

City of South Bend Disparity Study 2019



CITY OF SOUTH BEND DISPARITY STUDY

2019

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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; Ilene Grossman, B.S., CHA Chief Operating Officer; Glenn Sullivan, B.S., CHA Director of Technology; and Victoria Farrell, MBA, CHA Assistant Principal Researcher; and Joanne Lubert, J.D., Special Counsel. 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 City of South Bend (“City”) to perform a study in conformance with strict constitutional scrutiny to determine its utilization of Minority- and Women-Owned Business Enterprises (collectively “M/WBEs”); the availability of M/WBEs in its market area; any disparities between its utilization and M/WBE availability; and to evaluate whether the use of race-conscious measures is supported by the results of this analysis. We were also tasked with making recommendations for increasing the inclusion of M/WBEs and small businesses. We analyzed contract data for calendar years 2015 through 2017.

A. Summary of the Strict Constitutional Standards Applicable to Minority and Women Business Programs

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

Strict scrutiny analysis has two elements:

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

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

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

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

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

Classifications not based upon a suspect class (*e.g.*, race, ethnicity, religion, national origin or gender) are subject to the lesser standard of review called “rational basis” scrutiny. Thus, preferences for persons with disabilities or veteran status may be enacted with vastly less evidence than is required for race- or gender-based measures meant to combat historic discrimination.

To meet strict scrutiny, studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of minority- and women-owned firms and their actual utilization compared to White male-owned businesses. Quality studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored. This Report meets these tests.

B. 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 the federal 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 City’s utilization of M/WBEs and the availability of M/WBEs in its geographic and industry market area. We then compared utilization to availability to calculate disparity ratios between those two measures. 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 obtaining City contracts and associated subcontracts. We examined race- and gender-based barriers throughout the

economy through public meetings, focus groups with business owners and stakeholders, an electronic survey and interviews with City staff.

Based on the results of these extensive analyses, we have made recommendations for the City's equity and inclusion contracting policies.

C. Study Findings

1. Experiences with Obtaining City Contracting Opportunities

To explore the experiences of businesses seeking opportunities on City contracts, we solicited input from 110 individuals and stakeholder representatives about their experiences and solicited their suggestions for changes.

Obtaining work on City projects: Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications, professionalism and capabilities. While sometimes subtle, these biases impact their attempts to obtain City and private sector contracts.

Race- and gender-conscious program: These types of barriers led minorities and women to unanimous agreement that M/WBE goals remain necessary to level the playing field and equalize opportunities. Aspirational or voluntary approaches were reported to be ineffective.

Access to information and networks: Minority and women entrepreneurs felt excluded from the networks necessary for success. Many participants commented on barriers to City contracts in particular, and access to information about opportunities were mentioned as a frustrating challenge.

Contracting processes and requirements: Contract size is a major impediment to M/WBEs performing work for the City, especially as prime vendors. Several business owners described barriers to the City's procurement process and contract specifications, such as insurance requirements.

Outreach to small and certified firms: One suggestion to help increase knowledge of the City's contracting processes was for the City to conduct more outreach to M/WBEs and small local firms.

Support and capacity building: Another recommendation was to provide support for minority and women entrepreneurs through capacity-building initiatives for small firms. A lack of business resources to help entrepreneurs, M/WBEs and small firms was reported.

2. Utilization, Availability and Disparity Analyses for the City

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 the City's contract data for calendar years 2015 through 2017.

We received a Final Contract Data File from the City which contained 278 contracts, worth \$103,162,022. Of these prime contracts, there were 327 associated subcontracts valued at \$25,523,221. The Final Contract Data File was used to determine the geographic and product markets for the analyses, and to estimate the utilization and availability of M/WBEs by funding source and contract type.

The following tables present the NAICS codes, the label for each NAICS code, and the industry percentage distribution of spending across NAICS codes, by type of contract. Chapter IV provides tables disaggregated by dollars paid to prime contractors as well as dollars paid to subcontractors on contracts with subcontracting opportunities.

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

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	16.30%	16.30%
238210	Electrical Contractors and Other Wiring Installation Contractors	9.84%	26.14%
541330	Engineering Services	6.61%	32.75%
237110	Water and Sewer Line and Related Structures Construction	6.44%	39.19%
238910	Site Preparation Contractors	5.24%	44.43%
238220	Plumbing, Heating, and Air-Conditioning Contractors	4.23%	48.66%
441110	New Car Dealers	3.72%	52.39%
333120	Construction Machinery Manufacturing	3.33%	55.72%
238310	Drywall and Insulation Contractors	3.02%	58.74%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	2.70%	61.44%
238990	All Other Specialty Trade Contractors	2.08%	63.52%
221310	Water Supply and Irrigation Systems	2.01%	65.52%
333517	Machine Tool Manufacturing	1.90%	67.42%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.67%	69.09%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	1.67%	70.76%
336120	Heavy Duty Truck Manufacturing	1.46%	72.22%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	1.46%	73.68%
238140	Masonry Contractors	1.41%	75.10%
335999	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	1.29%	76.39%
561730	Landscaping Services	1.28%	77.67%
238160	Roofing Contractors	1.19%	78.86%
238110	Poured Concrete Foundation and Structure Contractors	1.18%	80.05%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	1.12%	81.17%
541511	Custom Computer Programming Services	1.11%	82.28%
541320	Landscape Architectural Services	1.08%	83.36%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	1.07%	84.43%
TOTAL			100.0%^a

a. City spending across another 72 NAICS codes comprised 15.57 percent of all spending. The entire list of NAICS codes is contained in Appendix D.

Source: CHA analysis of City of South Bend data

To determine the relevant geographic market area, we applied the well accepted standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.¹ Location was determined by ZIP code and aggregated into counties as the geographic unit. Spending in Indiana accounted for 81.93 percent of all contract dollars paid in the City's unconstrained product market. Upon further investigation of spending in Michigan and Illinois, we identified three counties (Ber-

1. National Academies of Sciences, Engineering, and Medicine 2010, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, p. 49. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14346>. ("National Disparity Study Guidelines").

rien, MI; Wabash, IL; and Kankakee, IL) that accounted for an additional 9.82 percent of the unconstrained product market). Therefore, our analysis used the State of Indiana and those three counties as the geographic market area for this study.

When the unconstrained product market was limited by the geographic market, the result was the *constrained product market*. The next step was to develop the Final Utilization Data File for the constrained product market which contains the dollar value of the City's utilization of M/WBEs as measured by payments to prime firms and subcontractors and disaggregated by race and gender.

Table 1-2 presents the utilization data by all industry sectors. Chapter IV provides detailed breakdowns of these results.

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

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
221310	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
236220	0.00%	0.00%	0.00%	8.20%	8.29%	16.49%	83.51%	100.00%
237110	0.00%	0.00%	0.00%	0.00%	4.17%	4.17%	95.83%	100.00%
237130	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
237310	0.00%	0.00%	0.00%	0.00%	1.90%	1.90%	98.10%	100.00%
238110	0.00%	0.00%	0.00%	0.00%	34.51%	34.51%	65.49%	100.00%
238140	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%	20.52%	20.52%	79.48%	100.00%
238210	0.00%	0.00%	0.00%	0.00%	14.96%	14.96%	85.04%	100.00%
238220	0.00%	0.00%	0.00%	0.26%	0.28%	0.53%	99.47%	100.00%
238290	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238310	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238910	0.00%	0.00%	0.00%	0.00%	17.16%	17.16%	82.84%	100.00%
238990	0.00%	0.00%	0.00%	0.00%	0.97%	0.97%	99.03%	100.00%
333120	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
333517	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%	0.00%	100.00%
334514	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423110	0.00%	0.00%	0.00%	0.00%	26.32%	26.32%	73.68%	100.00%

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
423120	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423810	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423830	0.00%	87.09%	0.00%	0.00%	7.04%	94.12%	5.88%	100.00%
441110	0.00%	0.00%	0.00%	5.10%	0.00%	5.10%	94.90%	100.00%
484220	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
511210	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541320	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541330	0.00%	0.00%	19.89%	0.00%	2.39%	22.27%	77.73%	100.00%
541511	0.00%	69.26%	0.00%	0.00%	0.00%	69.26%	30.74%	100.00%
541620	0.00%	0.00%	0.00%	0.00%	18.08%	18.08%	81.92%	100.00%
561730	0.00%	0.00%	0.00%	0.00%	36.87%	36.87%	63.13%	100.00%
Total	0.00%	2.20%	1.62%	0.34%	7.81%	11.97%	88.03%	100.00%

Source: CHA analysis of City of South Bend data.

Using the “custom census” approach to estimate 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 the City’s spending in its geographic and industry markets, to be 14.91 percent. Table 1-3 presents the weighted availability data for all product sectors combined for the racial and gender categories.

Table 1-3: Aggregated Weighted Availability

	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
Total	3.25%	0.57%	1.01%	0.92%	9.17%	14.91%	85.09%	100.0%

Source: CHA analysis of City of South Bend data; Hoovers; CHA Master Directory

To meet the constitutional test that all groups must have suffered discrimination in the City’s markets in order to be eligible for the benefits of the program, we next calculated disparity ratios by comparing the City’s utilization of M/WBEs as prime contractors and subcontractors measured in dollars paid to the availability of these firms in its market areas. Table 1-4 presents these results.

