analyze Economy-Wide Evidence of Race- and Gender-Based Disparities

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 whether the market functions properly for all

⁴⁹ *Id.* at 971.

⁵⁰ *Id.* at 973.

⁵¹ "Unremediated market" means "markets that do not have race- or gender-conscious subcontracting goals in place to remedy discrimination." *Northern Contracting II*, at *36.

⁵² See, e.g., *Western States*, 407 F.3d at 992 (Congress properly considered evidence of the "significant drop in racial minorities' participation in the construction industry" after state and local governments removed affirmative action provisions).

⁵³ *Engineering Contractors II*, 122 F.3d at 912.

⁵⁴ *Adarand VII*, 228 F.3d at 1174.

⁵⁵ See also *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 599-601 (3rd Cir. 1996) ("*Philadelphia III*").

⁵⁶ *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 737 (N.D. Ill. 2003); see also *Concrete Works IV*, 321 F.3d at 987-988.

⁵⁷ *Concrete Works II*, 36 F.3d at 1529.

firms regardless of the race or gender of their ownership. These analyses contributed to the successful defense of Chicago's construction program.⁵⁸ As 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.⁵⁹

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 again demonstrates that *existing* M/WBEs are precluded from competing for public contracts."⁶⁰ 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."

For example, in unanimously upholding the DBE Program for federal-aid transportation 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.⁶¹ 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.⁶²

5. Evaluate Anecdotal Evidence of Race- and Gender-Based Barriers

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

⁵⁸ *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 met compelling interest using this framework).

⁵⁹ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-69 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001).

⁶⁰ *Id.*

⁶¹ *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001); *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*");

⁶² *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.").

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.”⁶³ 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.⁶⁴ 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.”⁶⁵ “[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.”⁶⁶

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making as opposed to judicial proceedings. “Plaintiff offers no rationale as to why a fact finder could not rely on the State’s ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not—indeed cannot—be verified because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perception.”⁶⁷ 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.”⁶⁸

D. Narrowly Tailoring a Minority-Owned and Women-Owned Business Enterprise Procurement Program for Kansas City Public Schools

Even if the District has a strong basis in evidence to believe that race- and gender-based measures are needed to remedy identified discrimination, the program must still be narrowly tailored to that evidence. We note that programs that closely mirror those of the U.S. Department of Transportation’s Disadvantaged Business Enterprise program⁶⁹ have been upheld using that framework.⁷⁰ The courts have repeatedly examined the following factors in determining whether race-based remedies are narrowly tailored to achieve their purpose:

- The efficacy of race-neutral remedies at overcoming identified discrimination;
- The relationship of numerical benchmarks for government spending to the availability of minority- and women-owned firms and to subcontracting goal setting procedures;
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;
- The congruence between the remedies adopted and the beneficiaries of those remedies;
- Any adverse impact of the relief on third parties; and
- The duration of the program.⁷¹

1. Consider Race- and Gender-Neutral Remedies

Race- and gender-neutral approaches are a necessary component of a defensible and effective M/WBE program⁷² and the failure to seriously consider such remedies has been fatal to several programs.⁷³ Difficulty in

⁶³ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

⁶⁴ *Adarand VII*, 228 F.3d at 1168-1172.

⁶⁵ *Concrete Works II*, 36 F.3d at 1520, 1530.

⁶⁶ *Engineering Contractors II*, 122 F.3d at 926.

⁶⁷ *Id.* at 249.

⁶⁸ *Concrete Works IV*, 321 F.3d at 989.

⁶⁹ 49 C.F.R. Part 26.

⁷⁰ See, e.g., *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).

⁷¹ *United States v. Paradise*, 480 U.S. 149, 171 (1987); see also *Sherbrooke*, 345 F.3d at 971-972.

accessing procurement opportunities, restrictive bid specifications, excessive experience requirements, and overly burdensome insurance and/or bonding requirements, for example, might be addressed by KCPS without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units, providing technical support, and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.⁷⁴ Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.⁷⁵

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 it predicts will be met through such measures has been central to the holdings that the DBE program regulations meet narrow tailoring.⁷⁶

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.⁷⁷ 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 subsumed in the exhaustion requirement.”⁷⁸

2. Set Targeted MBE and WBE Goals

Numerical goals or benchmarks for M/WBE participation must be substantially related to their availability in the relevant market.⁷⁹ For example, the DBE program regulations require 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.⁸⁰ “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*.”⁸¹

Goals can be set at various levels of particularity and participation. The District may set an overall, aspirational goal for its annual, aggregate spending. Annual goals can be further disaggregated by race and gender. Approaches range from a single M/WBE or DBE goal that includes all racial and ethnic minorities and nonminority women,⁸² to separate goals for each minority group and women.⁸³ We note, however, that Ohio’s Program was specifically faulted for lumping together all “minorities,” with the court questioning the legitimacy of forcing African American contractors to share relief with recent Asian immigrants.⁸⁴

The Eighth Circuit has recognized that goal setting is not an absolute science. In holding the DBE regulations to be narrowly tailored, the court noted that “[t]hough the underlying estimates may be inexact, the exercise

⁷² *Croson*, 488 U.S. at 507 (Richmond considered no alternatives to race-based quota); *Drabik II*, 214 F.3d at 738; *Philadelphia III*, 91 F.3d at 609 (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).

⁷³ 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.

⁷⁴ See 49 CFR § 26.51.0.

⁷⁵ *Croson*, 488 U.S. at 503 n.3; *Webster*, 51 F.Supp.2d at 1380.

⁷⁶ See, e.g., *Sherbrooke*, 345 F.3d. at 973

⁷⁷ *Gutter*, 529 U.S. at 339.

⁷⁸ *Coral Construction*, 941 F.2d at 923.

⁷⁹ *Webster*, 51 F.Supp.2d at 1379, 1381 (statistically insignificant disparities are insufficient to support an unexplained goal of 35 percent M/WBE participation in County contracts); see also *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, et al.*, 83 F.Supp.2d 613, 621 (D. Md. 2000) (“*Baltimore I*”).

⁸⁰ 49 C.F.R. § 26.45.

⁸¹ *Id.*

⁸² See 49 C.F.R. §26.45(h) (overall goal must not be subdivided into group-specific goals).

⁸³ See *Engineering Contractors II*, 122 F.3d at 900 (separate goals for Blacks, Hispanics and women).

⁸⁴ *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000) (“*Drabik II*”); see also *Western States*, 407 F.3d at 998 (“We have previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.”).

requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets.”⁸⁵ However, sheer speculation cannot form the basis for an enforceable measure.⁸⁶

It is settled case law that goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets; goals must be contract specific. “Standard” goals are not defensible. 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. Not only is this legally mandated,⁸⁷ 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, there is no option to avoid meeting narrow tailoring because to do so would be more burdensome.

3. Ensure Flexibility of Goals and Requirements

It is imperative that remedies not operate as fixed quotas.⁸⁸ A 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.⁸⁹ Further, firms that meet the goals cannot be favored over those who made good faith efforts. In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the USDOT’s DBE program.⁹⁰ This feature has been central to the holding that the DBE program meets the narrow tailoring requirement.⁹¹

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

The District must consider the over- or under-inclusiveness of those persons who may benefit from a race- and gender-conscious program for its contracts. This analysis addresses whether the remedies truly target the evil identified. The “fit” between the problem and the remedy manifests in three ways: which groups to include; how to define those groups; and which persons will be eligible to be included within those groups.

The groups to include must be based upon the evidence.⁹² 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.”⁹³ 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.”⁹⁴ However, at least one court has held some quantum of evidence of discrimination for each group is sufficient; *Croson* does not require that each group included in the ordinance suffer equally from discrimination.⁹⁵ Therefore, remedies should be limited to those firms that have suffered actual harm in the market area.⁹⁶

Next, the firm’s owner(s) must be disadvantaged. The DBE Program’s rebuttable presumptions of social and economic disadvantage, including the requirement that the disadvantaged owner’s personal net worth not exceed a certain ceiling and that the firm must meet the Small Business Administration’s size definitions for its

⁸⁵ *Sherbrooke*, 345 F.3d. at 972.

⁸⁶ *BAGC v. Chicago*, 298 F.Supp.2d at 740 (City’s MBE and WBE goals were “formulistic” percentages not related to the availability of firms).

⁸⁷ See *Sherbrooke*, 345 F.3d at 972; *Coral Construction*, 941 F.2d at 924.

⁸⁸ See 49 C.F.R 26.43 (quotas are not permitted and setaside contracts may be used only in limited and extreme circumstances “when no other method could be reasonably expected to redress egregious instances of discrimination”).

⁸⁹ See, e.g., *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.”).

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

⁹¹ See, e.g., *Sherbrooke*, 345 F.3d. at 972.

⁹² *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990, 1007-1008 (3rd Cir. 1993) (“*Philadelphia II*”) (strict scrutiny requires data for each minority group; data was insufficient to include Hispanics, Asians or Pacific Islanders or Native Americans).

⁹³ *Webster*, 51 F.Supp.2d at 1380–1381.

⁹⁴ *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001).

⁹⁵ *Concrete Work IV*, 321 F.3d at 971 (Denver introduced evidence of bias against each group; that is sufficient).

⁹⁶ *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 254 (4th Cir. 2010) (“[T]he statute contemplates participation goals only for those groups shown to have suffered discrimination. As such, North Carolina’s statute differs from measures that have failed narrow tailoring for overinclusiveness.”).

industry, have been central to the courts' holdings that it is narrowly tailored.⁹⁷ "[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively [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."⁹⁸ Further, anyone must be able challenge the disadvantaged status of any firm.⁹⁹

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.¹⁰⁰ However, "innocent" parties can be made to share some of the burden of the remedy for eradicating racial discrimination.¹⁰¹ The burden of compliance need not be placed only upon those firms directly responsible for the discrimination. The proper focus is whether the burden on third parties is "too intrusive" or "unacceptable."

Burdens must be proven, and cannot constitute mere speculation by a plaintiff.¹⁰² "Implementation of the race-conscious contracting goals for which TEA-21 provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although this places a very real burden on non-DBE firms, this fact alone does not invalidate TEA-21. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities."¹⁰³

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 and there is no requirement that a program be limited only to the subcontracting portions of contracts. The DBE program regulations provide this remedy for discrimination against DBEs seeking prime work,¹⁰⁴ and the regulations do not limit the application of the program to only subcontracts.¹⁰⁵ The trial court in upholding the Illinois DOT's DBE program explicitly recognized that barriers to subcontracting opportunities affect the ability of DBEs also 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

⁹⁷ *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 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).

⁹⁸ *Id.* at 973.

⁹⁹ 9 C.F.R. §26.87.

¹⁰⁰ See *Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County* ("Engineering Contractors I"), 943 F.Supp. 1546, 1581-1582 (S.D. Fla. 1996) (County chose not to change its procurement system).

¹⁰¹ *Concrete Works IV*, 321 F.3d at 973; *Wygant*, 476 U.S. at 280-281; *Adarand VII*, 228 F.3d 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").

¹⁰² *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).

¹⁰³ *Western States*, 407 F.3d at 995.

¹⁰⁴ 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.").

¹⁰⁵ 49 C.F.R. § 26.45(a)(1).

particularly burdensome in the construction industry, a highly competitive industry with tight profit margins, considerable hazards, and strict bonding and insurance requirements.¹⁰⁶

6. Examine the Duration and Review of the Program

Race-based programs must have duration limits. A race-based remedy must “not last longer than the discriminatory effects it is designed to eliminate.”¹⁰⁷ The unlimited duration and lack of review were factors in the court’s holding that 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 2004.¹⁰⁸ How old is too old is not definitively answered,¹⁰⁹ but governments would be wise to analyze data at least once every five or six years.

In contrast, the USDOT DBE program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.¹¹⁰ 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 5 years.”¹¹¹

¹⁰⁶ *Northern Contracting II*, 2005 U.S. Dist. LEXIS 19868 at 74.

¹⁰⁷ *Adarand III*, 515 U.S. at 238.

¹⁰⁸ *BAGC v. Chicago*, 298 F.Supp.2d at 739.

¹⁰⁹ 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) (fourteen-year-old evidence of discrimination “too remote to support a compelling governmental interest.”).

¹¹⁰ See *Western States*, 407 F.3d at 995.

¹¹¹ *Rowe*, 615 F.3d at 253.

III. KANSAS CITY PUBLIC SCHOOLS SUPPLIER DIVERSITY PROCUREMENT PROGRAM

A. Kansas City Public Schools' Supplier Diversity Procurement Program

The District first adopted a Minority Owned Business Enterprise and Women Owned Business Enterprise Participation policy in its Business & Finance Division Procurement Services Procedures for Fiscal Year 2011-2012, Section III.D. provides:

Every contract opportunity or expenditure is to be analyzed to see if [M/WBEs] can be included. If MBEs and/or WBEs are included, the certification letter from the City of Kansas City, Missouri should be submitted to Procurement Services with the correct requisition number written on the certification letter. MBE and WBE participation is a District Commitment and strongly encouraged in all facets of our business dealings. End users presenting service agreement and contracts to the Procurement and Contract Committee should expect vigorous review of the M/WBE efforts.

KCPS next adopted a Supplier Diversity Procurement Program (SDPP) policy in 2015. It is unclear whether the SDPP supersedes the earlier directive. The SDPP seeks to ensure MBEs, WBEs, Veteran Business Enterprises (VBE), Service-Disabled Veteran Business Enterprises (SDVBEs), Historically Underutilized Business Zone (HUBZone) Businesses under the HUBZone Empowerment Act,¹¹² and Small Business Concerns under the U.S. Small Business Administration's 8(a) program have the maximum practicable opportunity to participate and compete for KCPS purchases and contracts.

KCPS is committed to the following program principles:

- To influence the depth and diversity of the vendor pool by promoting fair and open access for KCPS business opportunities.
- To cultivate an inclusive organization that reflects the marketplace and fuels economic development for the communities that we live in and serve.
- To ensure strict compliance with KCPS's Supplier Diversity policies and procedures, all regulatory agency requirements, as well as with federal, state, and local procurement regulations and programs.

The SDPP does not alter current purchasing policies and procedures. Further, competitive opportunities for firms in the Program must be commensurate with the merits of their offerings and their proven affiliations and/or demonstrated performance.

Similar to private sector supplier diversity programs, KCPS categorizes firms as "first tier" and "second tier," rather than the usual government approach of "prime vendors" and "subcontractors/subconsultants/suppliers."

Payment is made off of Purchase Orders (POs). POs are not tied to the original contract. As discussed fully in Chapter IV, this lack of record keeping and database development made is almost impossible to determine actual payments for the contracts in the Sample Contract Data File.

KCPS accepts certifications from the City of Kansas City, Missouri; the State of Missouri; the U.S. Small Business Administration; National Minority Supplier Development Council; Women's Business Enterprise National Council; National Women Business Owners Corporation; and other state certifications.

KCPS' current overall goals are as follows:

¹¹² P.L. 105-135 (1997).

Classification	Construction	Professional and Other Services	Materials and Supplies
Minority	15%	5%	5%
Women	10%	5%	5%
Veteran	3%	3%	3%
HUBZone	3%	3%	3%
Service-Disabled Veteran	3%	3%	3%
Small Business Concern (8(a))	3%	3%	3%

The evidentiary basis for these goals is not provided.

Goals may vary per project. However, we were not provided with any policies, procedures or forms to implement contract specific goal setting.