Table 1-4: Disparity Ratios by Demographic Group

	MBE	White Women	M/WBE	Non-M/WBE	Total
Total	72.38%	85.18%	80.25%	103.46%	100.0%

Source: CHA analysis of City of South Bend data

3. Analysis of Economy-Wide Race and Gender Disparities in the City's Market

We explored the Census Bureau data relevant to how discrimination in the City's industry market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the City's prime contract and subcontract opportunities.

We analyzed the following data:

- Data from the Census Bureau's *Survey of Business Owners* indicated 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 in most cases, Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men at the All Industries level. (Small numbers within the sample limited our ability to produce reliable estimates at the level of specific industry sectors). 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.

These types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall market-place discrimination without some type of affirmative intervention. Taken together with anecdotal data, this is the type of proof that addresses whether, in the absence of M/WBE contract goals, the City will be a passive participant in the discriminatory systems found throughout its industry market. These economy-wide analyses are relevant and probative to whether the City may employ narrowly tailored race- and gender-conscious measures to ensure equal opportunities to access its contracts and associated subcontracts.

4. Qualitative Evidence of Race and Gender Barriers in the City's 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 by the agency are supportable.

To explore this type of anecdotal evidence, we received input from 110 participants. Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications, professionalism and/or capabilities. While sometimes subtle, these biases about minorities' and women's lack of competence infect all aspects of their attempts to obtain contracts and to be treated equally in performing contract work. Minorities and women repeatedly discussed their struggles with negative perceptions and attitudes of their capabilities in the business world.

- The assumption is that minority firms are less qualified.
- Discriminatory attitudes, stereotypes and negative perceptions of qualifications, professionalism and capabilities of minorities and women exist.
- Aspirational or voluntary approaches were reported to be ineffective.
- Minority and women entrepreneurs felt excluded from the networks necessary for success and reported barriers to City contracts in particular.
- Access to information about opportunities was reported as a big problem, as were barriers to accessing the City's procurement process and meeting contract specifications.
- Contract size is a major impediment to M/WBEs performing work for the City, especially as prime vendors.
- More outreach to M/WBEs and small local firms by the City was suggested, along with implementation of capacity-building support measures for minority and women entrepreneurs.

D. Recommendations

The quantitative and qualitative data in this Study provide a thorough examination of the evidence of the experiences of minority- and women-owned business enterprises ("M/WBEs") in the City's geographic and industry markets. As required by strict constitutional scrutiny, we analyzed evidence of M/WBEs' utili-

zation by the City as measured by dollars spent. We next estimated the availability of M/WBEs in the City's markets in the aggregate and by detailed industry code. We then compared the City's utilization of M/WBEs to the availability of all ready, willing and able firms in its markets to calculate whether there are disparities between utilization and availability. We also solicited anecdotal or qualitative evidence from M/WBEs' experiences in obtaining contracts in the public and private sectors. Based upon these findings and national best practices for contracting equity programs, we make the following recommendations.

Implement Race- and Gender-Neutral Measures: 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 City's remedial purposes. Increased participation by M/WBEs through race-neutral measures will also reduce the need to set M/WBE contract goals.

Implement an Electronic Contracting Data Collection, Monitoring and Notification System: The City should immediately procure and implement an electronic data collection system for the M/WBE program with at least the following functionality:

- Full contact information for all firms
- Contract/project-specific goal setting using the Study data
- Utilization plan capture for prime contractor's submission of subcontractor utilization plans
- Contract compliance for certified and non-certified prime contract and subcontract payments for all formally procured contracts for all tiers of all subcontractors
- Spend analysis of informal expenditures; Program report generation that provides data on utilization by industries, race, gender, dollar amount, procurement method, etc.
- An integrated email notification and reminder engine to inform 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 City staff, prime contractors and subcontractors

Commit additional resources to M/WBE and small business program management and implementation: The City should formally create an office of Diversity and Inclusion and increase staff and resources dedicated to this function. Staff should be responsible for the contract award process (outreach, goal setting, bid and pro-

posal review for compliance, etc.) and the contract performance process (goal attainment, substitution reviews, prompt payment tracking, etc.), as they relate to M/WBE concerns. Functional areas must be separated by the type of program: labor compliance is very different from contract compliance, and personnel that specialize in each function are necessary for successful programs. The office should report directly to the Mayor to ensure the independence of the department and demonstrate the importance of this function and the City's commitment to inclusion.

Focus on Reducing Barriers to M/WBE Prime Contract Awards: The City's budget size provides numerous opportunities for smaller firms to participate and the following steps should be implemented:

- Develop contract specifications with an eye towards unbundling projects into less complex scopes and lower dollar values.
- Review experience requirements 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.
- Review surety bonding and insurance requirements so they are no greater than necessary to protect South Bend's interests. Steps might include reducing or eliminating insurance requirements on smaller contracts and removing the cost of the surety bonds from the calculation of the lowest apparent bidder on appropriate solicitations.

Increase Vendor Communication and Outreach to M/WBEs and Small Firms: Conduct more regularly scheduled vendor outreach events to provide minority- and women-focused organizations with information and address questions regarding upcoming opportunities. Outreach should facilitate "match making" between prime and subcontractors and an annual contracting forecast of larger contracts that will permit vendors to plan their work and form teams.

Special outreach for larger projects should be conducted to firms in those industry codes where M/WBEs are receiving few opportunities. This will permit them to 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.

Offer training and debriefing sessions to develop proficiency in the bidding and proposal process: A process should be disseminated, and bidders encouraged to meet with the City to develop their expertise in submitting bids or proposals and in doing business with the City. In addition to written materials, the City could hold in person sessions and create training videos that provide information on all

aspects of City contracting. Business owners reported they did not know how to obtain “debriefings” with the City when their firm was not successful in receiving a contract award and requested training in how to do business with the City.

Consider Partnering with Other Agencies and Local Organizations to Provide Bonding, Financing and Technical Assistance Programs: These include bonding and financing programs to assist small firms in obtaining loans as well as issuing surety bonds to certified contractors, with low interest rates. Programs could also provide general banking services on favorable terms to applicant firms. In addition, technical assistance with critical business skills such as estimating, accounting, safety, marketing, legal compliance, etc., could be made available in conjunction with existing efforts of South Bend area organizations such as chambers of commerce, professional associations, community-based organizations, etc. For example, the City should consider working with St. Mary’s College’s SPARK program offering community education and business assistance programs designed to assist women. Partnering with these types of programs will allow the City to leverage their expertise, knowledge and experience in assisting these types of businesses.

Consider partnering with other Indiana governments: The State of Indiana, the City of Indianapolis and other local agencies are interested in ensuring equal opportunities and supplier diversity. The Indiana Department of Transportation, for example, receives federal funds to support the growth and development of disadvantaged business enterprises in the construction industry. South Bend should explore assisting local firms to access contracting opportunities and supportive services provided by these agencies.

Provide Training for all City Staff with Contracting Responsibilities or Vendor Interface: With the City-wide roll out of the new program, all South Bend personnel with contracting responsibilities and responsibility for the program and vendor management will require training. In addition to providing technical information on compliance, the training will serve as an opportunity to reaffirm the City’s commitment to supplier diversity and to encourage all departments to buy into these values and objectives of the program.

Adopt a Small Business Enterprise Target Market: Set aside some smaller contracts for bidding only by small, local firms as prime contractors, if permitted under Indiana law. 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 consulting services. It will reduce the need to set contract goals to ensure equal opportunities, and is an approach specifically approved by the courts. The City would have to determine the size limits for contracts and the types of contracts to be included. It will be critical to keep complete race and gender information on bidders to evalu-

ate whether this is an effective race- and gender-neutral measure to reduce barriers. An 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.

Implement Race- and Gender-Conscious Measures: The City should set an annual, overall target for M/WBE utilization in City contracts (prime contracts and subcontracts combined). The availability estimates in Chapter IV should be the basis for consideration of overall, annual spending targets for City funds. We found the availability of M/WBEs to be 14.91 percent. This target can be the City's goal for its overall spending with certified firms across all industry categories.

Contract Goals: The City should use the study's detailed unweighted availability estimates as the starting point for contract specific goals: As discussed in Chapter II of the Study, the City's 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 the electronic monitoring system. This methodology involves four steps: 1. Weight the estimated dollar value of the scopes of the contract by industry codes, as determined during the process of creating the solicitation. 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.

Include all racial and ethnic groups and White women in program eligibility on a presumptive basis: The Study found that as a group, M/WBEs continue to suffer disparities in their access to City contracts. Program eligibility should be limited to firms that have a business presence in the City's market area, as established by this study. This consists of the State of Indiana and the three counties of Berrien, MI; Wabash, IL; and Kankakee, IL. The City should accept M/WBE Certifications from the State of Indiana, the City of Indianapolis, and the Indiana Unified Certification Program and will need to collect full and complete data on the firm's race and gender ownership, and NAICS code(s) to fully monitor the program as required by the courts. It will be the City's constitutional responsibility, however, to ensure that the certifications it accepts are from narrowly tailored programs with demonstrated integrity.

Implement Compliance and Monitoring Policies and Procedures: It is essential that the City adopt contract award and performance standards for program compliance and monitoring to ensure that any new M/WBE program sets narrowly tailored goals and eligibility requirements and embody best practices. In general, compliance and monitoring should include the following elements. 1. Clearly delineated policies and forms by which a bidder or proposer can establish that it has

either met the contract goal(s) or made good faith efforts to do so. 2. Rules for how participation by certified firms will be counted towards the goal(s). A firm must perform a “commercially useful function” in order to be counted for goal attainment and how various types of goods and services will be credited towards meeting goals must be spelled out. 3. Criteria and processes for how non-performing, certified firms can be substituted during performance. 4. Contract close-out procedures and standards for sanctions for firms that fail to meet their contractual requirements under the program. 5. A process to appeal adverse determinations under the program that meets due process standards.

Develop Performance Standards and a Review Process: To meet the requirements of strict constitutional scrutiny and ensure that best practices in program administration are applied, the City should conduct a full and thorough review of its race- and gender-neutral measures and the evidentiary basis for any new M/WBE program approximately every five to seven years. This includes adopting a sunset date for the M/WBE program. This 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.

It is important for the overall success of a new program to evaluate its effectiveness in reducing the systemic barriers identified by the study. In addition to meeting goals, possible benchmarks be:

- Progress towards meeting the overall, annual M/WBE goal.
- The number of bids or proposals, industry 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 and industry rejected as non-responsive for failure to make good faith efforts to meet the goal.
- The number, industry and dollar amount of M/WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors, including awards through an 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.

II. LEGAL STANDARDS FOR CONTRACTING AFFIRMATIVE ACTION PROGRAMS

A. Summary of Constitutional Equal Protection Standards

To be effective, enforceable, and legally defensible, a race-based program for public contracts must meet the judicial test of constitutional “strict scrutiny.” Strict scrutiny is the highest level of judicial review. The test consists of two elements:

1. 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.
2. Any remedies adopted must be “narrowly tailored” to that discrimination; that is, the program must be directed at the types and the depth of discrimination identified.²

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

1. 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 disparity indices, comparable to the type of “disparate impact” analysis used in employment discrimination cases.
2. Anecdotal evidence of race-based barriers to the full and fair participation of minority firms in the market area seeking contracts with the agency, comparable to the “disparate treatment” analysis used in employment discrimination cases.³ Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

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

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

3. *Id.* at 509.

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

Most courts, including the Seventh Circuit, 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.⁴ However, appellate courts have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program,⁵ or held that the results would be the same under strict scrutiny.⁶

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.⁷ In contrast to strict scrutiny, rational basis means the governmental action must only be “rationally related” to a “legitimate” government interest.⁸ Thus, preferences for persons with, for example, disabilities or veteran status, may be enacted with vastly less evidence than that required for 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 its race-conscious program.⁹ 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.¹⁰ “[W]hen the proponent of an affirmative action plan produces

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

5. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007), *cert. denied* 15-1827, June 26, 2017 (“*Northern Contracting III*”).

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

7. *See generally, Coral Construction Co. v. King County*, 941 F. 2d 910 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997).

8. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

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

10. *W.H. Scott Construction Co., Inc. v. City of Jackson, Mississippi*, 199 F.3d, at 219 (5th Cir. 1999); *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*”).

sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”¹¹

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”¹² For example, in the challenge to the Minnesota and Nebraska DBE programs, “plaintiffs presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.”¹³ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.¹⁴ 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.¹⁵

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

B. Elements of Strict Scrutiny

The U.S. Supreme Court, in the case of the *City of Richmond v. J.A. Croson Co.*, established the constitutional contours of permissible race-based public contracting programs. Reversing long established Equal Protection jurisprudence, the Court, for the first time, extended the highest level of judicial examination from

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11. *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997) (“*Engineering Contractors II*”).
 12. *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) (“*Concrete Works IV*”).
 13. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).
 14. *Coral Construction*, 941 F.2d. 910, 921 (9th Cir. 1991); *Engineering Contractors II*, 122 F.3d at 916.
 15. *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1522-1523 (10th Cir. 1994) (“*Concrete Works II*”); *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999), *aff’d per curiam*, 218 F. 3d 1267 (11th Cir. 2000); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

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 (“Plan”) that required prime contractors award 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 that was at least 51 percent owned and controlled by minority 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 active participation in discrimination:

[A] state or local subdivision...has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment... [I]f the City could show that it had essentially become a “passive participant” in a system of racial exclusion...[it] could take affirmative steps to dismantle such a system.¹⁶

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.¹⁷ It further ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the

16. *Croson*, 488 U.S. at 491-92.

motive for the classification was illegitimate racial prejudice or stereotyping. 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.

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."¹⁸

The foregoing analysis was applied only to Blacks. The Court then emphasized that there was "absolutely no evidence" of discrimination against other minorities. "The random inclusion of racial groups that, as a practical matter, may have never suffered from discrimination in the construction industry in Richmond, suggests that perhaps the City's purpose was not in fact to remedy past discrimination."¹⁹

17. 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.").

18. *Id.* at 510.

19. *Id.*

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.²⁰ Richmond noted that the City “does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”²¹

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 individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.²²

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.²³ 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.

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

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

22. *Croson*, 488 U.S. at 509 (citations omitted).

23. *Id.* at 502.

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.²⁴

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*.²⁵

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

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

25. *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").

26. *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).

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 South Bend's Minority- and Women-Owned Business Enterprise Program

The case law on the DBE program should guide the City's program for locally-funded contracts. As discussed, 49 C.F.R. Part 26 has been upheld by every court, and local programs for Minority- and Women-Owned Business Enterprises ("M/WBEs") will be judged against this legal framework.²⁷ We note that programs for veterans, persons with disabilities or truly race- and gender-neutral small business efforts are not subject to strict scrutiny and no evidence comparable to that in a disparity study is needed to enact such initiatives.

While Congress evaluated the evidence of discrimination against M/WBEs in the federal marketplace, a local agency must conduct its own fact finding. It is well established that disparities between an agency's utilization of M/WBEs and their availability in the relevant marketplace provide a sufficient basis for the consideration of race- or gender-conscious remedies. Proof of the disparate impacts of economic factors on M/WBEs and the disparate treatment of such firms by actors critical to their success 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.²⁸ 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.²⁹

Croson's admonition that "mere societal" discrimination is not enough to meet strict scrutiny is met where the government presents evidence of discrimination in the industry targeted by the program. "If such evidence is presented, it is immaterial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry... The genesis of the identified discrimination is irrelevant." There is no requirement to "show the existence of spe-

27. *Midwest Fence Corp. v. US Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 953 (7th Cir. 2016) ("*Midwest Fence II*").

28. *Adarand VII*, 228 F.3d at 1166 ("statistical and anecdotal evidence are appropriate").

29. *Id.*

cific discriminatory policies and that those policies were more than a reflection of societal discrimination.”³⁰

South Bend need not prove that it is itself guilty of discrimination to meet its burden. In upholding Denver’s M/WBE construction program, the court stated that Denver can show its compelling interest by “evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination...[by] linking its spending practices to the private discrimination.”³¹ Denver further linked its award of public dollars to discriminatory conduct through the testimony of M/WBEs that identified general contractors who used them on City projects with M/WBE goals but refused to use them on private projects without goals.

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

1. Define South Bend’s Market Areas

The first step is to determine the market areas in which the City operates. *Croson* states that a state or local government may only remedy discrimination within its own contracting market area. The City of Richmond was specifically faulted for including minority contractors from across the country in its program, based on national data considered by Congress.³² The City 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.³³

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.³⁴ Likewise, the accepted approach is to analyze those detailed industries that make up at least 75 percent of the prime contract and associated subcontract payments for the study period.³⁵ This produces the utilization results within the geographic market area.

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

31. *Id.* at 977.

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

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

34. National Academies of Sciences, Engineering, and Medicine 2010, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, p. 49. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14346>. (“*National Disparity Study Guidelines*”).

35. *Id.* at pp. 50-51.

2. Examine Disparities between South Bend's Utilization of M/WBEs and M/WBE Availability

Next, the study must estimate the availability of minorities and women to participate in the City's contracts as prime contractors and associated subcontractors compared to the City's utilization of such firms. The primary inquiry is whether there are statistically significant disparities between the availability of M/WBEs and their utilization.

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.³⁶

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.³⁷ 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.³⁸ Where possible, statistical techniques are applied to examine whether any disparities are significant. In addition to creating the disparity ratio, correct measures of availability are necessary to determine whether discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors, known as an "economy-wide" analysis.³⁹

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

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

38. 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.

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

To determine disparity ratios once utilization has been established, the next step is to calculate the availability of minority- and women-owned firms in the government's market area. Based on the product and geographic utilization data, the study should calculate weighted M/WBE availability estimates of ready, willing and able firms in the City's market. This is generally the "Custom Census" methodology recommended in the National Study Guidelines and repeatedly approved by the courts. This methodology includes both certified firms and non-certified firms owned by minorities or women.