The SDPP is to be implemented by the Superintendent or designee, who will be responsible for monitoring the Program. A contract compliance monitoring and reporting system is to be developed. The SDPP document provides that compliance may be demonstrated through the utilization of certified firms or by making a documented “good faith” effort to do so.

The District has developed SDPP language for bid documents. Bidders/offers are to make good faith efforts to meet the overall goals. If “diverse firms” are utilized, the Supplier Diversity Utilization Form must be submitted with the bid. This Form requires the contact information for the certified firm; the scope of work of the certified firm; the price of the subcontract; a copy of the firm’s certification; and the signature of both parties. If diverse firms are not utilized, the Bidder/Offeror must submit the Request for Waiver with Good Faith Efforts with the bid. The Waiver form requires a detailed summary of the reason or the request, including the Bidder’s/Offeror’s efforts to recruit diverse firm; its contacts with diverse firms; steps taken to divide the project into smaller units; efforts to negotiate with diverse firms; the reasons for rejecting any firms with which it negotiated; and efforts “to assist a diverse firm in overcoming any requirements such firm may not have met.”

No further instructions are standards or provided, such as how participation will be counted, including whether a bidder/proposer may count firms towards more than one category or whether a certified bidder/proposer may count its participation towards meeting the goals; whether a certified firm must perform a commercially useful function; how a diverse firm may be substituted during contract performance; contractors’ reporting requirements, etc.

There is no electronic system for gathering contract records and monitoring M/WBE participation. To the contrary, this study was slowed down for many months because of the lack of contract records. KCPS was unable to provide a list of the contracts awarded during the study period. Instead, we had to gather minutes of District Board’s monthly meetings and extract information about that month’s contract awards. These awards lacked contact information, race, gender and industry for the vendor and any information about subcontractors. The District further could not provide payment information on its contracts during the study period. We therefore had to ascertain based on other public records how to contact the vendor to obtain payment information, subcontractors, and the race, gender and industry/scope of work of each firm. For those vendors we were able to locate, many did not have the necessary data. This limited the scope of the study.

It is our understanding that KCPS is in the process of implementing an accounting and procurement system to capture payment records for prime vendors.

B. Experiences with Kansas City Public Schools' Contracting Activities

To explore the impacts of KCPS' current race- and gender-neutral contracting activities, we interviewed 56 individuals about their experiences and solicited their suggestions for changes. Most comments pertained to the City of Kansas City, Missouri, which has had a robust M/WBE program for many years. However, a few individuals had experience with attempting to obtain work on District contracts.

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

1. Access to information about contracting opportunities

To the extent participants had even tried to obtain work with KCPS, they reported it was extremely difficult to access information about upcoming District contracts and make connections with other firms.

The School District when they dismantled their program two superintendents ago, you can't even find out about their work.... We have to scramble around and look for information, little bits and there, and then when we do put an application or try to work with this school board, which I've done, I get the runaround.

[The] School District['s access], it's abysmal.

If you're dealing with ... the School District ... it's virtually impossible to find the person who would give you that information [on current or future opportunities].

2. Small business assistance services

Many M/WBEs welcomed additional assistance for their businesses, such as programs on how to estimate jobs, comply with government paperwork, conduct effective marketing, etc.

Estimating is the biggest single need I encounter with the people I deal with.... The Builders Association program is the Cadillac but you're not going to do that in a couple of one-hour seminars. Additionally, if you're not willing to buy some software, if you're still taking off everything by hand and use some paper plans, you're not going to get there.

Majority contractors also noted the need for supportive services.

Legal counsel, accounting assistance...especially legal services [are needed] because a lot of people don't know how to evaluate the contracts that they are getting from the general contractors or the subcontractors and the next thing you know is that they have problems, they have issues because the contract is really in the favor of the general contractor or subcontractor.... People buy QuickBooks and they don't have a clue of how to set it up, and they set it up and it is garbage in and garbage out.

Many firm participant's mentioned assistance with obtaining bonding and financing was a major priority for M/WBEs and other small firms. The inability to obtain working capital and surety bonds for construction contracts were major barriers to working on government projects.

I was told to my face by a banker that I was a non-traditional business owner and therefore I was not going to be considered for a loan for my business plan. Bonding and insurance, same situation. I know based on my financial statements, what my bonding capacity should be. I am at roughly 60 to 75 percent allowed that capacity without explanation.

[The Stadium project had] an umbrella bond and under that bond everybody that was on the project paid their proportion so it did not become an issue for anybody, bonding was not the issue.

The City of Kansas City, Missouri's recent initiative Contractors Loan Program, in partnership with Lead Bank of Kansas City and Corner Stone Financial, was praised as an example of the type of innovative program owners found useful and that the District should emulate.

The City has created partnerships with banks here. They have taken their own initiative in regards to the City projects.

3. Race- and Gender-Neutral Procurement Policies

Mentor-protégé type efforts, where a small firm would be paired with a larger firm, were welcomed.

If there was a mentoring kind of program or a program to where, you know, let's help the more emerging businesses to get to that next level, because you don't just start at that level, unless you've been working it for 25 years and you start your own company. That's where I think we can really help the smaller business and emerging business on.

Another popular recommendation was the use of small business set-asides, whereby only certified small businesses would be eligible to submit a bid or proposal. This would increase opportunities for M/WBEs and small firms to obtain work as KCPS prime vendors, not just function as subcontractors or subconsultants. Participants suggested that the District follow the model of KCMO programs.

[The City of Kansas City, Missouri is] setting aside small business set-aside projects as well. So, you received training.

"Unbundling" contracts into smaller jobs would also assist firms to be awarded prime contracts.

Kansas City, Missouri, actually does an excellent job and I have to thank [the Director] and their staff in helping minority contractors and women contractors by encouraging the general contractors to break it down so that we do have a chance to participate so that the people that we work for can see that we do good work and quality work and, you know, it's not a baby-sitting service.

If [an agency] can consider unbundling its contracts and making certain dollar procurements available only for the smallest of businesses and then having another contract goal for the remaining businesses, I think it would really encourage that particular vibrancy.

C. Conclusion

KCPS has not developed a full-fledged M/WBE program, and its procurement systems currently not provide information and access for small firms. We provide detailed recommendations in Chapter VII regarding the elements of a legally defensible and administratively successful program for KCPS.

IV. UTILIZATION AND AVAILABILITY ANALYSIS FOR KANSAS CITY PUBLIC SCHOOLS

A. Contract Data Sources and Sampling Method

We analyzed contract data for 2008 through 2013 for the Kansas City Public Schools (“KCPS” or “District”). The Final Contract Data File for analysis contained a total award amount of \$180,487,497.87 representing 177 contracts to primes; of this amount, 13 associated subcontracts received \$ 1,493,029.87. The Final Contract Data File was used to determine the geographic and product markets for the analysis, to estimate the utilization of M/WBEs on those contracts, and to calculate M/WBE availability in the District’s marketplace.

B. Kansas City Public Schools’ Product and Geographic Markets

1. Kansas City Public School’ Product Market

As discussed in Chapter II, a defensible disparity study must determine empirically the industries that comprise the District’s product or industry market. The accepted approach is to analyze those detailed industries, as defined by 6-digit North American Industry, Classification System (“NAICS”) codes¹¹³ that make up at least 75 percent of the prime contract and subcontract payments for the study period.¹¹⁴ However, for this study, we went further, and applied a “90/90/90” rule, whereby we analyzed NAICS codes that cover over 90 percent of the total contract dollars; over 90 percent of the prime contract dollars; and over 90 percent of the subcontract dollars. We took this approach to assure a comprehensive analysis of KCPS’ activities.

Tables 4.1 through 4.4 present the NAICS codes used to define the product market for the District’s contracts when examining contracts disaggregated by level of contract (*i.e.*, was the firm receiving the contract as a prime vendor or a subcontractor or were there subcontracting opportunities), the label for each NAICS code, and the industry percentage distribution of the number of contracts and spending across NAICS codes and funding source. The results in Tables 4.1 through 4.3 present KCPS’ *unconstrained* product market, which was later constrained by the geographic market area, discussed below.

**Table 4.1 Industry Percentage Distribution of Contracts by Dollars Paid,
All Contracts with Subcontracting Opportunities**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	24.8%	24.8%
485410	School and Employee Bus Transportation	21.7%	46.5%
524114	Direct Health and Medical Insurance Carriers	12.9%	59.4%
424490	Other Grocery and Related Products Merchant Wholesalers	9.2%	68.6%
423420	Office Equipment Merchant Wholesalers	4.9%	73.5%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.7%	76.2%
561720	Janitorial Services	2.5%	78.6%
238160	Roofing Contractors	2.1%	80.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.7%	82.4%
562910	Remediation Services	1.4%	83.8%
541110	Offices of Lawyers	1.2%	85.1%

¹¹³ www.census.gov/eos/www/naics.

¹¹⁴ “Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program,” Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, pp. 50-51 (“National Disparity Study Guidelines”).

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.2%	86.3%
236210	Industrial Building Construction	1.1%	87.4%
524210	Insurance Agencies and Brokerages	1.1%	88.4%
541310	Architectural Services	1.1%	89.5%
541330	Engineering Services	1.1%	90.6%
TOTAL			100.00% ¹¹⁵

Source: CHA analysis of KCPS data.

Table 4.2 Industry Percentage Distribution of Contracts by Dollars Paid, Prime Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	25.0%	25.0%
485410	School and Employee Bus Transportation	21.9%	46.9%
524114	Direct Health and Medical Insurance Carriers	13.0%	59.9%
424490	Other Grocery and Related Products Merchant Wholesalers	9.2%	69.1%
423420	Office Equipment Merchant Wholesalers	5.0%	74.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.7%	76.8%
561720	Janitorial Services	2.5%	79.3%
238160	Roofing Contractors	2.2%	81.4%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.7%	83.1%
562910	Remediation Services	1.4%	84.5%
541110	Offices of Lawyers	1.2%	85.8%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.2%	87.0%
236210	Industrial Building Construction	1.1%	88.1%
524210	Insurance Agencies and Brokerages	1.1%	89.2%
238990	All Other Specialty Trade Contractors	1.0%	90.2%
TOTAL			100.00% ¹¹⁶

Source: CHA analysis of KCPS data

Table 4.3 Industry Percentage Distribution of Contracts by Dollars Paid, Subcontracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238310	Drywall and Insulation Contractors	42.8%	42.8%

¹¹⁵ Agency spending across another 38 NAICS codes comprised 9.4% of all spending.

¹¹⁶ Agency spending across another 37 NAICS codes comprised 9.8% of all spending.

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
541330	Engineering Services	40.6%	83.4%
541310	Architectural Services	9.2%	92.6%
TOTAL			100.00% ¹¹⁷

Source: CHA analysis of KCPS data.

2. Kansas City Public Schools' Geographic Market

For the purposes of this study, we used 6 counties spanning Missouri and Kansas: Buchanan, Cass, Clay, and Jackson Counties in Missouri; and Johnson, and Wyandotte Counties in Kansas. These counties were used because they represented the geographic market for the government of the City of Kansas City, Missouri, upon which the District relies for certification of M/WBEs. We therefore used these counties as the geographic market for further analysis.

C. Kansas City Public Schools' Utilization of M/WBEs

Having determined the District's product and geographic market areas, the next essential step was to determine the dollar value of KCPS' utilization of M/WBEs as measured by payments to prime firms and subcontractors and disaggregated by race and gender. KCPS did not collect any data for subcontractors, and for many industries, payment data had to be reconstructed from a variety of files in different departments. We therefore had to obtain missing data from prime vendors, a very lengthy process, as well as reconstruct other contract records.

Table 4.4 presents data on the total contract dollars paid by the District for each NAICS code in the constrained product market and the share the contract dollars comprise of all industries. It is important to note the contract dollar shares are equivalent to the weight of each NAICS code spending. These weights were used to transform data from unweighted availability to weighted availability.

**Table 4.4 NAICS Code Distribution of Contract Dollars
All Sectors**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	\$44,792,720.00	26.9%
485410	School and Employee Bus Transportation	\$39,135,932.00	23.5%
524114	Direct Health and Medical Insurance Carriers	\$23,299,712.00	14.0%
424490	Other Grocery and Related Products Merchant Wholesalers	\$16,515,453.00	9.9%
423420	Office Equipment Merchant Wholesalers	\$8,922,167.00	5.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$4,783,828.00	2.9%
561720	Janitorial Services	\$4,447,691.00	2.7%
238160	Roofing Contractors	\$3,877,779.00	2.3%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$3,005,289.00	1.8%
562910	Remediation Services	\$2,555,564.25	1.5%

¹¹⁷ Agency spending across another 2 NAICS codes comprised 7.4% of all spending.

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541110	Offices of Lawyers	\$2,186,051.00	1.3%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$2,174,565.00	1.3%
236210	Industrial Building Construction	\$1,980,365.75	1.2%
524210	Insurance Agencies and Brokerages	\$1,958,105.00	1.2%
541310	Architectural Services	\$1,928,974.50	1.2%
541330	Engineering Services	\$1,912,497.25	1.1%
238990	All Other Specialty Trade Contractors	\$1,814,973.00	1.1%
238310	Drywall and Insulation Contractors	\$1,305,300.00	0.8%
TOTAL		\$166,596,966.75	100.0%

Source: CHA analysis of KCPS data.

Tables 4.5a and 4.5b also present the paid contract dollars (total dollars and share of total dollars) by NAICS codes for all industries, this time disaggregated by race and gender.

Table 4.5a Distribution of Contract Dollars by Race and Gender
All Sectors
(total dollars)

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,980,366	\$1,980,366
236220	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$44,792,719	\$44,792,719
238160	\$0	\$0	\$0	\$0	\$0	\$42,564	\$42,564	\$3,835,215	\$3,877,779
238210	\$0	\$0	\$0	\$0	\$0	\$403,448	\$403,448	\$4,380,380	\$4,783,828
238220	\$0	\$15,000	\$0	\$0	\$15,000	\$658,817	\$673,817	\$1,500,748	\$2,174,565
238310	\$0	\$0	\$0	\$666,386	\$666,386	\$0	\$666,386	\$638,914	\$1,305,300
238990	\$0	\$0	\$0	\$0	\$0	\$231,326	\$231,326	\$1,583,647	\$1,814,973
423420	\$2,050,000	\$0	\$0	\$0	\$2,050,000	\$0	\$2,050,000	\$6,872,167	\$8,922,167
424490	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,515,453	\$16,515,453
484220	\$0	\$0	\$0	\$0	\$0	\$1,215,289	\$1,215,289	\$1,790,000	\$3,005,289
485410	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$39,135,933	\$39,135,933
524114	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$23,299,712	\$23,299,712
524210	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,958,105	\$1,958,105
541110	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$2,186,051	\$2,186,051
541310	\$28,500	\$588,682	\$0	\$0	\$617,182	\$32,000	\$649,182	\$1,279,792	\$1,928,974
541330	\$84,121	\$886,676	\$0	\$0	\$970,797	\$38,200	\$1,008,997	\$903,500	\$1,912,497
561720	\$99,726	\$0	\$0	\$0	\$99,726	\$85,332	\$185,058	\$4,262,633	\$4,447,691
562910	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$2,555,564	\$2,555,564
TOTAL	\$2,262,347	\$1,490,358	\$0	\$666,386	\$4,419,091	\$2,706,976	\$7,126,068	\$159,470,899	\$166,596,966

Source: CHA analysis of KCPS data.