The Custom Census involves the following steps: 1. Develop directories of M/WBEs to develop the Master M/WBE Directory. 2. Define a subset of business data to establish the availability of all firms. 3. Merge the Directory with the contract data file created during the utilization analysis. 4. Assign race, gender and 6-digit North American Industry Classification System codes.⁴⁰ This analysis results in an overall availability estimate of the number of ready, willing and able M/WBEs that is a narrowly tailored, dollar-weighted average of all the underlying industry availability numbers, with larger weights applied to industries with relatively more spending and lower weights applied to industries with relatively less spending. The availability figures should be also subdivided by race, ethnicity, and gender.

This approach has several benefits. As held by the federal court of appeals in finding the Illinois Department of Transportation's program to be constitutional, the "remedial nature of [DBE programs] militates in favor of a method of D/M/W/SBE availability calculation that casts a broader net" than merely using bidders lists or other agency or government directories. A broad methodology is also recommended by the USDOT for the federal DBE program, which has been upheld by every court.⁴¹

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

Many plaintiffs have argued that studies must somehow control for "capacity" of M/WBEs to perform specific agency contracts. The definition of "capacity" has varied based upon the plaintiff's particular point of view, but it has gener-

40. See *National Disparity Study Guidelines*, Chapter III, pp. 33-34.

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

ally meant bonding limits, firm size, firm revenues, and prior experience on agency projects (no argument has been made outside of the construction industry). This test has been rejected by the courts when directly addressed by the plaintiff and the agency. As recognized by the courts and the National Model Disparity Study Guidelines, size and experience are not race- and gender-neutral variables. Discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors. It is these types of “capacity” variables where barriers to full and fair opportunities to compete will be manifested. Based on expert testimony, judges understand that factors such as size and experience are not race- and gender-neutral variables: “M/WBE construction firms are generally smaller and less experienced *because* of discrimination.”⁴² Capacity limitations on availability would import the current effects of past discrimination into the model, because if M/WBEs are newer or smaller because of discrimination, then controlling for those variables will mask the phenomenon of discrimination that is being studied. In short, identifiable indicators of capacity are themselves impacted and reflect discrimination. 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.⁴³ Additionally, *Croson* does not “require disparity studies that measure whether construction firms are able to perform a *particular contract*.”⁴⁴

Capacity variables should be examined at the economy-wide level of business formation and earnings, discussed below, not at the first stage of the analysis, to reduce the downward bias that discrimination imposes on M/WBEs’ availability and the upward bias enjoyed by non-M/WBEs.

South Bend 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.⁴⁵

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

43. Conjecture and unsupported criticism of the government are not enough. The plaintiff must rebut the government’s evidence and introduce “credible, particularized evidence” of its own. See *Midwest Fence II*, 840 F.3d 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).

44. *Croson*, 488 U.S. at 508 (emphasis in the original).

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

Nor must the City demonstrate that the “ordinances will *change* discriminatory practices and policies” in the local market area; such a test would be “illogical” because firms could defeat the remedial efforts simply by refusing to cease discriminating.⁴⁶

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

Denver’s only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination.... Denver was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. To impose such a burden on a municipality would be tantamount to requiring proof of discrimination and would eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence.⁴⁷

Similarly, statistical evidence by its nature cannot identify the individuals responsible for the discrimination.⁴⁸

3. Examine the Results in South Bend’s Unremediated Markets

The results of contracts solicited without goals are an excellent indicator of whether discrimination continues to impact opportunities in public contracting. Evidence of race and gender discrimination in relevant “unremediated”⁴⁹ markets provides an important indicator of what level of actual M/WBE participation can be expected in the absence of City mandated affirmative efforts to contract with M/WBEs.⁵⁰ As the Eleventh Circuit has acknowledged, “the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.”⁵¹ If M/WBE utilization is below availability in unremediated markets, an inference of discrimination may be supportable.

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

47. *Id.* at 971.

48. *Id.* at 973.

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

50. *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).

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

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.”⁵² 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.⁵³ 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.⁵⁴ Evidence of unremediated markets “sharpens the picture of local market conditions for MBEs and WBEs.”⁵⁵

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 of whether the market functions properly for all firms regardless of the race or gender of their

52. *Adarand VII*, 228 F.3d at 1174.

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

54. *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 737 (N.D. Ill. 2003); (holding that City of Chicago’s M/WBE program for local construction contracts met compelling interest using this framework); *see also Concrete Works IV*, 321 F.3d at 987-988.

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

ownership. These analyses contributed to the successful defense of Chicago's construction program. 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.⁵⁶

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."⁵⁷ 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

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

57. *Id.*

disparities in commercial loan denial rates between Black business owners compared to similarly situated non minority-owned business owners are strong evidence of the continuing effects of discrimination.⁵⁸ 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.⁵⁹

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 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.”⁶⁰ 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.⁶¹ 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.”⁶² “[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,

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

59. *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.”).

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

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

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

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.”⁶³

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.”⁶⁴ 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.”⁶⁵

D. Narrowly Tailoring a Minority-Owned and Women-Owned Business Enterprise Procurement Program for South Bend

Even if the City has a strong basis in evidence to believe that race-based measures are needed to remedy identified discrimination, the program must still be narrowly tailored to that evidence. As discussed above, programs that closely mirror those of the U.S. Department of Transportation’s Disadvantaged Business Enterprise program⁶⁶ have been upheld using that framework.⁶⁷ 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;

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

64. *Id.* at 249.

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

66. 49 C.F.R. Part 26.

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

- 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.⁶⁸

1. Consider Race- and Gender-Neutral Remedies

Race- and gender-neutral approaches are necessary components of a defensible and effective M/WBE program⁶⁹ and the failure to seriously consider such remedies has been fatal to several programs.⁷⁰ Difficulty in accessing procurement opportunities, restrictive bid specifications, excessive experience requirements, and overly burdensome insurance and/or bonding requirements, for example, might be addressed by the City without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units, providing technical support, and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.⁷¹ Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.⁷²

The requirement that the agency must meet the maximum feasible portion of the goal through race-neutral measures, as well as estimate that portion of the goal that it predicts will be met through such measures, has been central to the holdings that the DBE program regulations meet narrow tailoring.⁷³

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.⁷⁴ 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

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

69. *Croson*, 488 U.S. at 507 (Richmond considered no alternatives to race-based quota); *Associated General Contractors of Ohio v. Drabik*, 214 F.3d at 738 (“*Drabik II*”); *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).

70. *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.

71. *See* 49 CFR § 26.51.O.

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

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

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

unlikely to succeed such alternative might be... [S]ome degree of practicality is subsumed in the exhaustion requirement.”⁷⁵

2. Set Targeted M/WBE Goals

Numerical goals or benchmarks for M/WBE participation must be substantially related to their availability in the relevant market.⁷⁶ 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.⁷⁷ “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*.”⁷⁸

Goals can be set at various levels of particularity and participation. The City 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 non-minority women,⁷⁹ to separate goals for each minority group and women.⁸⁰

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 requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets.”⁸¹ However, sheer speculation cannot form the basis for an enforceable measure.⁸²

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.

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

76. *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*”).

77. 49 C.F.R. § 26.45 (b)

78. *Id.*

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

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

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

82. *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).

Not only is this legally mandated,⁸³ 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ This feature has been central to the holding that the DBE program meets the narrow tailoring requirement.⁸⁷

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

The over- or under-inclusiveness of those persons to be included in the City’s program is an additional consideration and addresses whether the remedies truly target the evil identified. 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.⁸⁸ 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”.⁸⁹ 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

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

84. 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”).

85. 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.”).

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

87. See, e.g., *Sherbrooke*, 345 F.3d. at 972; *Webster*, 51 F. Supp. 2d 1354, 1380.

88. *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 Native Americans).

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

Asian-Americans and women.”⁹⁰ 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.⁹¹ Therefore, remedies should be limited to those firms owned by the relevant minority groups as established by the evidence that have suffered actual harm in the market area.⁹²

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 industry, have been central to the courts’ holdings that it is narrowly tailored.⁹³ “[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.”⁹⁴ Further, anyone must be able to challenge the disadvantaged status of any firm.⁹⁵

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.⁹⁶ However, “innocent” parties can be made to share some of the burden of the remedy for eradicating racial discrimination.⁹⁷ The burden of compliance need not be placed only upon those firms directly responsible for the discrimination. The

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

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

92. *H. B. Rowe Co., Inc. 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.”).

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

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

95. 49 C.F.R. §26.87.

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

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

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.⁹⁸ “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 the result 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.”⁹⁹

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,¹⁰⁰ and the regulations do not limit the application of the program to only subcontracts.¹⁰¹ The trial court in upholding the Illinois DOT’s DBE program explicitly recognized that barriers to subcontracting opportunities also affect the ability of DBEs to compete for prime work on a fair basis.

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

98. *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).

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

100. 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.”).