**Table 4.5b Distribution of Contract Dollars by Race and Gender
All Sectors
(share of total dollars)**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
236220	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238160	0.0%	0.0%	0.0%	0.0%	0.0%	1.1%	1.1%	98.9%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	0.0%	8.4%	8.4%	91.6%	100.0%
238220	0.0%	0.7%	0.0%	0.0%	0.7%	30.3%	31.0%	69.0%	100.0%
238310	0.0%	0.0%	0.0%	51.1%	51.1%	0.0%	51.1%	48.9%	100.0%
238990	0.0%	0.0%	0.0%	0.0%	0.0%	12.7%	12.7%	87.3%	100.0%
423420	23.0%	0.0%	0.0%	0.0%	23.0%	0.0%	23.0%	77.0%	100.0%
424490	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
484220	0.0%	0.0%	0.0%	0.0%	0.0%	40.4%	40.4%	59.6%	100.0%
485410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
524114	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
524210	0.0%	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%	0.0%	100.0%	100.0%
541310	1.5%	30.5%	0.0%	0.0%	32.0%	1.7%	33.7%	66.3%	100.0%
541330	4.4%	46.4%	0.0%	0.0%	50.8%	2.0%	52.8%	47.2%	100.0%
561720	2.2%	0.0%	0.0%	0.0%	2.2%	1.9%	4.2%	95.8%	100.0%
562910	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
TOTAL	1.4%	0.9%	0.0%	0.4%	2.7%	1.6%	4.3%	95.7%	100.0%

Source: CHA analysis of KCPS data.

Tables 4-6 through 4-13b presents the same data as the previous three tables, this time disaggregating the data into Construction, Professional Services, Other Services, and Materials and Supplies sectors.

**Table 4.6 NAICS Code Distribution of Contract Dollars
Construction**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
236220	Commercial and Institutional Building Construction	44,792,719	70.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	4,783,828	7.5%
238160	Roofing Contractors	3,877,779	6.1%
484220	Specialized Freight (except Used Goods) Trucking, Local	3,005,289	4.7%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2,174,565	3.4%
236210	Industrial Building Construction	1,980,366	3.1%
238990	All Other Specialty Trade Contractors	1,814,973	2.8%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
238310	Drywall and Insulation Contractors	1,305,300	2.0%
TOTAL		63,734,819	100.0%

Source: CHA analysis of KCPS data.

**Table 4.7a Distribution of Contract Dollars by Race and Gender
Construction
(total dollars)**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,980,366	\$1,980,366
236220	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$44,792,719	\$44,792,719
238160	\$0	\$0	\$0	\$0	\$0	\$42,564	\$42,564	\$3,835,215	\$3,877,779
238210	\$0	\$0	\$0	\$0	\$0	\$403,448	\$403,448	\$4,380,380	\$4,783,828
238220	\$0	\$15,000	\$0	\$0	\$15,000	\$658,817	\$673,817	\$1,500,748	\$2,174,565
238310	\$0	\$0	\$0	\$666,386	\$666,386	\$0	\$666,386	\$638,914	\$1,305,300
238990	\$0	\$0	\$0	\$0	\$0	\$231,326	\$231,326	\$1,583,647	\$1,814,973
484220	\$0	\$0	\$0	\$0	\$0	\$1,215,289	\$1,215,289	\$1,790,000	\$3,005,289
TOTAL	\$0	\$15,000	\$0	\$666,386	\$681,386	\$2,551,444	\$3,232,830	\$60,501,989	\$63,734,819

Source: CHA analysis of KCPS data.

**Table 4.7b Distribution of Contract Dollars by Race and Gender
Construction
(share of total dollars)**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
236220	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238160	0.00%	0.00%	0.00%	0.00%	0.00%	1.10%	1.10%	98.90%	100.00%
238210	0.00%	0.00%	0.00%	0.00%	0.00%	8.40%	8.40%	91.60%	100.00%
238220	0.00%	0.70%	0.00%	0.00%	0.70%	30.30%	31.00%	69.00%	100.00%
238310	0.00%	0.00%	0.00%	51.10%	51.10%	0.00%	51.10%	48.90%	100.00%
238990	0.00%	0.00%	0.00%	0.00%	0.00%	12.70%	12.70%	87.30%	100.00%
484220	0.00%	0.00%	0.00%	0.00%	0.00%	40.40%	40.40%	59.60%	100.00%
TOTAL	0.00%	0.00%	0.00%	1.00%	1.10%	4.00%	5.10%	94.90%	100.00%

Source: CHA analysis of KCPS data.

**Table 4.8 NAICS Code Distribution of Contract Dollars
Professional Services**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
562910	Remediation Services	2,555,564	39.9%
541310	Architectural Services	1,928,974	30.2%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541330	Engineering Services	1,912,497	29.9%
TOTAL		6,397,035	100.0%

Source: CHA analysis of KCPS data.

**Table 4.9a Distribution of Contract Dollars by Race and Gender
Professional Services
(total dollars)**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
\$541,310	\$28,500	\$588,682	\$0	\$0	\$617,182	\$32,000	\$649,182	\$1,279,792	\$1,928,974
\$541,330	\$84,121	\$886,676	\$0	\$0	\$970,797	\$38,200	\$1,008,997	\$903,500	\$1,912,497
\$562,910	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$2,555,564	\$2,555,564
TOTAL	\$112,621	\$1,475,358	\$0	\$0	\$1,587,979	\$70,200	\$1,658,179	\$4,738,856	\$6,397,035

Source: CHA analysis of KCPS data.

**Table 4.9b Distribution of Contract Dollars by Race and Gender
Professional Services
(share of total dollars)**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
541310	1.5%	30.5%	0.0%	0.0%	32.0%	1.7%	33.7%	66.3%	100.0%
541330	4.4%	46.4%	0.0%	0.0%	50.8%	2.0%	52.8%	47.2%	100.0%
562910	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
TOTAL	1.8%	23.1%	0.0%	0.0%	24.8%	1.1%	25.9%	74.1%	100.0%

Source: CHA analysis of KCPS data.

**Table 4.10 NAICS Code Distribution of Contract Dollars
Other Services**

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
485410	School and Employee Bus Transportation	39,135,933	55.10%
524114	Direct Health and Medical Insurance Carriers	23,299,712	32.80%
561720	Janitorial Services	4,447,691	6.30%
541110	Offices of Lawyers	2,186,051	3.10%
524210	Insurance Agencies and Brokerages	1,958,105	2.80%
TOTAL		71,027,492	100.00%

Source: CHA analysis of KCPS data.

Table 4.11a Distribution of Contract Dollars by Race and Gender
Other Services
(total dollars)

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
485410	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$39,135,933	\$39,135,933
524114	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$23,299,712	\$23,299,712
524210	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,958,105	\$1,958,105
541110	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$2,186,051	\$2,186,051
561720	\$99,726	\$0	\$0	\$0	\$99,726	\$85,332	\$185,058	\$4,262,633	\$4,447,691
TOTAL	\$99,726	\$0	\$0	\$0	\$99,726	\$85,332	\$185,058	\$70,842,434	\$71,027,492

Source: CHA analysis of KCPS data

Table 4.11b Distribution of Contract Dollars by Race and Gender
Other Services
(share of total dollars)

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
485410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
524114	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
524210	0.0%	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%	0.0%	100.0%	100.0%
561720	2.2%	0.0%	0.0%	0.0%	2.2%	1.9%	4.2%	95.8%	100.0%
TOTAL	0.1%	0.0%	0.0%	0.0%	0.1%	0.1%	0.3%	99.7%	100.0%

Source: CHA analysis of KCPS data.

Table 4.12 NAICS Code Distribution of Contract Dollars
Materials and Supplies

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
424490	Other Grocery and Related Products Merchant Wholesalers	16,515,453	64.90%
423420	Office Equipment Merchant Wholesalers	8,922,167	35.10%
TOTAL		25,437,620	100.00%

Source: CHA analysis of KCPS data.

Table 4.13a Distribution of Contract Dollars by Race and Gender
Materials and Supplies
(total dollars)

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
423420	\$2,050,000	\$0	\$0	\$0	\$2,050,000	\$0	\$2,050,000	\$6,872,167	\$8,922,167
424490	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,515,453	\$16,515,453
TOTAL	\$2,050,000	\$0	\$0	\$0	\$2,050,000	\$0	\$2,050,000	\$23,387,620	\$25,437,620

Source: CHA analysis of KCPS data.

**Table 4.13b Distribution of Contract Dollars by Race and Gender
Materials and Supplies
(share of total dollars)**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
423420	23.0%	0.0%	0.0%	0.0%	23.0%	0.0%	23.0%	77.0%	100.0%
424490	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
TOTAL	8.1%	0.0%	0.0%	0.0%	8.1%	0.0%	8.1%	91.9%	100.0%

Source: CHA analysis of KCPS data.

D. Availability of M/WBEs in Kansas City Public Schools' Market

1. Methodological Framework

Estimates of the availability of minority- and female-owned firms in the District's market area are a critical component of the analysis of possible barriers to equal opportunities to participate in the agency's contracting activities. These availability estimates are compared to the utilization percentage of dollars received by M/WBEs to examine whether minority- and women-owned firms receive parity.¹¹⁸ Availability estimates are also crucial for KCPS to set narrowly tailored annual and contract goals.

We applied the "custom census" approach to estimating availability. As recognized by the courts and the National Model Disparity Study Guidelines,¹¹⁹ this methodology 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) and the denominator (e.g., registered vendors or the Census Bureaus' County Business Patterns data).

Next, 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. A custom census is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in the agency's market areas that have not been able to access its opportunities.

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. Most 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 women 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.¹²⁰

¹¹⁸ For our analysis, the term "M/WBE" includes firms that are certified by government agencies and minority- and women-owned firms that are not certified. As discussed in Chapter II, the inclusion of all minority- and female-owned businesses in the pool casts the broad net approved by the courts that supports the remedial nature of the programs. See *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007) (The "remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net.").

¹¹⁹ National Disparity Study Guidelines, pp.57-58.

¹²⁰ For a detailed discussion of the role of capacity in disparity studies, see the National Disparity Study Guidelines, Appendix B, "Understanding Capacity."

Fourth, it has been upheld by every court that has reviewed it, including in the recent successful defenses of the Illinois State Toll Highway's DBE program,¹²¹ and the Illinois Department of Transportation's DBE program.¹²²

2. Estimation of M/WBE Availability

To conduct the Custom Census for this study, CHA utilized three different databases:

1. The KCPS Final Contract Data File (described in Section A of this Chapter).
2. A Master M/W/DBE Directory compiled by CHA.
3. Dun & Bradstreet/Hoovers Database downloaded from the companies' website.

The Master M/WDBE Directory combined the results of an exhaustive search for directories and other lists containing information about minority and women-owned businesses. The resulting list of minority and women businesses is comprehensive.

We took the following steps to develop the Dun & Bradstreet/Hoovers Database. After compiling the Master M/W/DBE Directory, we limited the firms we used in this Custom Census analysis to those firms operating within the District's constrained product market. We purchased the firm information from Hoovers for the firms in the NAICS codes located in KCPS' market area in order to form the Dun & Bradstreet/Hoovers Database. Hoovers, a Dun & Bradstreet company, 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. In the initial download, the data from Hoovers simply identify a firm as being minority-owned.¹²³ However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). We obtained this additional information from Hoovers.¹²⁴

We merged these three databases to form an accurate estimate of firm availability to the agency. Table 4.14 present data on the unweighted availability by race and gender and by NAICS codes for all industries in KCPS' constrained product market.

**Table 4.14 Unweighted Availability
All Sectors**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	13.9%	10.3%	0.5%	16.7%	41.3%	17.3%	58.7%	41.3%	100.0%
236220	9.9%	3.5%	2.3%	2.3%	18.0%	13.6%	31.6%	68.4%	100.0%
238160	2.4%	0.9%	0.2%	0.2%	3.7%	4.0%	7.8%	92.2%	100.0%
238210	7.4%	2.4%	0.9%	1.2%	11.8%	8.3%	20.1%	79.9%	100.0%
238220	2.8%	1.3%	0.5%	0.4%	4.9%	6.3%	11.2%	88.8%	100.0%
238310	5.1%	1.8%	0.5%	0.9%	8.3%	5.0%	13.3%	86.7%	100.0%
238990	4.0%	0.8%	0.5%	0.4%	5.5%	7.7%	13.2%	86.8%	100.0%
423420	6.5%	0.9%	0.6%	0.4%	8.5%	15.3%	23.7%	76.3%	100.0%
424490	2.5%	0.3%	0.2%	0.1%	3.1%	10.2%	13.4%	86.6%	100.0%
484220	28.5%	1.0%	1.8%	0.5%	31.8%	38.6%	70.5%	29.5%	100.0%

¹²¹ *Midwest Fence, Corp. v. U.S. Department of Transportation et al*, 1:10-cv-05627 (N. Dist. Ill., March 24, 2015).

¹²² *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).

¹²³ The variable is labeled: "Is Minority Owned" and values for the variable can be either "yes" or "no".

¹²⁴ Hoovers was able to provide the detailed information for 75% of the firms. We used the available information to estimate the detailed information for the firms where the data was not provided.

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
485410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
524114	5.4%	0.9%	0.6%	0.4%	7.3%	4.9%	12.2%	87.8%	100.0%
524210	0.7%	0.2%	0.1%	0.1%	1.0%	5.5%	6.6%	93.4%	100.0%
541110	1.3%	0.4%	0.2%	0.1%	2.0%	5.7%	7.8%	92.2%	100.0%
541310	4.5%	2.8%	1.2%	1.0%	9.5%	11.9%	21.4%	78.6%	100.0%
541330	6.2%	2.1%	2.7%	1.0%	12.0%	8.1%	20.1%	79.9%	100.0%
561720	14.1%	3.0%	1.8%	1.0%	19.9%	11.7%	31.6%	68.4%	100.0%
562910	26.4%	2.2%	4.7%	13.6%	46.9%	12.5%	59.4%	40.6%	100.0%
TOTAL	4.4%	1.3%	0.7%	0.7%	7.2%	7.8%	15.0%	85.0%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

To further meet the constitutional and regulatory requirement that the availability estimates that will be used to set goals are narrowly tailored, we then weighted the availability estimate for each of the aggregated industries in the NAICS codes by the share of the District's spending in each code. Tables 4.15 present these weights for all contracts.¹²⁵ Tables 4.16 presents the final estimates of the weighted averages of the individual 6-digit level availability estimates in KCPS market area.

**Table 4.15 Share of KCPS Spending by NAICS Code
All Sectors**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236210	Industrial Building Construction	1.2%
236220	Commercial and Institutional Building Construction	26.9%
238160	Roofing Contractors	2.3%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.9%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.3%
238310	Drywall and Insulation Contractors	0.8%
238990	All Other Specialty Trade Contractors	1.1%
423420	Office Equipment Merchant Wholesalers	5.4%
424490	Other Grocery and Related Products Merchant Wholesalers	9.9%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.8%
485410	School and Employee Bus Transportation	23.5%
524114	Direct Health and Medical Insurance Carriers	14.0%
524210	Insurance Agencies and Brokerages	1.2%
541110	Offices of Lawyers	1.3%
541310	Architectural Services	1.2%
541330	Engineering Services	1.1%

¹²⁵ These weights are equivalent to the share of contract dollars presented in Table 4.6 above

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
561720	Janitorial Services	2.7%
562910	Remediation Services	1.5%
TOTAL		100.0%

Source: CHA analysis of KCPS data.

**Table 4.16 Aggregated Weighted Availability
All Sectors**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
TOTAL	6.0%	1.6%	1.0%	1.2%	9.8%	8.5%	18.3%	81.7%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

Tables 4.17 through 4.28 presents the same data as the previous three tables, this time disaggregating the data into Construction, Professional Services, Other Services, and Materials and Supplies sectors.

**Table 4.17 Unweighted Availability
Construction**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
236210	13.9%	10.3%	0.5%	16.7%	41.3%	17.3%	58.7%	41.3%	100.0%
236220	9.9%	3.5%	2.3%	2.3%	18.0%	13.6%	31.6%	68.4%	100.0%
238160	2.4%	0.9%	0.2%	0.2%	3.7%	4.0%	7.8%	92.2%	100.0%
238210	7.4%	2.4%	0.9%	1.2%	11.8%	8.3%	20.1%	79.9%	100.0%
238220	2.8%	1.3%	0.5%	0.4%	4.9%	6.3%	11.2%	88.8%	100.0%
238310	5.1%	1.8%	0.5%	0.9%	8.3%	5.0%	13.3%	86.7%	100.0%
238990	4.0%	0.8%	0.5%	0.4%	5.5%	7.7%	13.2%	86.8%	100.0%
484220	28.5%	1.0%	1.8%	0.5%	31.8%	38.6%	70.5%	29.5%	100.0%
TOTAL	5.9%	1.9%	0.8%	1.3%	10.0%	8.9%	18.8%	81.2%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.18 Share of KCPS Spending by NAICS Code
Construction**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
236210	Industrial Building Construction	3.1%
236220	Commercial and Institutional Building Construction	70.3%
238160	Roofing Contractors	6.1%
238210	Electrical Contractors and Other Wiring Installation Contractors	7.5%
238220	Plumbing, Heating, and Air-Conditioning Contractors	3.4%
238310	Drywall and Insulation Contractors	2.0%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
238990	All Other Specialty Trade Contractors	2.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	4.7%
TOTAL		100.0%

Source: CHA analysis of KCPS data.

**Table 4.19 Aggregated Weighted Availability
Construction**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
TOTAL	9.7%	3.2%	1.8%	2.3%	17.0%	13.3%	30.3%	69.7%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.20 Unweighted Availability
Professional Services**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
541310	4.5%	2.8%	1.2%	1.0%	9.5%	11.9%	21.4%	78.6%	100.0%
541330	6.2%	2.1%	2.7%	1.0%	12.0%	8.1%	20.1%	79.9%	100.0%
562910	26.4%	2.2%	4.7%	13.6%	46.9%	12.5%	59.4%	40.6%	100.0%
TOTAL	6.3%	2.3%	2.3%	1.4%	12.4%	9.3%	21.7%	78.3%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.21 Share of KCPS Spending by NAICS Code
Professional Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
541310	Architectural Services	30.2%
541330	Engineering Services	29.9%
562910	Remediation Services	39.9%
TOTAL		100.0%

Source: CHA analysis of KCPS data.

**Table 4.22 Aggregated Weighted Availability
Professional Services**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
TOTAL	13.8%	2.4%	3.0%	6.0%	25.2%	11.0%	36.2%	63.8%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.23 Unweighted Availability
Other Services**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
485410	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
524114	5.4%	0.9%	0.6%	0.4%	7.3%	4.9%	12.2%	87.8%	100.0%
524210	0.7%	0.2%	0.1%	0.1%	1.0%	5.5%	6.6%	93.4%	100.0%
541110	1.3%	0.4%	0.2%	0.1%	2.0%	5.7%	7.8%	92.2%	100.0%
561720	14.1%	3.0%	1.8%	1.0%	19.9%	11.7%	31.6%	68.4%	100.0%
TOTAL	2.9%	0.7%	0.4%	0.2%	4.1%	6.4%	10.6%	89.4%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.24 Share of KCPS Spending by NAICS Code
Other Services**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
485410	School and Employee Bus Transportation	55.10%
524114	Direct Health and Medical Insurance Carriers	32.80%
524210	Insurance Agencies and Brokerages	2.80%
541110	Offices of Lawyers	3.10%
561720	Janitorial Services	6.30%
TOTAL		100.00%

Source: CHA analysis of KCPS data.

**Table 4.25 Aggregated Weighted Availability
Other Services**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
TOTAL	2.7%	0.5%	0.3%	0.2%	3.7%	2.7%	6.4%	93.6%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.26 Unweighted Availability
Materials and Supplies**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
423420	6.5%	0.9%	0.6%	0.4%	8.5%	15.3%	23.7%	76.3%	100.0%
424490	2.5%	0.3%	0.2%	0.1%	3.1%	10.2%	13.4%	86.6%	100.0%
TOTAL	3.8%	0.5%	0.3%	0.2%	4.8%	11.8%	16.7%	83.3%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

**Table 4.27 Share of KCPS Spending by NAICS Code
Materials and Supplies**

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
423420	Office Equipment Merchant Wholesalers	35.10%
424490	Other Grocery and Related Products Merchant Wholesalers	64.90%
TOTAL		100.00%

Source: CHA analysis of KCPS data.

**Table 4.28 Aggregated Weighted Availability
Materials and Supplies**

NAICS	Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE	Total
TOTAL	3.9%	0.5%	0.3%	0.2%	5.0%	12.0%	17.0%	83.0%	100.0%

Source: CHA analysis of KCPS data; Hoovers; CHA Master Directory.

These weighted availability estimates for federally-assisted contracts can be used by the District to set its MBE and WBE goals.

E. Analysis of Race and Gender Disparities in Kansas City Public Schools' Utilization of Minority- and Women-Owned Business Enterprises

To meet the strict scrutiny requirement that the District consider evidence of disparities to establish its compelling interest in remedying discrimination in its market area, we next calculated disparity ratios for total M/WBE utilization compared to the total weighted availability of M/WBEs, measured in dollars paid.

A “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80 percent of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.¹²⁶ A 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. A more in depth discussion of statistical significance is provided in Appendix C.

Tables 4.29 through 4.33 present the results of this disparity analysis by demographic group for all combined data sets and each of the individual sectors. Large and statistically significant disparities were found for all sectors or M/WBEs as a group, and for all but two groups in two subsectors (these results were driven by a small number of vendors), suggesting that the City will then function as a passive participant in marketplace discrimination without the use of race- and gender-conscious measures.

¹²⁶ See U.S. Equal Opportunity Employment 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.”).

**Table 4.29: Disparity Ratios by Demographic Group,
All Sectors**

Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE
23.3%‡	56.3%‡	0.0%‡	32.4%‡	27.4%‡	18.9%‡	23.5%‡***	117.2%***

Source: CHA analysis of KCPS data.

‡ Indicates substantive significance

** Indicates statistical significance at the 0.01 level

*** Indicates statistical significance at the 0.001 level

**Table 4.30: Disparity Ratios by Demographic Group,
Construction**

Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE
0.0%‡	0.7%‡	0.0%‡	45.7%‡	6.3%‡	30.1%‡	16.7%‡***	136.3%***

Source: CHA analysis of KCPS data.

‡ Indicates substantive significance

*** Indicates statistical significance at the 0.001 level

**Table 4.31: Disparity Ratios by Demographic Group,
Professional Services**

Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE
12.8%‡	976.5%	0.0%‡	0.0%‡	98.6%	10.0%‡	71.7%‡	116.0%

Source: CHA analysis of KCPS data.

‡ Indicates substantive significance

**Table 4.32: Disparity Ratios by Demographic Group,
Other Services**

Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE
5.2%‡	0.0%‡	0.0%‡	0.0%‡	3.8%‡	4.5%‡	4.1%‡	106.6%

Source: CHA analysis of KCPS data.

‡ Indicates substantive significance

**Table 4.33: Disparity Ratios by Demographic Group,
Materials and Supplies**

Black	Hispanic	Native American	Asian	MBE	White Women	MWBE	Non-MWBE
205.1%	0.0%‡	0.0%‡	0.0%‡	160.6%	0.0%‡	47.4%‡	110.8%

Source: CHA analysis of KCPS data.

‡ Indicates substantive significance

V. ANALYSIS OF DISPARITIES IN KANSAS CITY PUBLIC SCHOOLS' ECONOMY

A. Introduction

The late Nobel Prize Laureate Kenneth Arrow, in his seminal paper on the economic analysis of discrimination, observed:

Racial discrimination pervades every aspect of a society in which it is found. It is found above all in attitudes of both races, but also in social relations, in intermarriage, in residential location, and frequently in legal barriers. It is also found in levels of economic accomplishment; this is income, wages, prices paid and credit extended.¹²⁷

This Chapter explores the data and literature relevant to how discrimination in Kansas City Public Schools' ("KCPS" or "District") market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in KCPS contract opportunities. First, we analyzed the rates at which M/WBEs in Missouri form firms and their earnings from those firms. 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 interventions.

A key element to determine the need for government intervention through contract goals in the sectors of the economy where the District procures goods and services is an analysis of the extent of disparities in those sectors independent of the agency's intervention through its contracting affirmative action programs.

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 whether the market functions properly for all firms regardless of the race or gender of their ownership.¹²⁸ These analyses contributed to the successful defense of the City of Chicago's construction program.¹²⁹ As explained by the Tenth Circuit in upholding the U.S. Department of Transportation's Disadvantaged Business Enterprise program, 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.¹³⁰

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. "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.

¹²⁷ Arrow, Kenneth J., "What Has Economics to say about racial discrimination?" *Journal of Economic Perspectives*, (1998), 12(2), pp. 91-100.

¹²⁸ See the discussion in Chapter II of the legal standards applicable to contracting affirmative action programs.

¹²⁹ *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 met compelling interest using this framework).

¹³⁰ *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).

Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”¹³¹ 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.”

For example, in unanimously upholding the USDOT DBE Program, 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.¹³² 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.¹³³

To conduct this type of court-approved economy-wide analysis, we utilized U.S. Bureau of the Census datasets to address the central question whether firms owned by non-Whites and White women face disparate treatment in the District’s marketplace.¹³⁴

We explored the existence of any disparities by analyzing two datasets, each of which permits examination of the issue from a unique vantage point.

- The Census Bureau’s *Survey of Business Owners* allows us to examine disparities using individual firms as the basic unit of analysis.
- The Census Bureau’s *American Community Survey* allows us to examine disparities using individual entrepreneurs as the basic unit of analysis.¹³⁵

The Survey of Business Owners does not present data below a state-level of geography; hence, this analysis examines data from the state of Missouri. The American Community Survey presents data at a much smaller level of geography. These units are called Public Use Microdata Areas (PUMAs) and this study aggregated these PUMAs in order to examine economic activity in the Kansas City metropolitan area as defined by the U.S. Census. The following counties were included in this definition of the metropolitan area:

State	County
Kansas	Johnson
Kansas	Wyandotte
Missouri	Cass
Missouri	Clay
Missouri	Clinton
Missouri	Jackson

¹³¹ *Id.*

¹³² *Id.*; *Western States*, 407 F.3d at 993; *Northern Contracting I*, 2004 U.S. Dist. LEXIS 3226 at *64.

¹³³ *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.”).

¹³⁴ While this is often described as a “private sector analysis,” a more accurate description is an “economy-wide” analysis because expenditures by the public sector are included in the Census databases.

¹³⁵ Data from 2010 - 2014 American Community Survey are the most recent for a five-year period.

State	County
Missouri	Lafayette
Missouri	Platte
Missouri	Ray

Using both data sets, we found disparities for minorities and women across most industry sectors in KCPS' marketplace.

B. Summary of Findings

1. Disparities in Firm Sales and Payroll

One way to measure equity is to examine the share of total sales and/or payroll a group has relative to its share of total firms. Parity would be represented by the ratio of sales or payroll share over the share of total firms equaling 100% (*i.e.*, a group has 10% of total sales and comprises 10% of all firms.) A ratio that is less than 100% indicates an underutilization of a demographic group, and a ratio of more than 100% indicates an overutilization of a demographic group. Table 5.1 presents data from the Census Bureau's 2012 Survey of Business Owners that indicate very large disparities for non-White and White women-owned firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms. In contrast, the firms that were not non-White and not White women-owned were overutilized using the identical metrics.¹³⁶

Table 5.1 Disparity Ratios of Firm Utilization Measures
All Industries,
Survey of Business Owners, 2012

	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
Non-whites	11.7%	15.5%	66.4%
White Women	14.1%	19.7%	75.3%
Not Non-White/Not White Women	154.8%	127.4%	102.6%

Source: CHA Calculations from Survey of Business Owners

2. Disparities in Wages and Business Earnings

Another way to measure equity is to examine how the economic utilization of particular demographic groups compares to White men. Multiple regression statistical techniques allowed us to examine the impact of race and gender on economic outcome while controlling for other factors, such as education, that might impact outcomes.¹³⁷ Using these techniques and data from the Census Bureau's American Community Survey, we found that Blacks, Latinos, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men: controlling for other factors relevant to business success, wages and business earnings were lower for these groups compared to White men. We report wages and business earnings because disparities in wages and business earnings can lead to disparities in business outcomes. These findings are presented in Table 5.2. Parity would exist if the figures in Table 5.2 were 0.0%; in other words, non-Whites and White women would be utilized identical to White men. When the Table indicates that the wage differential between Blacks and White men is -32.9%, for example, this means that wages received by Blacks are 32.9% less than wages received by similar White men. Because of these disparities, the rates at which these groups formed businesses were lower than the business formation rate of similarly situated White men.

¹³⁶ The Survey of Business Owners data available via American Fact Finder do not permit the use of regression analysis on these results.

¹³⁷ See Appendix A for more information on multiple regression statistical analysis.

**Table 5.2 Economic Outcome Differentials of Minorities and White Women
Relative to White Males
All Industries,
American Community Survey, 2010 - 2014**

Demographic Group	Wages Differentials Relative to White Men (% Change)	Business Earnings Relative to White Men (% Change)
Black	-32.90%***	-72.70%***
Latino	-11.60%***	-33.10%*
Native American	-45.10%***	-27.70%
Asian/Pacific Islander	-29.30%***	-64.20%*
Other	-18.70%	-17.50%
White Women	-35.40%***	-75.80%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

* Indicates statistical significance at the 0.05 level

3. Disparities in Business Formation

A third method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. We developed these business formation rates using data from the U.S. Bureau of the Census' American Community Survey. Table 5.3a presents these results. The Table indicates that White men have higher business formation rates compared to non-Whites and White women.¹³⁸ Table 5.3b explores the same question but utilizes multiple regression analysis to control for important factors beyond race and gender. This Table indicates that non-Whites and White women are less likely to form businesses compared to similarly situated White men. For instance, Blacks are 4.4% less likely to form a business compared to White men after other key explanatory variables are controlled. These Tables reinforce the notion that there are significant differences in the rate of non-Whites and White women to form business compared to the rate of White men. These differences support the inference that minority- and women-owned business enterprises ("M/WBEs") suffer major barriers to equal access to entrepreneurial opportunities in the overall Kansas City Metropolitan area economy.

¹³⁸ Many times, there were not sufficient observations in the data to conduct a reliable statistical analysis. In these instances, the tables will contain the symbol "---".