101. 49 C.F.R. § 26.45(a)(1).

competitive industry with tight profit margins, considerable hazards, and strict bonding and insurance requirements.¹⁰²

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.”¹⁰³ 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 2004.¹⁰⁴ How old is too old is not definitively answered,¹⁰⁵ 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.¹⁰⁶ Similarly, “two facts [were] particularly compelling in establishing that [North Carolina’s M/WBE program] was narrowly tailored: the statute’s provisions (1) setting a specific expiration date and (2) requiring a new disparity study every five years.”¹⁰⁷

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

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

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

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

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

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

III. QUALITATIVE EVIDENCE OF RACE AND GENDER BARRIERS IN THE CITY OF SOUTH BEND'S MARKET

In addition to quantitative data, a disparity study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities and the City of South Bend. This evidence is relevant to the question of whether observed statistical disparities are due to discrimination and not to some other non-discriminatory cause or causes, as well as the likely efficacy of any race- and gender-neutral remedies employed by the City. As discussed in Chapter II, this type of anecdotal data has been held by the courts to be relevant and probative under the Fourteenth Amendment of whether the City has a “strong basis in evidence” to enact a race- and gender-conscious program, and if so, what narrowly tailored remedies are supportable to reduce the effects of past and current discrimination, and create a level playing field for contract opportunities for all firms.

The Supreme Court has held that anecdotal evidence can be persuasive because it “brought the cold [statistics] convincingly to life.”¹⁰⁸ Evidence about discriminatory practices engaged in by prime contractors, agency personnel, and other actors relevant to business opportunities has been found relevant regarding barriers both to minority firms’ business formation and to their success on governmental projects.¹⁰⁹ 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.”¹¹⁰ “[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.”¹¹¹

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

109. *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) (“*Adarand VII*”).

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

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 City’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.”¹¹² 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.”¹¹³

To explore this type of anecdotal evidence of possible discrimination against minorities and women in the City of South Bend’s geographic and industry markets and the effectiveness of its current race-neutral measures, we conducted a public meeting, and business owner and stakeholder interviews in person and by telephone, totaling 110 participants.¹¹⁴ We met with a broad cross section of business owners from the City’s geographic and industry markets. Firms ranged in size from large national businesses to established family-owned firms to new start-ups. We sought to explore their experiences in seeking and performing public and private sector prime contracts and subcontracts with the City, other government agencies, and in the private sector. We also elicited recommendations for effective measures to reduce barriers and create equal opportunities.

A. Business Owner Interviews

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

Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications, professionalism and capabilities. The assumption is that minority firms are less qualified. While sometimes subtle,¹¹⁵ these biases impact their attempts to obtain City and private sector contracts.

I don't market that I have an MBE.... A lot of times, if I say "Hey, I'm an MBE firm", I don't get the work.

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

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

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

114. Meetings were held on June 8, 2018; November 16, 2018; December 5, 2018; and March 20, 2019.

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

When you tell companies that you're WBE, DBE, some men ... do get a little defensive.... You have to kind of evaluate, is this gonna help me, or is this gonna give us a stigma that we need help? Sometimes you have to swallow your pride, get that project, get that purchase, and then show them that you provide the value that they're looking for.

I really felt like [the City staff] didn't want me to have the job. It wasn't because I wasn't the best at what I do, because I am. It was just because they would say, "Well, you don't need that much money." Like, "You just a little black girl. You won't need that much money."

Our problem is that people are trained to believe that Black folks, poor people, or minorities can't deliver.... There's a whole lot of Black people in here that wanna do something, and somebody needs to see that.

These types of barriers led minorities and women to unanimous agreement that M/WBE goals remain necessary to level the playing field and equalize opportunities. Aspirational or voluntary approaches were reported to be ineffective.

If [prime contractors or City staff] don't have to, they're not gonna make the choice to funnel any work this way [to minority-owned firms].... It's almost as if they're saying they don't want to try to have a relationship with you.

We've had people who've hired us as their diverse partner say, 'Yeah, well, I have to hire you because I need diversity.'

There are Black-owned construction companies, but one reason a lot of them that I talked to went out of business, because they can't get contracts with the City. So, they can't get any big contracts, then they have to try to build their business with only small ones, and it's hard to maintain a cash flow with the other issues that you deal with.

The engineers and the architects, we do exist. We're out there. We understand they're looking for capacity, reliability, capability [but we still don't get the work].

Minority and women entrepreneurs felt excluded from the networks necessary for success.

Minority entrepreneurs aren't in the networks

People will buy from people they like.

One thing I hear is, 'I don't feel I should have to do business with you just because you're DBE, WBE, ACDBE.' It really is about service, and price, and it boils down to relationships.

The construction industry, it's very male-dominant.

Many participants commented on barriers to City contracts in particular. Access to information about opportunities was mentioned as a frustrating challenge.

It's very difficult.

You have to have a relationship with the buyers, so that the buyers call you up and say, "Hey, you know, we're going out on a bid on this."

You're not given information. You just have to like claw through stuff to try to find it, to see what's going on.

You try to go to their website, you can't find the information. It has last year's dates on it. Just trying to get to a phone message or to talk to someone. You got to a phone tree just to find out when just a meeting is and then when you get the information, and if you need to take something to those meetings to promote yourself, it's like 12 hours beforehand and you may not have all the documents or things like that.

There is said to be a clear exclusion, especially to Black-owned and African American companies, to get access to information.

Contract size is a major impediment to M/WBEs performing work for the City, especially as prime vendors.

There's plenty of room for [minority firms]. We just want the crumbs. The crumbs will satisfy everybody in this room. We don't need that whole... We can make those crumbs work.

If you make [contracts] so big, none of us here want to lose, or in other words, embarrass ourselves, then say, 'Well, that's why we don't hire minorities, because they can't get the job done.'

They're making the contracts too large. They need to narrow them down. We do demolition only. There's a little excavating involved in it because we have to clean the holes out and some compacting, but these contracts are getting huge. They'll link them in with building. They'll link them in with dirt work, and so therefore, this larger contract, just say well, 'I'll just pick whoever I want, because once they get the contract, it's out of the City's hand.'

Several business owners described barriers to the City's procurement process and contract specifications.

The [City's] specifications are all messed up on the [commodities] items.

I was told by someone in the Parks department that, for small businesses, the insurance requirements may be a hurdle for myself, my company.

It would be helpful if they put on little mini training videos.

One suggestion to address these issues was for the City to conduct more outreach to M/WBEs and small local firms.

I have not seen the City of South Bend do any of the outreach things that some of the other places do.

[Conduct] a meet-and-greet, and say, 'This is how we're moving forward.' And that businesses are here and now and would like to do business with you and we want to help them establish relationships.

Suggestion [for South Bend]: the Indianapolis Office of Minority Suppliers has a forum every quarter, and so, it's a networking event. And so, you can set up your booth, and they set up booths, and you get personal introductions there. And they might have a training there.

Another recommendation was to provide support for minority and women entrepreneurs and implement capacity building measures for small firms.

I don't think we have a lot of resources here for entrepreneurs.

St. Mary's College has the SPARK program [the City should partner with].

B. Conclusion

Consistent with other evidence reported in this study, anecdotal interview information suggests that minorities and women continue to suffer discriminatory barriers to full and fair access to South Bend, and private sector, contracts and subcontracts. While not definitive proof that the City should apply race- and gender-conscious measures to these impediments, M/WBEs' experiences are the type of evidence that, especially when considered alongside the study's statistical evidence, the courts have found to be probative of whether the City may use narrowly tailored M/WBE contract goals to address that discrimination.

IV. UTILIZATION AND AVAILABILITY ANALYSIS FOR THE CITY OF SOUTH BEND CONTRACT DOLLARS

A. Contract Data Sources

We analyzed contract data for the calendar years 2015 through 2017 for the City of South Bend (the City)’s contracts. We received a Final Contract Data File from the City which contained 278 contracts, worth \$103,162,022.37. Of these prime contracts there were 327 associated subcontracts valued at \$25,523,221.36. This Final Contract Data File was used to determine the geographic and product markets for the analyses, to estimate the utilization of M/WBEs on those contracts, and to calculate M/WBE availability in the City’s marketplace.

B. Summary of Findings

As described fully below, we used the Final Contract Data File to determine the City’s utilization of M/WBEs in its geographic and product markets. This analysis yielded the Final Utilization Data File. Next, we employed the “custom census” methodology to determine the set of firms that could have been utilized by the City. These two analyses yielded the following results: The utilization of M/WBEs was 11.97 percent; and M/WBE weighted availability was 14.91 percent.

C. The City of South Bend’s Product and Geographic Markets

A defensible disparity study must determine empirically the industries that comprise the City’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”) codes¹¹⁶ that make up at least 75 percent of the prime con-

116. www.census.gov/eos/www/naics.

tract and subcontract payments for the study period.¹¹⁷ However, for this study, we went further, and applied a “90/90/90” rule, whereby we analyzed NAICS codes for City-funded contracts 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 the City of South Bend’s contracting activities.

1. The City of South Bend’s Unconstrained Product Markets

Tables 4-1 through 4-3 present the NAICS codes used to define the product market for the City’s contracts. These contracts were disaggregated by level of contract (*i.e.*, was the firm receiving the contract as a prime vendor or a sub-contractor), the label for each NAICS code, and the industry percentage distribution of the number of contracts and spending across NAICS codes. The following tables present South Bend’s *unconstrained* product market, which was later constrained by the geographic market area, discussed below.