**Table 5.3a Business Formation Rates
All Industries,
American Community Survey, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	3.98%
Latino	6.42%
Native American	6.12%
Asian/Pacific Islander	6.08%
Other	---
Non-White	5.18%
White Women	6.59%
Non-White Male	6.07%
White Male	9.74%

Source: CHA calculations from the American Community Survey
 --- There were insufficient observations to conduct a reliable statistical analysis

**Table 5.3b Business Formation Probabilities Relative to White Males
All Industries,
American Community Survey, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-4.36%
Latino	-3.08%
Native American	-1.33%
Asian/Pacific Islander	-1.87%
Other	4.52%
White Women	-1.96%

Source: CHA calculations from the American Community Survey

Overall, the results of our analyses of the Missouri economy demonstrate that minorities and White women continue to face race- and gender-based barriers to equal opportunities as firm owners, and to equal opportunities to earn wages and salaries that impact their ability to form firms and to earn income from those firms. While not dispositive, this suggests that absent some affirmative intervention in the current operations of the Kansas City Metropolitan area marketplace, KCPS will function as a passive participant in these potentially discriminatory outcomes.¹³⁹

C. Disparate Treatment in the Marketplace: Evidence from the Census Bureau's 2012 Survey of Business Owners

Every five years, the Census Bureau administers the *Survey of Business Owners* ("SBO") to collect data on particular characteristics of businesses that report to the Internal Revenue Service receipts of \$1,000 or

¹³⁹ Various appendices to this Chapter contain additional data and methodological explanations. Appendix A provides a "Further Explanation of the Multiple Regression Analysis." Appendix B provides a "Further Explanation of Probit Regression Analysis." Appendix C discusses the meaning and role of "Significance Levels." Appendix D provides detailed "Additional Data from the Analysis of the Survey of Business Owners." Appendix E provides "Additional Data from the Analysis of American Community Survey."

more.¹⁴⁰ The 2012 SBO was released on December 15, 2015, so our analysis reflects the most current data available. The SBO collects demographic data on business owners disaggregated into the following groups:^{141,142}

- Non-Hispanic Blacks
- Latinos
- 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 where the ownership could not be classified
- Publicly-Owned Firms

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 women-owned firms, the last five groups were aggregated to form one category. To ensure this aggregated group is described accurately, we label this group “not non-White/non-White women”. While this label is cumbersome, it is important to be clear 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.

To examine those sectors in which KCPS purchases, we analyzed economy-wide SBO data on the following sectors:

- Construction
- Professional, Scientific and Technical Services
- Information Technology
- Goods
- Services

However, the nature of the SBO 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 2-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 District’s contract data in Chapter IV, where we are able to determine sectors at the 6-digit NAICS code level. At a more detailed level, the number of firms sampled in particular demographic and sector cells may be so small that the Census Bureau does not report the information, either to avoid disclosing data on businesses that can be identified or because the small sample size generates unreliable estimates of the universe.¹⁴³ We therefore report 2-digit data.

Table 5.4 presents information on which NAICS codes were used to define each sector.

Table 5.4 2-Digit NAICS Code Definition of Sector

SBO Sector Label	2-Digit NAICS Codes
Construction	23

¹⁴⁰ See <http://www.census.gov/econ/sbo/about.html> for more information on the Survey.

¹⁴¹ Race and gender labels reflect the categories used by the Census Bureau.

¹⁴² 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 Latino.

¹⁴³ Even with these broad sector definitions, there was an insufficient number of Native American owned firms to perform our analysis on this demographic group. This limitation also arose for Latinos and Asians in the Services sector.

SBO Sector Label	2-Digit NAICS Codes
Professional, Scientific, and Technical Services ¹⁴⁴	54
Information	51
Goods	31, 42, 44
Services	48, 52, 53, 56, 61, 62, 71, 72, 81

The balance of this Chapter section reports the findings of the SBO analysis. For each sector, we present data describing the sector and report disparities within the sector.

1. All SBO Industries

For a baseline analysis, we examined all industries in the state of Missouri. Table 5.5 presents data on the percentage share that each group has of the total of each of the following six business outcomes:

- The number of all firms
- The sales and receipts of all firms
- The number of firms with employees (employer firms)
- The sales and receipts of all employer firms
- The number of paid employees
- The annual payroll of employers firms

Panel A of Table 5.5 presents data for the four basic non-White racial groups:

- Black
- Latino
- Native American
- Asian

Panel B of Table 5.5 presents data for six types of firm ownership:

- Non-white
- White Women
- White Men
- Equally non-Whites and Whites
- Equally women and men
- Firms that are publicly owned or not classifiable

Categories in the second panel are mutually exclusive. Hence, firms that are non-White and equally owned by men and women are classified as non-White and firms that are equally owned by non-Whites and Whites and equally owned by men and women are classified as equally owned by non-Whites and Whites.¹⁴⁵

¹⁴⁴ This sector includes (but is broader than just) construction-related services. It is impossible to narrow this category to construction-related services without losing the capacity to conduct race and gender specific analyses.

¹⁴⁵ Some of the figures in Panel B may not correspond to the related figures in Panel A because of discrepancies in how the SBO reports the data

**Table 5.5 Percentage Demographic Distribution of Sales and Payroll Data
All Industries, 2012**

	Total Number of Firms (All Firms)	Sales & Receipts - All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	7.30%	0.40%	3.09%	0.32%	0.88%	0.69%
Latino	1.79%	0.29%	1.19%	0.26%	0.57%	0.37%
Native American	0.69%	0.07%	0.40%	0.05%	0.11%	0.07%
Asian	2.61%	0.68%	3.38%	0.62%	1.26%	0.71%
Panel B: Distribution of All Firms						
Non-White	12.42%	1.46%	8.13%	1.26%	2.84%	1.89%
White Women	26.35%	3.72%	16.96%	3.34%	5.89%	4.43%
White Men	47.22%	27.67%	51.64%	26.88%	31.16%	28.63%
Equally Non-White & White	0.63%	0.11%	0.64%	0.09%	0.23%	0.14%
Equally Women & Men	11.05%	3.95%	14.97%	3.67%	6.30%	3.96%
Firms Not Classifiable	2.34%	63.09%	7.67%	64.76%	53.58%	60.94%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

Since the central issue is the possible disparate treatment of non-White and White women firms, Table 5.6 re-aggregates the last four groups— White men; equally non-White and White; equally women and men; and firms not classifiable— into one group: Not Non-White/Not White Women.¹⁴⁶ We then present the shares each group has of the six indicators of firm utilization. These data were then used to calculate three disparity ratios, presented in Table 5.7:

- Ratio of sales and receipts share for all firms over the share of total number of all 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 firms for Black firms is 5.5% (as shown in Table 5.7). This is derived by taking the Black share of sales and receipts for all firms (0.40%) and dividing it by the Black share of total number of all firms (7.30%) that are presented in Table 5.6. If Black-owned firms earned a share of sales equal to their share of total firms, the disparity would have been 100%. An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission's "80 percent" rule that a ratio less than 80 percent presents a *prima facie* case of discrimination.¹⁴⁷ All disparity ratios for non-White firms and White women firms are below this threshold.¹⁴⁸

¹⁴⁶ 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.

¹⁴⁷ 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

**Table 5.6 Demographic Distribution of Sales and Payroll Data – Aggregated Groups
All Industries, 2012**

	Total Number of Firms (All Firms)	Sales & Receipts - All Firms (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts - All Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	7.30%	0.40%	3.09%	0.32%	0.88%	0.69%
Latino	1.79%	0.29%	1.19%	0.26%	0.57%	0.37%
Native American	0.69%	0.07%	0.40%	0.05%	0.11%	0.07%
Asian	2.61%	0.68%	3.38%	0.62%	1.26%	0.71%
Panel B: Distribution of All Firms						
Non-White	12.42%	1.46%	8.13%	1.26%	2.84%	1.89%
White Women	26.35%	3.72%	16.96%	3.34%	5.89%	4.43%
Not Non-White/Not White Women	61.24%	94.82%	74.91%	95.40%	91.26%	93.68%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

**Table 5.7 Disparity Ratios of Firm Utilization Measures
All Industries, 2012**

	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
Panel A: Disparity Ratios for Non-White Firms			
Black	5.5%	10.2%	77.9%
Latino	16.2%	21.7%	64.6%
Native American	9.7%	13.1%	64.0%
Asian	26.0%	18.2%	56.3%
Panel B: Disparity Ratios for All Firms			
Non-Whites	11.7%	15.5%	66.4%
White Women	14.1%	19.7%	75.3%
Not Non-White/Not White Women	154.8%	127.4%	102.6%
All Firms	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

¹⁴⁸ Because the data in Tables 5.6 and 5.7 are presented for descriptive purposes, significance tests on these results are not conducted.

This same approach was used to examine the key sectors in which KCPS purchases. The underlying data on the various industries of construction; professional, scientific and technical services; information technology; and services are presented in Appendix D to this Chapter. The following are summaries of the results of the disparity analyses.

2. Construction

Of the 17 disparity ratios for non-White firms and White women firms presented in Table 5.8, 10 fall under the 80% threshold.¹⁴⁹

**Table 5.8 Disparity Ratios – Aggregated Groups
Construction, 2012**

	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
Panel A: Disparity Ratios for Non-White Firms			
Black	27.11%	107.72%	96.53%
Latino	25.88%	45.88%	S
Native American	56.78%	64.62%	93.13%
Asian	22.00%	74.43%	62.08%
Panel B: Disparity Ratios for All Firms			
Non-White	29.07%	67.14%	88.14%
White Women	126.24%	98.65%	90.66%
Not Non-White/Not White Women	103.38%	101.08%	101.54%
All Firms	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

3. Professional, Scientific and Technical Services

Of the 18 disparity ratios for non-White firms and White women firms presented in Table 5.9, 15 fall under the 80% threshold.

**Table 5.9 Disparity Ratios – Aggregated Groups
Professional, Scientific, and Technical Services, 2012**

	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
Panel A: Disparity Ratios for Non-White Firms			
Black	20.2%	46.4%	107.0%
Latino	25.1%	34.1%	88.9%
Native American	31.8%	25.8%	45.6%
Asian	40.0%	38.3%	92.7%

¹⁴⁹ The values of “S” reflect that the SBO did not publish data in these instances because it was “withheld because estimate did not meet publication standards”. See the Disclosure section under Methodology at <http://www.census.gov/econ/sbo/methodology.html>.

	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
Panel B: Disparity Ratios for All Firms			
Non-White	27.5%	36.9%	91.8%
White Women	20.6%	22.5%	63.2%
Not Non-White/Not White Women	147.2%	128.1%	103.7%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

4. Information

Of the 5 disparity ratios for non-White firms and White women firms presented in Table 5.9, all fall under the 80% threshold.

**Table 5.10 Disparity Ratios – Aggregated Groups
Information, 2012**

	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
Panel A: Disparity Ratios for Non-White Firms			
Black	1.7%	S	S
Latino	7.2%	S	S
Native American	0.5%	S	S
Asian	S	S	S
Panel B: Disparity Ratios for All Firms			
Non-White	2.6%	S	S
White Women	2.9%	S	S
Not Non-White/Not White Women	148.3%	S	S
All Firms	100.0%	S	S

Source: CHA calculations from Survey of Business Owners

5. Services

Of the available 6 disparity ratios for non-White firms and White women firms presented in Table 5.11, all fall below the 80% threshold.

**Table 5.11 Disparity Ratios – Aggregated Groups
All Services, 2012**

	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
Panel A: Disparity Ratios for Non-White Firms			
Black	7.1%	S	S
Latino	24.1%	S	S

	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
Native American	11.5%	S	S
Asian	30.6%	S	S
Panel B: Disparity Ratios for All Firms			
Non-White	14.6%	S	S
White Women	15.2%	S	S
Not Non-White/Not White Women	168.7%	S	S
All Firms	100.0%	S	S

Source: CHA calculations from Survey of Business Owners

6. Goods

Of the 18 disparity ratios for non-White firms and White women firms presented in Table 5.12, 14 fall under the 80% threshold.

**Table 5.12 Disparity Ratios – Aggregated Groups
Goods, 2012**

	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
Panel A: Disparity Ratios for Non-White Firms			
Black	7.50%	55.93%	108.54%
Latino	19.43%	39.52%	76.85%
Native American	7.85%	10.74%	82.58%
Asian	20.25%	19.35%	80.75%
Panel B: Disparity Ratios for All Firms			
Non-White	16.26%	23.75%	153.53%
White Women	13.66%	20.57%	79.48%
Not Non-White/Not White Women	132.84%	117.34%	99.70%
All Firms	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

D. Disparate Treatment in the Marketplace: Evidence from the Census Bureau's 2010 - 2014 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 a race- and gender-conscious program.

In the previous section, we explored this question using SBO data. In this section, we use the Census Bureau's *American Community Survey* data to address other aspects of this question. One element asks if there exist demographic differences 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. 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* ("ACS") *Public Use Microdata Sample* ("PUMS") is useful in addressing these issues. The ACS is an annual survey of 1 percent of the population and the PUMS provides detailed information at the individual level. In order to obtain robust results from our analysis, we use the file that combines data for 2010 through 2014, the most recent available.¹⁵⁰ With this rich data set, our analysis can establish with greater certainty any causal links between race, gender and economic outcomes.

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, but 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 the 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.

We employ 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 more detail on this technique in Appendix A.

With respect to the first result of regression analysis, we will examine 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 are determining the impact of changes in one variable (e.g., race, gender or industry) on another variable (wages), "controlling for" the movement of any other independent variables.

With respect to the second result of regression analysis, this technique also allows us to determine the statistical significance of the relationship between the dependent variable and independent variable. For example, the relationship between gender and wages might exist 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 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 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 we are 99.9% confident that the relationship is different from zero.¹⁵¹

In the balance of this section, we report data on the following sectors:

- All Industries

¹⁵⁰ For more information about the ACS PUMS, please see <http://www.census.gov/acs/>.

¹⁵¹ Most social scientists do not endorse utilizing a confidence level of less than 95%. Appendix C explains more about statistical significance.

- Construction
- Construction-Related Services
- Information Technology
- Services
- Goods

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).

1. All Industries in Kansas City Metropolitan Area

a. Business Formation Rates

Table 5.13 presents business formation rates in the Kansas City metropolitan area economy by demographic groups.

**Table 5.13 Business Formation Rates,
Kansas City Metro Area
All Industries, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	3.98%
Latino	6.42%
Native American	6.12%
Asian/Pacific Islander	6.08%
Other	---
Non-White	5.18%
White Women	6.59%
Non-White Male	6.07%
White Male	9.74%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than Non-White males. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed.¹⁵² The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.14 presents the results of the probit analysis for the Kansas City metropolitan area economy.

¹⁵² Probit is a special type of regression technique where the dependent variable only has two possible values: 0 or 1. For instance, the unit of observation is an individual and he/she forms a business or does not form a business. In the former case, the value of the dependent variable would be 1 while in the latter case, the value of the dependent variable would be 0. This is in contrast to the multiple regression technique discussed earlier where the dependent variable such as wages might have any non-negative value. For a more extensive discussion of probit regression analysis, see Appendix B.

**Table 5.14 Business Formation Probability Differentials
for Selected Groups Relative to White Men
All Industries, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-4.36%***
Latino	-3.08%***
Native American	-1.33%***
Asian/Pacific Islander	-1.87%***
Other	4.52%***
White Women	-1.96%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

The analysis indicates that (with the exception of Other) non-Whites and White women in Kansas City metropolitan area are less likely than White men to form businesses even after controlling for key factors. The reduction in probability ranges from 1.33% to 4.36%. Once again, these estimates are statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 5.15 presents the findings from the wage and salary income regression analysis examining the Kansas City metropolitan area economy. This indicates the wage differential for selected demographic groups in Kansas City metropolitan area relative to White men.

**Table 5.15 Wage Differentials
for Selected Groups Relative to White Men
All Industries, 2010 - 2014**

Demographic Group	Wages Relative to White Men (% Change)
Black	-32.90%***
Latino	-11.60%***
Native American	-45.10%***
Asian/Pacific Islander	-29.30%***
Other	-18.70%
White Women	-35.40%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, Asian/Pacific Islanders and Others in Kansas City metropolitan area earn less than White men in the overall economy. Estimates of the coefficients for Black, Latino, Native American, Asian/Pacific Islander and White Women are statistically significant at the 0.001 level. For example, we are 99.9% confident that wages for Blacks in Kansas City metropolitan area (after controlling for numerous other factors) are 32.9% less than those received by White men.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by Non-Whites and White women entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the

sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.16 presents these findings.

**Table 5.16 Business Earnings Differentials
for Selected Groups Relative to White Men
All Industries, 2010 - 2014**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-72.70%***
Latino	-33.10%*
Native American	-27.70%
Asian/Pacific Islander	-64.20%*
Other	-17.50%
White Women	-75.80%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

* Indicates statistical significance at the 0.05 level

Two of the estimates of the coefficients for these variables were found to be statistically significant at the 0.001 level. Two of the estimates of the coefficients for these variables were found to be statistically significant at the 0.05 level. The statistically significant differentials in business earnings received by Non-Whites and White women compared to White males ranged from -27.7% to -75.8%.

d. Conclusion

Using descriptive analysis, Table 5.13 shows that differentials exist between the business formation rates by non-Whites and White women and White males across industry sectors. Table 5.14 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 5.15 and 5.16 present data indicating differentials in wages and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-Whites and White women entrepreneurs.

2. The Construction Industry in Kansas City Metropolitan area

a. Business Formation Rates

Table 5.17 presents business formation rates in the Kansas City metropolitan area construction industry for selected demographic groups.

**Table 5.17 Business Formation Rates,
Kansas City Metro Area
Construction, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	15.52%
Latino	18.31%
Native American	---
Asian/Pacific Islander	---
Other	---
Non-White	18.10%
White Women	13.57%

Demographic Group	Business Formation Rates
Non-White Male	16.92%
White Male	22.08%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than non-White males where there were sufficient observations to make a statistical inference. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.18 presents the results of the probit analysis for the construction industry in Kansas City metropolitan area.

**Table 5.18 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Construction, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-1.73%***
Latino	-0.59%***
Native American	-4.09%***
Asian/Pacific Islander	-6.53%***
Other	---
White Women	-2.28%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

The analysis indicates that non-Whites and White women in Kansas City metropolitan area are less likely to form construction businesses compared to White men even after controlling for key factors. The reduction in probability ranges from 0.59% to 6.53%. Once again, these estimates are statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 5.19 presents the findings from the wage and salary income regression analysis examining the construction industry in Kansas City metropolitan area. This indicates the wage differential for selected demographic groups in Kansas City metropolitan area relative to White men.

**Table 5.19 Wage Differentials
for Selected Groups Relative to White Men
Construction, 2010 - 2014**

Demographic Group	Wages Relative to White Men (% Change)
Black	-48.50%***
Latino	-15.90%*
Native American	30.80%
Asian/Pacific Islander	-15.90%
Other	---

Demographic Group	Wages Relative to White Men (% Change)
White Women	-55.30%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

* Indicates statistical significance at the 0.05 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, White women, and Asian/Pacific Islanders in Kansas City metropolitan area earn less than White men in the construction industry. The differential ranges between 15.9% less and 55.3% less. Estimates of the coefficients for Black and White Women are statistically significant at the 0.001 level. The coefficient for Latino and statistically significant at the 0.05 level and the coefficient for Asian/Pacific Islander is not statistically significant.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.20 presents these findings.

**Table 5.20 Business Earnings Differentials
for Selected Groups Relative to White Men
Construction, 2010 - 2014**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-57.70%
Latino	-10.20%
Native American	-136.00%
Asian/Pacific Islander	-125.00%
Other	---
White Women	25.20%

Source: CHA calculations from the American Community Survey

** Indicates statistical significance at the 0.01 level

None of the coefficients are significantly statistically different from zero.

d. Conclusion

Using descriptive analysis, Table 5.17 shows that differentials exist between the business formation rates by non-White males and White males. Table 5.18 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Table 5.19 presents data indicating wage differentials in wage and Table 5.20 indicates no statistically significant differences in business earnings.

3. The Construction-Related Services Industry in Kansas City Metropolitan Area

a. Business Formation Rates

Table 5.21 presents business formation rates in the construction-related services industry in Kansas City metropolitan area for selected demographic groups.

**Table 5.21 Business Formation Rates,
Kansas City Metropolitan Area
Construction-Related Services, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	---
Latino	---
Native American	No observations
Asian/Pacific Islander	---
Other	---
Non-White	---
White Women	1.04%
Non-White Male	---
White Male	3.89%

Source: CHA calculations from the American Community Survey

A limited number of observations hampered the studies' ability to conduct a detailed analysis in this sector. There were no Native Americans in this sector and the small number of Black, Latino, Asians, and Others meant that reliable estimates for specific groups could not be made. White males have a higher rate of business formation than White females. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.22 presents the results of the probit analysis for the construction-related services industry in Kansas City metropolitan area.

**Table 5.22 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Construction-related Services, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-0.46%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Because of sample size concerns, the only valid analysis could examine business formation probabilities for White Women; here, White Women were 0.46% less likely to form a business relative to White Men. This estimate was statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 5.23 presents the findings from the wage and salary income regression analysis examining the construction-related services industry in Kansas City metropolitan area. This indicates the wage differential for selected demographic groups in Kansas City metropolitan area relative to White men.

**Table 5.23 Wage Differentials
for Selected Groups Relative to White Men
Construction-Related Services, 2010 - 2014**

Demographic Group	Wages Relative to White Men (% Change)
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-35.20%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Because of sample size concerns, the only valid analysis could examine wage differentials for White Women; here, White Women earn 35.2% less than White Men. This estimate was statistically significant at the 99.1 level.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.24 presents these findings.

**Table 5.24 Business Earnings Differentials
for Selected Groups Relative to White Men
Construction-related Services, 2010 - 2014**

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-73.60%**

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Because of sample size concerns, the only valid analysis could examine business earnings differentials for White Women; here, business earnings for White Women were 73.6% less than White Men. This estimate was statistically significant at the 99.1 level.

d. Conclusion

Because of the limited number of observations in this sector and subsequent sample size concerns, reliable estimates could only be conducted for White women. For this group, the analysis found statistically significant disadvantages relative to White men.

4. The Information Technology Industry in Kansas City Metropolitan Area

a. Business Formation Rates

Table 5.25 presents business formation rates in the information technology industry in Kansas City metropolitan area for selected demographic groups.

**Table 5.25 Business Formation Rates,
Kansas City Metro Area
Information Technology, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
Non-White	---
White Women	3.36%
Non-White Male	---
White Male	5.02%

Source: CHA calculations from the American Community Survey

Similar to the Construction-related Services sector, a limited number of observations in the Information Technology sector hampered the studies' ability to conduct a detailed analysis in this sector. There were no Native Americans in this sector and the small number of Black, Latino, Asians, and Others meant that reliable estimates for specific groups could not be made. White males have a higher rate of business formation than White females. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.26 presents the results of the probit analysis for the information technology industry in Kansas City metropolitan area.

**Table 5.26 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Information Technology, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-1.29%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Because of sample size concerns, the only valid analysis could examine business formation probabilities for White Women; here, White Women were 01.29% less likely to form a business relative to White Men. This estimate was statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 5.27 presents the findings from the wage and salary income regression analysis examining the information technology industry in Kansas City metropolitan area. This indicates the wage differential for selected demographic groups in Kansas City metropolitan area relative to White men.

**Table 5.27 Wage Differentials
for Selected Groups Relative to White Men
Information Technology, 2010 - 2014**

Demographic Group	Wages Relative to White Men (% Change)
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-14.00%**

*** Indicates statistical significance at the 0.001 level

Source: CHA calculations from the American Community Survey

Because of sample size concerns, the only valid analysis could examine wage differentials for White Women; here, White Women earn 14.0%% less than White Men. This estimate was statistically significant at the 99.1 level.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.28 presents these findings.

**Table 5.28 Business Earnings Differentials
for Selected Groups Relative to White Men
Information Technology, 2010 - 2014**

Demographic Group	Earnings Relative to White Men (% Change)
Black	---
Latino	---
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-10.60%

Source: CHA calculations from the American Community Survey

** Indicates statistical significance at the 0.01 level

* Indicates statistical significance at the 0.05 level

Because of sample size concerns, the only valid analysis could examine business earnings differentials for White Women; here, business earnings for White Women were 10.6% less than White Men. This estimate was statistically significant at the 99.1 level.

d. Conclusion

Because of the limited number of observations in this sector and subsequent sample size concerns, reliable estimates could only be conducted for White women. For this group, the analysis found statistically significant disadvantages relative to White men.

5. The Services Industry in Kansas City Metropolitan Area

a. Business Formation Rates

Table 5.29 presents business formation rates in the services industry in Kansas City metropolitan area for selected demographic groups.

**Table 5.29 Business Formation Rates,
Kansas City Metro Area
Services, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	4.48%
Latino	5.60%
Native American	---
Asian/Pacific Islander	5.58%
Other	---
Non-White	5.02%
White Women	7.29%
Non-White Male	6.48%
White Male	10.17%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than non-White males. (Sample size issues meant that analyses could not be conducted for Native Americans and Others.) However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.30 presents the results of the probit analysis for the services industry in Kansas City metropolitan area.

**Table 5.30 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Services, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-4.30%***
Latino	-2.57%***
Native American	---
Asian/Pacific Islander	-3.12%***
Other	---

Demographic Group	Probability of Forming a Business Relative to White Men
White Women	-2.37%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

The analysis indicates that compared to White men, non-Whites and White women in Kansas City metropolitan area are less likely to form services businesses even after controlling for key factors. The reduction in probability ranges from 2.37% less to 4.30% less. Once again, these estimates are statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 5.31 presents the findings from the wage and salary income regression analysis examining the services industry in Kansas City metropolitan area. This indicates the wage differential for selected demographic groups in Kansas City metropolitan area relative to White men.

**Table 5.31 Wage Differentials
for Selected Groups Relative to White Men
Services, 2010 - 2014**

Demographic Group	Wages Relative to White Men (% Change)
Black	-31.80%***
Latino	-1.61%
Native American	---
Asian/Pacific Islander	-23.60%***
Other	---
White Women	-32.80%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

Holding constant factors such as education, age, occupation, and industry, Blacks, White women, and Asian/Pacific Islanders in Kansas City metropolitan area earn less than White men in the services industry. The differential ranges between 23.6% less and 32.8% less. All estimated coefficients statistically significant at the 0.001 level. The estimated coefficient for Latinos was not statistically different than zero.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.32 presents these findings.

**Table 5.32 Business Earnings Differentials
for Selected Groups Relative to White Men
Services, 2010 - 2014**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-65.10%**
Latino	-64.20%*
Native American	---
Asian/Pacific Islander	-91.50%*

Demographic Group	Earnings Relative to White Men (% Change)
Other	---
White Women	-77.00%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

* Indicates statistical significance at the 0.05 level

The differentials in business earnings for Blacks, Latinos, Asians, and White women relative to White males ranged from 64.2%% less to 77.0% less. For White Women, the coefficient was statistically significant at the 0.001 level; for Black, the coefficient was statistically significant at the 0.01 level; and for Latino and Asian/Pacific Islander, the coefficient was statistically significant at the 0.05 level.

d. Conclusion

Using descriptive analysis, Table 5.29 shows that differentials exist between the business formation rates by non-White males and White males. Table 5.30 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 5.31 and 5.32 present data indicating differentials in wage and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-Whites and White women entrepreneurs.

6. The Goods Industry in Kansas City Metropolitan area

a. Business Formation Rates

Table 5.33 presents business formation rates in the goods industry in Kansas City Metropolitan area for selected demographic groups.

**Table 5.33 Business Formation Rates,
Kansas City Metro Area
Goods, 2010 - 2014**

Demographic Group	Business Formation Rates
Black	3.08%
Latino	2.50%
Native American	---
Asian/Pacific Islander	---
Other	---
Non-White	3.32%
White Women	4.96%
Non-White Male	4.34%
White Male	7.06%

Source: CHA calculations from the American Community Survey

White males have a higher rate of business formation than non-Whites and White women. Note: the observed number of Native American, Asian/Pacific Islander, and Other was too small for any reliable statistical analysis. However, as with the issue of income and earnings differences, the higher rates could be attributed to factors aside from race and/or gender. To explore this question further, a probit regression statistical technique was employed. The basic question is: how does the probability of forming a business vary as factors such as race, gender, etc. vary?

Table 5.34 presents the results of the probit analysis for the construction industry in Kansas City metropolitan area.

**Table 5.34 Business Formation Probability Differentials
for Selected Groups Relative to White Men
Goods, 2010 - 2014**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-5.47%***
Latino	-3.38%***
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-0.73%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

The analysis indicates that Blacks, Latinos, and White women in Kansas City metropolitan area are less likely to form goods businesses compared to White men even after controlling for key factors. The reduction in

business formation probability ranged from 0.73% to 5.47%. These estimates are statistically significant at the 99.1 level.

b. Differences in Wage and Salary Incomes

Table 5.35 presents the findings from the wage and salary income regression analysis examining the goods industry in Kansas City metropolitan area. This indicates the wage differential for selected demographic groups in Kansas City metropolitan area relative to White men.

**Table 5.35 Wage Differentials
for Selected Groups Relative to White Men
Goods, 2010 - 2014**

Demographic Group	Wages Relative to White Men (% Change)
Black	-24.90%**
Latino	-15.90%*
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-41.60%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

* Indicates statistical significance at the 0.05 level

Holding constant factors such as education, age, occupation, and industry, Blacks, Latinos, and White women in Kansas City metropolitan area earn less than White men in the goods industry. The differential ranges between 15.9% less and 41.6% less.

c. Differences in Business Earnings

The same approach was used to investigate if there were differences in business earnings received by non-White male entrepreneurs and White male entrepreneurs. Using the PUMS, we limited the sample to the self-employed and examined how their business income varied in response to factors such as race, gender, age, education, and industry. Table 5.36 presents these findings.

**Table 5.36 Business Earnings Differentials
for Selected Groups Relative to White Men
Goods, 2010 - 2014**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-229.00%**
Latino	34.80%
Native American	---
Asian/Pacific Islander	---
Other	---
White Women	-129.00%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

Blacks earned 229.0% less than White males and White women earned 129.0% less than White males. These coefficients were statistically significant at the 0.01 level and 0.001 level, respectively. The coefficient for Latino was not statistically different from zero.

d. Conclusion

Using descriptive analysis, Table 5.33 shows that differentials exist between the business formation rates by non-Whites and White women and White males. Table 5.34 presents the results of a further statistical analysis, which indicated that even after taking into account potential mitigating factors, the differential still exists. Tables 5.35 and 5.36 present data indicating differentials in wage and business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-Whites and White women entrepreneurs.