Table 4-1: Industry Percentage Distribution of the City of South Bend’s Contracts
by Dollars Paid, All Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	16.30%	16.30%
238210	Electrical Contractors and Other Wiring Installation Contractors	9.84%	26.14%
541330	Engineering Services	6.61%	32.75%
237110	Water and Sewer Line and Related Structures Construction	6.44%	39.19%
238910	Site Preparation Contractors	5.24%	44.43%
238220	Plumbing, Heating, and Air-Conditioning Contractors	4.23%	48.66%
441110	New Car Dealers	3.72%	52.39%
333120	Construction Machinery Manufacturing	3.33%	55.72%
238310	Drywall and Insulation Contractors	3.02%	58.74%

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

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	2.70%	61.44%
238990	All Other Specialty Trade Contractors	2.08%	63.52%
221310	Water Supply and Irrigation Systems	2.01%	65.52%
333517	Machine Tool Manufacturing	1.90%	67.42%
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.67%	69.09%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	1.67%	70.76%
336120	Heavy Duty Truck Manufacturing	1.46%	72.22%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	1.46%	73.68%
238140	Masonry Contractors	1.41%	75.10%
335999	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	1.29%	76.39%
561730	Landscaping Services	1.28%	77.67%
238160	Roofing Contractors	1.19%	78.86%
238110	Poured Concrete Foundation and Structure Contractors	1.18%	80.05%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	1.12%	81.17%
541511	Custom Computer Programming Services	1.11%	82.28%
541320	Landscape Architectural Services	1.08%	83.36%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	1.07%	84.43%
TOTAL			100.0%^a

a. City spending across another 72 NAICS codes comprised 15.57 percent of all spending. The entire list of NAICS codes is contained in Appendix D.

Source: CHA analysis of City of South Bend's data.

**Table 4-2: Industry Percentage Distribution of the City of South Bend's
Contracts
by Dollars Paid, Prime Contracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	19.90%	19.90%
237110	Water and Sewer Line and Related Structures Construction	8.11%	28.01%
541330	Engineering Services	7.25%	35.26%
441110	New Car Dealers	4.95%	40.20%
333120	Construction Machinery Manufacturing	4.43%	44.64%
238310	Drywall and Insulation Contractors	4.01%	48.65%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	3.59%	52.23%
238910	Site Preparation Contractors	3.36%	55.60%
238990	All Other Specialty Trade Contractors	2.55%	58.14%
333517	Machine Tool Manufacturing	2.52%	60.66%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	2.21%	62.88%
221310	Water Supply and Irrigation Systems	2.21%	65.08%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.17%	67.25%
423830	Industrial Machinery and Equipment Merchant Wholesalers	2.10%	69.35%
336120	Heavy Duty Truck Manufacturing	1.94%	71.29%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	1.93%	73.22%
335999	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	1.72%	74.94%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.67%	76.62%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	1.49%	78.10%
541511	Custom Computer Programming Services	1.44%	79.55%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	1.43%	80.97%
541320	Landscape Architectural Services	1.34%	82.31%
511210	Software Publishers	1.32%	83.63%
236220	Commercial and Institutional Building Construction	1.00%	84.63%
TOTAL			100.0%^a

a. City spending across another 41 NAICS codes comprised 15.37 percent of all spending. The entire list of NAICS codes is contained in Appendix D.

Source: CHA analysis of City of South Bend's data.

**Table 4-3: Industry Percentage Distribution of the City's Contracts
by Dollars Paid, Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238210	Electrical Contractors and Other Wiring Installation Contractors	33.19%	33.19%
238220	Plumbing, Heating, and Air-Conditioning Contractors	12.01%	45.20%
238910	Site Preparation Contractors	10.93%	56.13%
237310	Highway, Street, and Bridge Construction	5.36%	61.49%
561730	Landscaping Services	5.17%	66.65%
238140	Masonry Contractors	5.00%	71.65%
541330	Engineering Services	4.68%	76.33%
238290	Other Building Equipment Contractors	3.72%	80.06%
238160	Roofing Contractors	2.62%	82.68%
238110	Poured Concrete Foundation and Structure Contractors	2.28%	84.96%
221310	Water Supply and Irrigation Systems	1.40%	86.36%
541620	Environmental Consulting Services	1.37%	87.73%
237110	Water and Sewer Line and Related Structures Construction	1.36%	89.09%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237130	Power and Communication Line and Related Structures Construction	1.32%	90.41%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.16%	91.57%
TOTAL			100.0%^a

a. City spending across another 47 NAICS codes comprised 8.43 percent of all spending. The entire list of NAICS codes is contained in Appendix D.

Source: CHA analysis of City of South Bend's data.

2. The City of South Bend's Geographic Market

The courts and the M/WBE regulations¹¹⁸ require that a local government limit the reach of its race- and gender-conscious contracting program to its geographic market area.¹¹⁹ While it may be that the state's jurisdictional boundaries comprise the City's geographic market area, this element of the analysis must be empirically established.¹²⁰

To determine the relevant geographic market area, we applied the standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.¹²¹ Location was determined by ZIP code and aggregated into counties as the geographic unit.

As presented in Table 4-4, spending in Indiana accounted for 81.93 percent of all contract dollars paid in the City's unconstrained product market. Upon further investigation of spending in Michigan and Illinois, we identified three counties (Berrien, MI; Wabash, IL; and Kankakee, IL) that accounted for an additional \$8,956,811.84 of the City's spending (9.82 percent of the unconstrained product market). Therefore, our analysis used the State of Indiana and those three counties as the geographic market area for this study.

118. https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DB_E_Program_20141106.pdf; see also 49 C.F.R § 26.45.

119. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (Richmond was specifically faulted for including minority contractors from across the country in its program based on the national evidence that supported the USDOT DBE program).

120. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) ("Concrete Works II") (to confine data to strict geographic boundaries would ignore "economic reality").

121. *National Disparity Study Guidelines*, p. 49.

Table 4-4: State Percentage Distribution of the City's Contracts by Dollars Paid

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
IN	81.93%	81.93%
MI	5.72%	87.65%
IL	5.33%	92.98%
SD	1.65%	94.63%
TX	1.46%	96.09%
OH	1.13%	97.23%
GA	0.99%	98.21%
FL	0.79%	99.00%
OK	0.65%	99.65%
KS	0.24%	99.89%
CA	0.11%	100.00%
TOTAL		100.0%

Source: CHA analysis of City of South Bend's data.

D. The City's Utilization of M/WBEs

Having determined the City's product and geographic market areas, the next essential step was to determine the dollar value of the City's utilization of M/WBEs as measured by payments to prime firms and subcontractors and disaggregated by race and gender. The following tables present data on the total contract dollars paid by the City 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, discussed below.

Tables 4-5 through 4-7 present the City's utilization by contract dollars.

Table 4-5: NAICS Code Distribution of the City of South Bend's Contract Dollars

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$16,002,610.00	19.12%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$10,149,864.00	12.13%
541330	Engineering Services	\$6,820,418.00	8.15%
237110	Water and Sewer Line and Related Structures Construction	\$6,642,345.50	7.94%
238910	Site Preparation Contractors	\$5,372,248.00	6.42%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$4,345,705.00	5.19%
441110	New Car Dealers	\$3,841,309.25	4.59%
333120	Construction Machinery Manufacturing	\$3,440,055.00	4.11%
238310	Drywall and Insulation Contractors	\$3,113,685.75	3.72%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	\$2,573,226.00	3.08%
238990	All Other Specialty Trade Contractors	\$2,144,081.25	2.56%
221310	Water Supply and Irrigation Systems	\$1,999,507.50	2.39%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	\$1,506,914.12	1.80%
238140	Masonry Contractors	\$1,459,038.88	1.74%
333517	Machine Tool Manufacturing	\$1,360,195.00	1.63%
561730	Landscaping Services	\$1,318,440.75	1.58%
238160	Roofing Contractors	\$1,232,683.50	1.47%
423830	Industrial Machinery and Equipment Merchant Wholesalers	\$1,199,167.25	1.43%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	\$1,153,981.12	1.38%
541511	Custom Computer Programming Services	\$1,146,518.88	1.37%
541320	Landscape Architectural Services	\$1,116,388.62	1.33%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	\$1,108,485.00	1.32%
238110	Poured Concrete Foundation and Structure Contractors	\$1,029,855.19	1.23%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
511210	Software Publishers	\$1,024,804.88	1.22%
236220	Commercial and Institutional Building Construction	\$939,516.69	1.12%
238290	Other Building Equipment Contractors	\$807,399.88	0.96%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$369,017.00	0.44%
237130	Power and Communication Line and Related Structures Construction	\$337,676.72	0.40%
541620	Environmental Consulting Services	\$120,408.86	0.14%
Total		\$83,675,547.59	100.0%

Source: CHA analysis of City of South Bend's data.