VI. QUALITATIVE EVIDENCE OF RACE AND GENDER DISCRIMINATION IN KANSAS CITY PUBLIC SCHOOLS' MARKET

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities. Such data are relevant to the determination of whether race- and gender-neutral measures will fully remediate discrimination and create a level playing field for KCPS contracts. As observed by the Supreme Court, anecdotal evidence can be persuasive because it “brought the cold [statistics] convincingly to life.”¹⁵³ Evidence about discriminatory practices engaged in by prime contractors and consultants, lenders and other actors relevant to business opportunities on agency contracts and associated subcontracts has been found probative regarding barriers both to minority firms' business formation and to their success on governmental projects.¹⁵⁴ 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.”¹⁵⁵ “[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.”¹⁵⁶

There is no requirement that anecdotal testimony be “verified” or corroborated, as befits the role of evidence in legislative decision-making as opposed to judicial proceedings. “Plaintiff offers no rationale as to why a fact finder could not rely on the State's ‘unverified’ anecdotal data. Indeed, a fact finder could very well conclude that anecdotal evidence need not—indeed cannot—be verified because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perception.”¹⁵⁷ 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.”¹⁵⁸

To explore anecdotal evidence of possible discrimination against minorities and women in KCPS' geographic and industry markets and the need for race- and gender-conscious contract goals, we interviewed 56 business owners or executives from the industries from which the District purchases. Firms ranged in size from large national businesses to decades-old family-owned firms to new start-ups. Owners' backgrounds included individuals with many years of experience in their fields and entrepreneurs beginning their careers. We sought to explore their experiences in seeking and performing public and private sector prime contracts and subcontracts with KCPS, other Kansas City area agencies and in the private sector. In view of the Districts' recent adoption of a program policy, few participants had direct experience with KCPS contracts. We have therefore also included comments relevant to government contracting in general.

As with other jurisdictions, most minority and women 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 summaries of the issues discussed and interviewees' experiences and comments. Quotations are indented, and have been edited for readability.

¹⁵³ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977).

¹⁵⁴ *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).

¹⁵⁵ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520, 1530 (10th Cir. 1994).

¹⁵⁶ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 926 (11th Cir. 1997).

¹⁵⁷ *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233, 249 (4th Cir. 2010).

¹⁵⁸ *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).

A. Discriminatory Attitudes and Negative Perceptions of Competence

Many minority and female owners reported that agencies and other firms display negative attitudes about the competency and professionalism of minorities and women. The assumption is that minority firms are less qualified.

The biggest barriers that I see is the perception that the G[eneral C[ontractor]s out there— it's still a good ol' boy network.... I've sat in meetings and had them talk about the small and the minority contractors as the “little people. We have to clean up after the little people.” To the point where I just want to scream.... There's the perception out there that GCs don't like participation. The GCs no matter how well you perform, do you paperwork, do the job, meet every of their requirements, you're used for participation. The good 'ol boy system is still out there.

There is still that undermining thing that women can't do it and minorities can't do it.

I didn't know there were minority firms that could do this kind of work are the kind of comments that I think have been rampant in certain areas.

There's always, of course, the issue that a minority- or women-owned business can't perform the services and so they're going to have to look elsewhere for someone to perform those services.

Women faced continuing sexist remarks and conduct.

When people make comments or something, I mean I'm in my 50s, I don't take that shit anymore from somebody says something to me. I'll just throw it right back at them and they were done.... A man is aggressive. A woman is a bitch.

[A Missouri Department of Transportation engineer] only talks to men and pretty young women. He's really condescending. Honestly, I don't project his little problems with all of MoDOT but it does piss you off after awhile sitting there watching. You just have to shut up and let it go. When you see people like that get promoted, it [tells you something about] the culture.

I get this a lot from white men: “It's really unfair that you get this WBE and it's unfair.”... I can give you enough stories when I was a young female engineer that will make your toes curl of some discrimination. Granted, that was back in the early '80s. I do think some of the over the top discrimination, that's kind of gone under. I do think there is unconscious bias. People hire who their comfortable with.

When you're at meetings, you get vibes of who you can approach and who you can't. When I get that vibe that that guy is not going to give me the time of day then I don't approach him. I do get an email off to him.

B. Obtaining Work on an Equal Basis

These types of barriers lead minorities and women to unanimous agreement that M/WBE goals remain necessary to level the playing field and equalize opportunities. M/WBEs sought the right to compete on a fair and equal basis. Without goals, they believed they would be shut out of government prime contracts and associated subcontracts and the overall Kansas City area market. Interviewees were clear that contract goals remain necessary to ensure equal opportunities because they receive little to no work on non-goals jobs.

[We get used] only on setasides.

We have performed numerous jobs for the City of Kansas City. ... Those goals have had a serious impact in our company for its survival over the last 7 years. If we didn't have the program that Kansas City, Missouri [implements], then I'm not sure what our company would look like.

[Minority-owned firms] don't do any work in the private sector, that the only window of opportunity we have is within the [government] program.... [The agencies' programs are] the entree we all have [to the marketplace].

There's not an aggressive marketing strategy or plan to pursue minorities or the certified companies on those private jobs.

The public sector work, you can find out about that. Contractors, generals will contact me. It's the private sector jobs that you never know about. If there isn't an inclusion goal, you won't even hear about the opportunity and be given the opportunity to even compete for it. That's the biggest gap I've seen.

If there is no goal setting, you don't have any opportunity to perform as a subcontractor. That's a big dichotomy, public-private.

Where there is a program, where there is a certifying apparatus, where goals are set on projects our people go to work and we are still disproportionately arrayed in the public sector. And the same companies that will work with you on a large public sector job will not recruit you on a private job.

We already can't do any private sector work... That's every kind of development in the world and we're missing it all.... it's the good old boy network. They can just give the job to who they want to.

If there is not a goal required you don't even know who you can call, let alone how you can participate.... You don't feel like you're adding any value if it's just about the value of meeting a goal. So, I think that means that programs like this really need to be in place and have an opportunity to grow.

Where there is an apparatus and goals are set we have an opportunity to work and the City of Kansas City is a prime example of that. We're meeting and exceeding the goals that were set initially at our second disparity study, but where there is no goal nothing happens and the whole state of Kansas is a good example of that.

Let's say a contractor comes to town, which a lot of them are. And the first thing, they see me and they say oh, okay. And they see my financials, they see my safety record. Everything just legit. Everything is great. First thing that comes out of their mouth is, are you certified by the City of Kansas City, Missouri. And as soon as I say no, all of a sudden I got a black cloud against me.

Minorities who spoke up about discrimination faced retaliation.

The minute I open my mouth, I am filleted and I have gotten filleted a little bit by one of the biggest contractors in town.... Kansas City's not a very big town. You piss off the right people, you're not getting any work.

[Retaliation against firms that complain about fronts or the failure to perform commercially useful functions is] going on all the time.

Prime contracts were especially difficult to obtain.

I'm able to get my prime contracts through the [City of Kansas City's program for] S[mall] L[ocal] B[usiness] E[nterprises on Water Department contracts]. I have had a few prime contracts not as an, SLBE but it's been kind of specialty type stuff.

MBEs that did receive prime contracts sometimes felt they were subjected to a double standard.

[The agencies] don't force the larger already white and established contractor [to meet standards], they go around the codes for them. For the minority contractor, you got the [prime] bid now. They're somewhat pissed off at you, for lack of a better term. That you've got it and they other one didn't. Then, you're being subjected to codes that they would have gotten around or that would have been allowances made in the City for the other contractor.

Some WBEs reported that unions were another source of discrimination.

My payment history [of benefits contributions] wasn't anything different from the male businesses. However, they did not incur the same action from the business manager that I got.... It's just all male. You're great if you're male. If you're a girl, bitching about something, it is not allowed and some of the things that even some of the male minority companies do, is acceptable. Whereas for me, I would get three days notice and you're pulling my men.

I don't have a bad relationship with the union, but I would say I have what I wouldn't call a favorable one because I did not come up through the trade and I'm female. It's the good ol' boy [network], yes. To get around that, I've put someone in my office [who is] a male that has really good relationships with key people at the union, which has helped me.

Only a handful of Kansas City area large firms apply the same process for private sector work as they do for government projects with goals.

The only exceptions are enlightened corporations like [name]. When they did their veteran office tower, all they did was solicit the same people they solicit on public sector work, and minorities and women went to work on that project. That is by way the exception.... All they did was cast a broader net and included minority- and women-owned companies, and the pool of contractors they solicited bids from. Internally, they had a goal that [name] supports inclusion and that's on all their work, but that is an exception.

Others agreed that this firm is exemplary.

I do a lot of work with [name] and it has nothing to do that I'm MBE certified. I believe in relationships, so I believe a lot of opportunities that I get are because of relationships, building relationships, or relationships that my father has built. I believe in relationships. It's about getting out there and meeting people, and they know who you are and what you do. When you get that chance, it's performing well, doing a great job performing, and then they'll come back. It won't have anything to do with whether you're MBE or WBE.

C. Access to Business Capital and Surety Bonds

The inability to obtain working capital and surety bonds for construction contracts were major barriers to working on government projects.

I was told to my face by a banker that I was a non-traditional business owner and therefore I was not going to be considered for a loan for my business plan. Bonding and insurance, same situation. I know based on my financial statements, what my bonding capacity should be. I am at roughly 60 to 75 percent allowed that capacity, without explanation.

D. Conclusion

Consistent with other evidence reported in this Study, anecdotal interview information strongly suggests that minorities and women continue to suffer discriminatory barriers to full and fair access to KCPS, other government and private sector contracts and subcontracts. While not definitive proof that the District should apply race- and gender-conscious measures to these reduce impediments, the results of the personal interviews are the types of evidence that, especially when considered alongside the numerous pieces of statistical evidence assembled, the courts have found to be highly probative of whether KCPS may use narrowly tailored M/WBE contract goals to address that discrimination.

VII. RECOMMENDATIONS FOR KANSAS CITY PUBLIC SCHOOLS' MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM

The quantitative and qualitative data presented in this Study provide a thorough examination of the evidence regarding the experiences of minority- and women-owned firms operating in KCPS' geographic and procurement markets. As required by strict scrutiny as that doctrine is applied to locally-funded contracts, we analyzed evidence of such firms' utilization by the District as measured by dollars spent, as well as business owners' experiences in obtaining agency contracts and associated subcontracts, and opportunities in the private sector. We gathered statistical and anecdotal data to provide the evidence necessary to determine whether there is a strong basis in evidence that barriers to full and equal contracting opportunities exist on the basis of race or gender in the KCPS' market area, and if so, what narrowly tailored remedies are appropriate.

The Study results fully support KCPS' compelling interest in utilizing narrowly tailored race- and gender-conscious remedies to ensure equal opportunities for its prime contracts and associated subcontracts. The statistical data and the anecdotal testimony provide a strong basis in evidence to implement a M/WBE Program. The record— both quantitative and qualitative— establishes that M/WBEs in the District's market area continue to experience significant disparities in their access to KCPS contracts and private sector opportunities and to those factors necessary for business success. These findings support the inference that discrimination remains a barrier to full and fair opportunities for all firms, and in the absence of contract goals, M/WBEs suffered significant disparities on KCPS-funded jobs. Without the use of contract goals to level the playing field, the District would likely function as a "passive participant" in the "market failure" of discrimination.

We therefore make the following recommendations.

A. Adopt a M/WBE Program

The District's Board should use the Study results as the basis for the new M/WBE program. We suggest that the policy explicitly reference the Study findings and recommendations. The Program should include the following elements:

1. Set MBE and WBE Annual Aspirational Goals

The availability estimates in Chapter IV should be the basis for consideration of overall, annual spending targets for KCPS funds. We found the availability of MBEs to be 9.8 percent, and the availability of WBEs to be 8.5 percent. These goals are aspirational and cannot function as quotas or set-asides.

2. Use the Study to Set Narrowly Tailored Contract Specific Goals

As discussed in Chapter II of the Study, KCPS' constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. The detailed availability estimates in the Study can serve as the starting point for contract goal setting. There should be a goal setting module in any electronic contract data collection and monitoring system.

This methodology involves four steps:

1. Weigh the estimated dollar value of the scopes of the contract by industry codes as determined during the process of creating the solicitation. To increase understanding and compliance, these industry codes could be listed in the solicitation as a guide to how the goal was determined and where the agency expects bidders to seek MBE and WBE participation. Good faith efforts could be defined as, among several other elements, an adequate solicitation of firms certified in these codes.
2. Determine the availability of MBEs and WBEs in those scopes as estimated in the Study.
3. Calculate a weighted goal based upon the scopes and the availability of firms.
4. Adjust the resulting percentage based on current market conditions.

We urge the District to bid some contracts that it determines have significant opportunities for M/WBE participation without goals. 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, will be probative of whether the M/WBE program remains needed to level the playing field for minorities and women.

3. Continue to Accept M/WBE Certifications from Programs with Narrowly Tailored Eligibility Standards

The District's current list of acceptable M/WBE certifications should be maintained. These agencies' standards for eligibility to participate in their M/W/DBE programs comport with the case law on the elements of a narrowly tailored ordinance.

4. Develop Program Implementation Policies and Procedures

In addition to goal setting and eligibility standards, KCPs will need explicit policies on how to determine preaward compliance, contract performance compliance and detailed electronic record keeping procedures. These will include how M/WBE participation will be counted towards contract goals; provisions to determine whether a bidder made good faith efforts to meet goals; criteria to determine whether a certified firm is performing a commercially useful function; contract performance standards such as when and how a certified firm may be substituted during performance; contract closeout evaluation tests; sanctions for non-compliance; and staff job descriptions and evaluation policies. It is critical that sufficient resources be put to the new Program; policies without enforcement will be inadequate to remediate the discriminatory barriers found in the Report.

B. Adopt 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 District's remedial purposes. Increased participation by M/WBEs through race-neutral measures will also reduce the need to set M/WBE contract goals.

1. Implement an Electronic Contracting Data Collection, Monitoring and Notification System

A critical element of this Study and a major challenge was data collection of full and complete prime contract and associated subcontractor records. The District lacked centralized award information; payment records to prime vendors; and information on the race, gender and industry codes of its vendors. It lacked any useable information on subcontractors to its prime vendors. These problems led to major delays in conducting the Study.

The lack of a system also makes it extremely difficult to monitor, enforce and review even the current voluntary program. It further means outreach is not as automated and convenient as these efforts could be. It makes accurate, complete and timely reporting to the Board almost impossible.

We recommend KCPS implement an electronic data collection system for the M/WBE program, similar to that used by the City of Kansas City, Missouri. Congruence with other local agencies reduces the burden on vendors and certified firms to provide high quality compliance efforts. The system should have with at least the following functionality:

- Full contact information for all firms, including email addresses, NAICS codes, race and gender ownership, and small business certification status.
- Contract/project-specific goal setting, using the data from this Study.
- Utilization plan capture for prime contractor's submission of subcontractor utilization plans, including real-time verification of M/WBE certification status and NAICS codes, and proposed utilization/goal validation.
- Contract compliance for certified and non-certified prime contract and subcontract payments for all formally procured contracts for all tiers of all subcontractors; verification of prompt payments to subcontractors; and information sharing between KCPS, prime vendors and subcontractors about the status of pay applications.

- Spend analysis of informal expenditures, such as those made with agency credit cards or on purchase orders, to determine the utilization of certified firms.
- Program report generation that provides data on utilization by industries, race, gender, dollar amount, procurement method, etc.
- An integrated email and fax notification and reminder engine to notify users of required actions, including reporting mandates and dates.
- Outreach tools for eBlasts and related communications and event management for tracking registration and attendance.
- Import/export integration with existing systems to exchange contract, payment, and vendor data.
- Access by authorized KCPS staff, prime contractors and subcontractors to perform all necessary activities.