**Table 4-6: Distribution of the City of South Bend's Contract Dollars, by Race and Gender
(total dollars)**

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
221310	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,999,508.00	\$1,999,508.00
236220	\$0.00	\$0.00	\$0.00	\$77,035.00	\$77,874.00	\$154,909.00	\$784,607.00	\$939,517.00
237110	\$0.00	\$0.00	\$0.00	\$0.00	\$277,225.00	\$277,225.00	\$6,365,120.00	\$6,642,346.00
237130	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$337,677.00	\$337,677.00
237310	\$0.00	\$0.00	\$0.00	\$0.00	\$304,073.00	\$304,073.00	\$15,698,537.00	\$16,002,610.00
238110	\$0.00	\$0.00	\$0.00	\$0.00	\$355,440.00	\$355,440.00	\$674,415.00	\$1,029,855.00
238140	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,459,039.00	\$1,459,039.00
238160	\$0.00	\$0.00	\$0.00	\$0.00	\$252,919.00	\$252,919.00	\$979,764.00	\$1,232,683.00

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
238210	\$0.00	\$0.00	\$0.00	\$0.00	\$1,518,594.00	\$1,518,594.00	\$8,631,270.00	\$10,149,864.00
238220	\$0.00	\$0.00	\$0.00	\$11,089.00	\$12,039.00	\$23,128.00	\$4,322,577.00	\$4,345,705.00
238290	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$807,400.00	\$807,400.00
238310	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$3,113,686.00	\$3,113,686.00
238910	\$0.00	\$0.00	\$0.00	\$0.00	\$922,052.00	\$922,052.00	\$4,450,196.00	\$5,372,248.00
238990	\$0.00	\$0.00	\$0.00	\$0.00	\$20,900.00	\$20,900.00	\$2,123,182.00	\$2,144,081.00
333120	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$3,440,055.00	\$3,440,055.00
333517	\$0.00	\$0.00	\$0.00	\$0.00	\$1,360,195.00	\$1,360,195.00	\$0.00	\$1,360,195.00
334514	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,153,981.00	\$1,153,981.00
423110	\$0.00	\$0.00	\$0.00	\$0.00	\$677,246.00	\$677,246.00	\$1,895,980.00	\$2,573,226.00
423120	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,108,485.00	\$1,108,485.00
423810	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,506,914.00	\$1,506,914.00
423830	\$0.00	\$1,044,315.00	\$0.00	\$0.00	\$84,368.00	\$1,128,683.00	\$70,484.00	\$1,199,167.00
441110	\$0.00	\$0.00	\$0.00	\$196,077.00	\$0.00	\$196,077.00	\$3,645,232.00	\$3,841,309.00
484220	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$369,017.00	\$369,017.00
511210	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,024,805.00	\$1,024,805.00
541320	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,116,389.00	\$1,116,389.00
541330	\$0.00	\$0.00	\$1,356,378.00	\$0.00	\$162,700.00	\$1,519,078.00	\$5,301,340.00	\$6,820,418.00
541511	\$0.00	\$794,103.00	\$0.00	\$0.00	\$0.00	\$794,103.00	\$352,416.00	\$1,146,519.00
541620	\$0.00	\$0.00	\$0.00	\$0.00	\$21,773.00	\$21,773.00	\$98,636.00	\$120,409.00
561730	\$0.00	\$0.00	\$0.00	\$0.00	\$486,145.00	\$486,145.00	\$832,296.00	\$1,318,441.00
Total	\$0.00	\$1,838,418.00	\$1,356,378.00	\$284,201.00	\$6,533,544.00	\$10,012,541.00	\$73,663,007.00	\$83,675,547.00

Source: CHA analysis of data.

Table 4-7: Distribution of the City of South Bend's Contract Dollars, by Race and Gender
(share of total dollars)

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
221310	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
236220	0.00%	0.00%	0.00%	8.20%	8.29%	16.49%	83.51%	100.00%
237110	0.00%	0.00%	0.00%	0.00%	4.17%	4.17%	95.83%	100.00%
237130	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
237310	0.00%	0.00%	0.00%	0.00%	1.90%	1.90%	98.10%	100.00%
238110	0.00%	0.00%	0.00%	0.00%	34.51%	34.51%	65.49%	100.00%
238140	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%	20.52%	20.52%	79.48%	100.00%
238210	0.00%	0.00%	0.00%	0.00%	14.96%	14.96%	85.04%	100.00%
238220	0.00%	0.00%	0.00%	0.26%	0.28%	0.53%	99.47%	100.00%
238290	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238310	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
238910	0.00%	0.00%	0.00%	0.00%	17.16%	17.16%	82.84%	100.00%
238990	0.00%	0.00%	0.00%	0.00%	0.97%	0.97%	99.03%	100.00%
333120	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
333517	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%	0.00%	100.00%
334514	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423110	0.00%	0.00%	0.00%	0.00%	26.32%	26.32%	73.68%	100.00%
423120	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423810	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423830	0.00%	87.09%	0.00%	0.00%	7.04%	94.12%	5.88%	100.00%
441110	0.00%	0.00%	0.00%	5.10%	0.00%	5.10%	94.90%	100.00%
484220	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
511210	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541320	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
541330	0.00%	0.00%	19.89%	0.00%	2.39%	22.27%	77.73%	100.00%
541511	0.00%	69.26%	0.00%	0.00%	0.00%	69.26%	30.74%	100.00%

NAICS	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
541620	0.00%	0.00%	0.00%	0.00%	18.08%	18.08%	81.92%	100.00%
561730	0.00%	0.00%	0.00%	0.00%	36.87%	36.87%	63.13%	100.00%
Total	0.00%	2.20%	1.62%	0.34%	7.81%	11.97%	88.03%	100.00%

Source: CHA analysis of City of South Bend's data.

E. Availability of M/WBEs in the City of South Bend's Markets

1. Methodological Framework

Estimates of the availability of disadvantaged, minority- and female-owned firms (collectively, M/WBEs) in the City's market area are a critical component of the analysis of possible barriers to equal opportunities to participate in the City'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.¹²² Availability estimates are also crucial for the City to set narrowly tailored annual and contract goals on its contracts.

We applied the "custom census" approach with refinements to estimating availability. As recognized by the courts and the *National Model Disparity Study Guidelines*,¹²³ this methodology in general is superior to the other methods for at least four reasons.

First, it provides an internally consistent and rigorous "apples to apples" comparison between firms in the availability numerator and those in the denominator. Other approaches often have different definitions for the firms in the numerator (*e.g.*, certified M/WBEs) and the denominator (*e.g.*, registered vendors or the Census Bureau's County Business Patterns data).

Next, by examining a comprehensive group of firms, it "casts a broader net" beyond those known to the City. As recognized by the courts, this comports

122. 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), *cert. denied* 15-1827, June 26, 2017 ("*Northern Contracting III*") (The "remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net."); https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf.

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

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 City'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.¹²⁴

Fourth, it has been upheld by every court that has reviewed it, including most recently in the successful defense of the Illinois State Toll Highway's M/WBE program, for which we served as testifying experts.¹²⁵

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

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

The Master M/WBE 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/WBE Directory, we limited the firms we used in this Custom Census analysis to those firms operating within the City's constrained product market. We purchased the firm information from Hoovers for the firms in the NAICS codes located in the City's market area in

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

125. *Midwest Fence, Corp. v. U.S. Department of Transportation et al*, 840 F.3d 932 (2016) (“*Midwest Fence II*”); see also *Northern Contracting III*, 473 F.3d 715 (7th Cir. 2007), cert. denied 15-1827, June 26, 2017.

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.¹²⁶ 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.

We merged these three databases to form an accurate estimate of firm availability to the City. Tables 4-8 through 4-10 present data on:

- The *unweighted* availability by race and gender and by NAICS codes in the City's constrained product markets;
- The weights used to adjust the unweighted numbers¹²⁷; and
- The final estimates of the weighted averages of the individual 6-digit level availability estimates in the City's market areas.

These weighted availability estimates can be used by the City to set M/WBE goals, if a race- and gender-conscious program is adopted.

2. Estimation of M/WBE Availability in the City of South Bend's Markets

The City requested we provide the actual numbers of M/WBEs and non-M/WBEs.

Table 4-8: Raw Availability Counts

NAICS	MBE	White Women	M/WBE	Non-M/WBE	Total
221310	1	0	1	80	81
236220	20	23	43	291	334
237110	2	4	6	22	28
237130	3	7	10	96	106
237310	26	29	55	146	201
238110	3	3	6	3	9

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

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

NAICS	MBE	White Women	M/WBE	Non-M/WBE	Total
238140	1	8	9	78	87
238160	1	11	12	164	176
238210	8	34	42	298	340
238220	16	29	45	479	524
238290	0	3	3	32	35
238310	3	4	7	79	86
238910	7	21	28	208	236
238990	11	32	43	344	387
333120	0	3	3	29	32
333517	0	3	3	35	38
334514	0	0	0	4	4
423110	0	3	3	71	74
423120	1	1	2	177	179
423810	1	1	2	57	59
423830	4	13	17	246	263
441110	7	25	32	705	737
484220	23	50	73	312	385
511210	2	0	2	46	48
541320	1	8	9	79	88
541330	42	24	66	321	387
541511	16	13	29	116	145
541620	2	3	5	4	9
561730	8	30	38	187	225
TOTAL	209	385	594	4709	5303

Source: CHA analysis of City of South Bend's data; Hoovers; CHA Master Directory.

The following is the availability of M/WBEs, expressed as percentages of all firms.