2. Focus on Reducing Barriers to M/WBE Prime Contract Awards

There are several steps that could be taken to reduce barriers to M/WBEs' receiving prime contracts. While contracting affirmative action programs primarily achieve M/WBE participation through subcontracting, it is essential that the programs not be limited to subcontracting opportunities. In fact, the most egregious discrimination occurs in the lead contracting role.

a. "Unbundle" contract solicitations

The size of government contracts is an impediment to small firms performing as prime vendors. We therefore suggest KCPS develop contract specifications with an eye towards unbundling projects into less complex scopes and lower dollar values. While more work for agency staff, the benefits of a more diverse supplier base outweigh the costs of staff time.

b. Review experience, insurance and bonding requirements

Experience requirements should be reviewed with the goal of reducing them to the lowest level necessary to ensure the bidder has adequate experience, perhaps by recognizing similar though not identical types of work, including work performed for private sector clients.

We further suggested reviewing surety bonding and insurance requirements so they are no greater than necessary to protect the District's interests. These are possible barriers to contracting by small firms that have been mentioned by the courts as areas to be considered. Steps might include reducing or eliminating insurance requirements on smaller contracts and removing the cost of the surety bonds from the calculation of lowest apparent bidder on appropriate solicitations.

c. Adopt a Small Business Enterprise Target Market

One highly effective approach would be to set aside some smaller contracts for bidding only by small, local firms as prime contractors. If implemented on a fully race- and gender-neutral basis, this is a constitutionally acceptable method to increase opportunities for all small firms. Small Business Enterprise ("SBE") set-asides are especially useful for those industries that do not operate on a prime vendor-subcontractor model, such as health care and consulting services. It will reduce the need to set contract goals to ensure equal opportunities, and is an approach specifically approved by the courts.

This might also be the vehicle to include firms certified as Veteran Business Enterprises, Service-Disabled Veteran Business Enterprises, Historically Underutilized Business Zone Businesses, and Small Business Concerns under the U.S. Small Business Administration's 8(a) program. These groups should not be part of the M/WBE goals at either the annual aspirational or contract specific levels for at least two reasons. First, the legal standard is "rational basis" scrutiny, not the "strict" scrutiny applied to race-based programs. Second, the addition of extra groups will dilute the opportunities for minority and women firms, thereby undermining the programs' objective. However, firms certified through these programs that are not also certified as M/WBEs could participate in the race- and gender-neutral setaside.

KCPS would have to determine the size limits for contracts (such as contracts under \$100,000) and the types of contracts to be included (such as only single scope jobs or lower dollar value multiple scope projects). For

example, maintenance contracts might be successfully procured using this method. It will be critical to keep complete race and gender information on bidders to evaluate whether this is an effective race- and gender-neutral measure to reduce barriers.

A SBE element could also include additional assistance for SBE and M/WBE vendors, such as quick pay (e.g., invoicing every two weeks); reduced experience requirements; no holding of retainage, etc.

3. Increase Vendor Communication's and Outreach to M/WBEs and Small Firms

Increased communication with the contracting community is critical. KCPS should conduct its more vendor outreach fairs to provide information and address questions regarding upcoming opportunities> The District should also facilitate “match making” sessions between prime contractors and subcontractors. Annual contracting forecasts of larger contracts would also help to increase contracting access and planning by small contractors.

Further, as is the case with many governments, the study revealed that M/WBEs are receiving few opportunities in several industry codes.¹⁵⁹ We suggest that special outreach for larger projects be conducted to firms in those sectors so that they are aware of opportunities and can make connections with other vendors as subcontractors or joint venture partners. Activities could include targeted emails about future contracts, matchmaking events focusing on those industries, and identification of firms that are not currently certified but might be eligible for inclusion to encourage applications.

4. Consider Partnering with Other Agencies to Implement Bonding, and Financing and Technical Assistance Programs

Both M/WBEs and majority-male owners supported services to assist M/WBEs to increase their skills and capabilities. To address this critical need, KCPS should partner with other Kansas City area agencies, especially the City of Kansas City, Missouri. For example, the District could participate in the City-sponsored financing assistance program with Lead Bank and Corner Stone Financial. This program assists small firms by providing loans and issuing surety bonds to certified contractors, with an interest rate of the New York Prime Rate plus two percent. It will also provide general banking services on favorable terms to applicant firms. Other agencies may also offer opportunities to leverage resources.

5. Provide Training for all KCPS Staff with Contracting Responsibilities or Vendor Interface

These significant changes will require a District-wide roll out of the new program as well as training of all KCSP personnel with responsibility for the program and vendor management. In addition to providing technical information on compliance, it is also an opportunity to reaffirm KCPS' commitment to supplier diversity and the program, and encourage all departments to buy into the values and objectives of the program.

C. Conduct Regular M/WBE Program Reviews

To meet the requirements of strict constitutional scrutiny and ensure best practices in program administration continue to be applied, KCPS should conduct a full and thorough review of the evidentiary basis for the program approximately every five to seven years.

A sunset date for the M/WBE program, when it will end unless reauthorized, is a constitutional requirement to meet the narrow tailoring test that race-and gender-conscious measures be used only when necessary. A new disparity study or other applicable research should be commissioned in time to meet the sunset date.

D. Develop Performance Measures for Program Success

KCPS should develop quantitative performance measures for overall success of its programs to evaluate their effectiveness in reducing the systemic barriers identified by the Study. This will require enhanced data collection and monitoring. In addition to meeting goals, possible benchmarks might be:

- Progress towards meeting the overall, annual MBE and WBE goals.

¹⁵⁹ See Table C, Executive Summary.

- The number of bids or proposals, and the dollar amount of the awards and the goal shortfall, where the bidder was unable to meet the goals and submitted good faith efforts to do so.
- The number and dollar amount of bids or proposals rejected as non-responsive for failure to make good faith efforts to meet the goal.
- The number, type and dollar amount of M/WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors, including through any SBE target market.
- Increased prime contract awards to certified firms.
- Increased “capacity” of certified firms, as measured by bonding limits, size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which M/WBEs are awarded prime contracts and subcontracts.

APPENDIX A: FURTHER EXPLANATION OF THE MULTIPLE REGRESSION ANALYSIS

As explained in the Report, the multiple regression statistical techniques seek to explore the relationship between a set of independent variables and a dependent variable. The following equation is a way to visualize this relationship:

$$DV = f(D, I, O),$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu,$$

where C is the constant term; β_1 , β_2 and β_3 are coefficients, and μ is the random error term.

The statistical technique seeks to estimate the values of the constant term and the coefficients.

In order to complete the estimation, the set of independent variables must be operationalized. For demographic variables, the estimation used race, gender and age. For industry and occupation variables, the relevant industry and occupation were utilized. For the other variables, education and the state of residence 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. An additional factor was included: because of our interest in the impact of race and gender on wages and earnings, we made the assumption that the impact of those variables might vary from state to state (*i.e.*, the impact of being Black on wages is different in Missouri than it is in Iowa). We therefore developed new variables that would show the interaction between race and gender and one particular state. Since this Report examined Missouri, that was the state employed. The coefficient for the new variable showed the impact of being a member of that race or gender in Missouri. Consequently, the impact of race or gender on wages or earnings had two components: the national coefficient and the state-specific impact.

APPENDIX B: FURTHER EXPLANATION OF THE PROBIT REGRESSION ANALYSIS

Probit regression is a special type of regression analysis. While there are many differences between the underlying estimation techniques used in the probit regression and the standard regression analysis, the main differences from the layperson's point of view lie in the nature of the dependent variable and the interpretation of the coefficients associated with the independent variables.

The basic model looks the same:

$$DV = f(D, I, O),$$

where DV is the dependent variable; D is a set of demographic variables; I is a set of industry & occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

$$DV = C + (\beta_1 * D) + (\beta_2 * I) + (\beta_3 * O) + \mu,$$

where C is the constant term; β_1 , β_2 , and β_3 are coefficients, and μ is the random error term.

In the standard regression model, the dependent variable is continuous and can take on many values. In the probit model, the dependent variable is dichotomous and can take on only two values: zero or one. For instance, in the standard regression analysis, we may be exploring the impact of a change in some independent variable on wages. In this case, the value of one's wage might be any non-negative number. In contrast, in the probit regression analysis, the exploration might be the impact of a change in some independent variable on the probability that some event occurs. For instance, the question might be how an individual's gender impacts the probability of that person forming a business. In this case, the dependent variable has two values: zero, if a business is not formed; one, if a business is formed.

The second significant difference – the interpretation of the independent variables' coefficients – is fairly straight-forward in the standard regression model: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.¹⁶⁰ However, in the probit model, the initial coefficients cannot be interpreted this way. One additional step - which can be computed easily by most statistical packages - 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) occurs. For instance, using our previous example of the impact on 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 final transformation of the coefficient of WOMAN was -0.12, we would interpret this to mean that women have a 12% lower probability of forming a business compared to men.

¹⁶⁰ The exact interpretation depends upon the functional form of the model.

APPENDIX C: SIGNIFICANCE LEVELS

Many tables in this Report contain asterisks indicating a number has statistical significance at 0.001 or 0.01 levels 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 whether 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 KCPS as it explores the necessity of intervening in the marketplace through contract goals to ensure it is not a passive participant in the continuation of historic and contemporary bias 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 this analysis determines that non-Whites receive wages that are 35% 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 is that estimation, that is, what is the probability 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% less than White men). This is sometimes called the null hypothesis. We then calculate a confidence interval to find explore the probability that the observed relationship (e.g., - 35%) is between 0 and minus that confidence interval.¹⁶¹ The confidence interval will vary depending upon the level of confidence (statistical significance) we wish to have in our conclusion. Hence, a statistical significance of 99% would have a broader confidence interval than statistical significance of 95%. Once a confidence interval is established, if -35% lies outside of that interval, we can assert the observed relationship (e.g., 35%) is accurate at the appropriate level of statistical significance.

¹⁶¹ Because 0 can only be greater than -35%, 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: ADDITIONAL DATA FROM THE ANALYSIS OF THE SURVEY OF BUSINESS OWNERS¹⁶²

**Table D1. Demographic Distribution of Sales and Payroll Data
Construction, 2012**

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	2.92%	0.79%	0.68%	0.73%	0.83%	0.80%
Latino	2.81%	0.73%	0.98%	0.45%	S	S
Native American	0.82%	0.47%	0.72%	0.46%	0.55%	0.51%
Asian	0.40%	0.09%	0.07%	0.05%	0.09%	0.05%
Panel B: Distribution of All Firms						
Non-White	6.96%	2.02%	2.45%	1.64%	2.19%	1.93%
White Women	7.85%	9.91%	10.44%	10.30%	11.45%	10.38%
White Men	73.81%	64.86%	66.62%	63.78%	61.61%	61.95%
Equally Non-White & White	0.38%	0.15%	0.45%	0.12%	0.26%	0.11%
Equally Women & Men	10.41%	9.06%	17.62%	9.02%	11.47%	10.12%
Firms Not Classifiable	0.60%	14.00%	2.43%	15.14%	13.01%	15.51%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

¹⁶² See Footnote 172 for an explanation of the reported value of "S".

**Table D2. Demographic Distribution of Sales and Payroll Data – Aggregated Groups
Professional, Scientific, and Technical Services, 2012**

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	3.91%	0.79%	1.45%	0.67%	0.87%	0.93%
Latino	1.74%	0.44%	1.12%	0.38%	0.54%	0.48%
Native American	0.76%	0.24%	0.86%	0.22%	0.19%	0.08%
Asian	2.43%	0.97%	2.29%	0.88%	1.13%	1.05%
Panel B: Distribution of All Firms						
Non-White	8.86%	2.43%	5.81%	2.15%	2.79%	2.56%
White Women	28.87%	5.93%	21.57%	4.85%	8.25%	5.21%
White Men	52.27%	32.03%	58.86%	30.49%	34.96%	32.95%
Equally Non-White & White	0.44%	0.10%	0.38%	0.07%	0.10%	0.06%
Equally Women & Men	8.29%	2.91%	8.54%	2.55%	4.91%	2.88%
Firms Not Classifiable	1.27%	56.58%	4.82%	59.91%	48.99%	56.34%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

Table D3. Demographic Distribution of Sales and Payroll Data – Aggregated Groups Information, 2012

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	5.50%	0.10%	0.67%	0.08%	0.25%	0.17%
Latino	1.32%	0.10%	0.42%	0.08%	0.16%	0.17%
Native American	0.71%	0.00%	0.25%	S	S	S
Asian	1.85%	S	0.67%	S	S	S
Panel B: Distribution of All Firms						
Non-White	9.33%	0.25%	2.02%	S	S	S
White Women	23.51%	0.68%	13.06%	0.61%	1.97%	1.07%
White Men	51.74%	8.08%	51.05%	7.73%	16.97%	10.34%
Equally Non-White & White	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Equally Women & Men	9.41%	0.91%	11.20%	0.85%	1.70%	1.17%
Firms Not Classifiable	4.93%	90.09%	22.49%	90.61%	78.90%	87.04%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

**Table D4. Demographic Distribution of Sales and Payroll Data – Aggregated Groups
Services, 2012**

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	10.16%	0.72%	4.77%	S	S	S
Latino	1.72%	0.41%	1.46%	S	S	S
Native American	0.69%	0.08%	0.28%	S	S	S
Asian	3.40%	1.04%	4.59%	0.86%	1.98%	1.15%
Panel B: Distribution of All Firms						
Non-White	15.95%	2.33%	11.20%	S	S	S
White Women	28.64%	4.35%	17.68%	3.40%	6.65%	5.07%
White Men	41.31%	22.77%	46.82%	20.97%	29.96%	25.75%
Equally Non-White & White	0.46%	0.15%	0.54%	0.12%	0.24%	0.15%
Equally Women & Men	10.55%	4.29%	14.07%	3.65%	7.49%	4.32%
Firms Not Classifiable	2.89%	66.02%	9.46%	69.95%	51.24%	62.08%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners

**Table D5. Demographic Distribution of Sales and Payroll Data – Aggregated Groups
Goods, 2012**

	Total Number of Firms (All Firms)	Sales & Receipts (All Firms) (\$1,000)	Number of Firms with Paid Employees (Employer Firms)	Sales & Receipts Firms with Paid Employees (Employer Firms) (\$1,000)	Number of Paid Employees	Annual payroll (\$1,000)
Panel A: Distribution of Non-White Firms						
Black	2.75%	0.21%	0.36%	0.20%	0.31%	0.34%
Latino	3.14%	0.61%	1.53%	0.61%	0.67%	0.52%
Native American	0.29%	0.02%	0.21%	0.02%	0.05%	0.04%
Asian	4.95%	1.01%	5.12%	0.99%	1.34%	1.10%
Panel B: Distribution of All Firms						
Non-White	11.21%	1.83%	7.26%	1.72%	2.24%	3.49%
White Women	16.49%	2.26%	10.87%	2.24%	4.48%	3.62%
White Men	55.34%	21.70%	60.49%	21.59%	37.56%	34.56%
Equally Non-White & White	0.33%	0.03%	0.29%	0.03%	0.07%	0.05%
Equally Women & Men	10.26%	1.77%	9.45%	1.75%	3.44%	2.75%
Firms Not Classifiable	6.03%	72.34%	11.50%	72.53%	52.01%	56.94%
All Firms	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: CHA calculations from Survey of Business Owners