Table 4-9: Unweighted Availability

NAICS	Black	Latino	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
221310	1.23%	0.00%	0.00%	0.00%	0.00%	1.23%	98.77%	100.00%
236220	2.93%	1.90%	0.43%	0.73%	6.89%	12.87%	87.13%	100.00%
237110	7.14%	0.00%	0.00%	0.00%	14.29%	21.43%	78.57%	100.00%
237130	2.83%	0.00%	0.00%	0.00%	6.60%	9.43%	90.57%	100.00%
237310	7.96%	1.00%	1.49%	2.49%	14.43%	27.36%	72.64%	100.00%
238110	22.22%	0.00%	0.00%	11.11%	33.33%	66.67%	33.33%	100.00%
238140	1.15%	0.00%	0.00%	0.00%	9.20%	10.34%	89.66%	100.00%
238160	0.57%	0.00%	0.00%	0.00%	6.25%	6.82%	93.18%	100.00%
238210	1.47%	0.59%	0.00%	0.29%	10.00%	12.35%	87.65%	100.00%
238220	1.02%	0.59%	0.40%	1.04%	5.53%	8.59%	91.41%	100.00%
238290	0.00%	0.00%	0.00%	0.00%	8.57%	8.57%	91.43%	100.00%
238310	0.00%	0.00%	0.00%	3.49%	4.65%	8.14%	91.86%	100.00%
238910	1.69%	0.85%	0.42%	0.00%	8.90%	11.86%	88.14%	100.00%
238990	1.48%	1.00%	0.37%	0.00%	8.27%	11.11%	88.89%	100.00%
333120	0.00%	0.00%	0.00%	0.00%	9.38%	9.38%	90.63%	100.00%
333517	0.00%	0.00%	0.00%	0.00%	7.89%	7.89%	92.11%	100.00%
334514	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
423110	0.00%	0.00%	0.00%	0.00%	4.05%	4.05%	95.95%	100.00%
423120	0.56%	0.00%	0.00%	0.00%	0.56%	1.12%	98.88%	100.00%
423810	0.00%	0.00%	1.69%	0.00%	1.69%	3.39%	96.61%	100.00%
423830	0.00%	0.95%	0.57%	0.00%	4.94%	6.46%	93.54%	100.00%
441110	0.33%	0.33%	0.00%	0.30%	3.39%	4.34%	95.66%	100.00%
484220	4.94%	0.78%	0.00%	0.26%	12.99%	18.96%	81.04%	100.00%
511210	0.00%	0.00%	4.17%	0.00%	0.00%	4.17%	95.83%	100.00%
541320	1.14%	0.00%	0.00%	0.00%	9.09%	10.23%	89.77%	100.00%
541330	3.20%	1.41%	5.48%	0.76%	6.20%	17.05%	82.95%	100.00%
541511	1.49%	0.69%	8.85%	0.00%	8.97%	20.00%	80.00%	100.00%

NAICS	Black	Latino	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
541620	11.11%	11.11%	0.00%	0.00%	33.33%	55.56%	44.44%	100.00%
561730	3.11%	0.44%	0.00%	0.00%	13.33%	16.89%	83.11%	100.00%
TOTAL	1.92%	0.67%	0.90%	0.45%	7.26%	11.20%	88.80%	100.00%

Source: CHA analysis of City of South Bend's data; Hoovers; CHA Master Directory.

Table 4-10: Table 4.10 Share of the City of South Bend's Spending by NAICS Code

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
221310	Water Supply and Irrigation Systems	2.39%
236220	Commercial and Institutional Building Construction	1.12%
237110	Water and Sewer Line and Related Structures Construction	7.94%
237130	Power and Communication Line and Related Structures Construction	0.40%
237310	Highway, Street, and Bridge Construction	19.12%
238110	Poured Concrete Foundation and Structure Contractors	1.23%
238140	Masonry Contractors	1.74%
238160	Roofing Contractors	1.47%
238210	Electrical Contractors and Other Wiring Installation Contractors	12.13%
238220	Plumbing, Heating, and Air-Conditioning Contractors	5.19%
238290	Other Building Equipment Contractors	0.96%
238310	Drywall and Insulation Contractors	3.72%
238910	Site Preparation Contractors	6.42%
238990	All Other Specialty Trade Contractors	2.56%
333120	Construction Machinery Manufacturing	4.11%
333517	Machine Tool Manufacturing	1.63%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	1.38%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	3.08%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	1.32%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	1.80%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.43%
441110	New Car Dealers	4.59%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.44%
511210	Software Publishers	1.22%
541320	Landscape Architectural Services	1.33%
541330	Engineering Services	8.15%
541511	Custom Computer Programming Services	1.37%
541620	Environmental Consulting Services	0.14%
561730	Landscaping Services	1.58%
Total		100.0%

Source: CHA analysis of City of South Bend's data.

Table 4-11: Table 4.11 Aggregated Weighted Availability

	Black	Hispanic	Asian	Native American	White Women	M/WBE	Non-M/WBE	Total
Total	3.25%	0.57%	1.01%	0.92%	9.17%	14.91%	85.09%	100.0%

Source: CHA analysis of City of South Bend's data; Hoovers; CHA Master Directory.

F. Analysis of Disparity Ratios Between M/WBE Utilization and Availability

To meet the strict scrutiny requirement that a local government must establish that discrimination operates in its market area, through consideration of 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, on locally-funded contracts.

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.¹²⁸ 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.

Substantive and Statistical Significance

- ‡ connotes these values are substantively significant. Courts have ruled the disparity ratio less or equal to 80% represent disparities that substantively significant. (See Footnote 17 for more information)
- * connotes these values are statistically significant at the 0.05 level (See Appendix C for more information)
- ** connotes these values are statistically significant at the 0.01 level (See Appendix C for more information)
- *** connotes these values are statistically significant at the 0.001 level (See Appendix C for more information)

Table 4.12 presents the disparity ratios.

Table 4-12: Table 4.12 Disparity Ratio Analysis

	MBE	White Women	M/WBE	Non-M/WBE	Total
Total	72.38%‡	85.18%	80.25%	103.46%	100.0%

Source: CHA analysis of City data

‡ Indicates substantive significance

128. 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.”).

V. ANALYSIS OF DISPARITIES IN THE SOUTH BEND 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.¹²⁹

This Chapter explores the data and literature relevant to how discrimination in the City of South Bend's market and throughout the wider Indiana economy affects the ability of minorities and women to fairly and fully engage in the City's contract opportunities.¹³⁰ First, we examined the distribution of firms, their sales and their employees across different demographic groups. Next, we analyzed the rates at which M/WBEs in the State of Indiana 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 City procures goods and services is an analysis of the extent of disparities in those sectors independent of the City'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 of whether the market functions properly for all firms regardless of the race or gender of their ownership.¹³¹ These analyses

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

130. We analyzed data from the State of Indiana, because this best corresponded to the geographic market of the City of South Bend.

contributed most recently to the successful defense of the Illinois Tollway's Disadvantaged Business Enterprise (DBE) Program.¹³² As explained by the Tenth Circuit in upholding the U.S. Department of Transportation's DBE 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.¹³³

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. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts."¹³⁴ 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".

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

132. *Midwest Fence Corp. v. Illinois Department of Transportation, Illinois State Toll Highway Authority et al*, 840 F.3d 942 (7th Cir. 2016) ("*Midwest Fence II*") (upholding the Illinois Tollway's program for state-funded contracts modeled after Part 26 and based on CHA's expert testimony, including about disparities in the overall Illinois construction industry); see also *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).

133. *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) ("*Adarand VII*").

134. *Id.*

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.¹³⁵ 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.¹³⁶

Likewise, in holding that the DBE program regulations meet strict scrutiny, the court in the *Western States* opinion relied on the “substantial body of statistical and anecdotal materials” considered by Congress, including studies based on Census data that provide “ample” evidence of barriers to the formation of minority-owned firms in the transportation contracting industry.¹³⁷

B. 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 more.¹³⁸ The 2012 SBO was released in December 2015, so our analysis reflects the most current data avail-

135. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at *64 (Sept. 8, 2005) (“*Northern Contracting II*”).

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

137. *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

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

able. The SBO collects demographic data on business owners disaggregated into the following groups:^{139,140}

- 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.

In this section, we examined all industries in the State of Indiana. Table 5-1 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

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

140. 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.

- The annual payroll of employer firms

Panel A of Table 5-1 presents data for the four basic Non-White racial groups:

- Black
- Latino
- Native American
- Asian

Panel B of Table 5-1 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.¹⁴¹

Table 5-1: 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	6.95%	0.53%	1.26%	0.47%	0.82%	0.58%
Latino	2.83%	0.30%	1.42%	0.24%	0.60%	0.35%

141. 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

	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)
Native American	0.41%	0.04%	0.22%	0.03%	0.12%	0.08%
Asian	2.52%	0.88%	3.66%	0.83%	1.40%	0.98%
Panel B: Distribution of All Firms						
Non-White	12.79%	1.78%	6.84%	1.61%	3.08%	2.07%
White Women	27.01%	3.77%	15.70%	3.49%	6.60%	4.98%
White Men	47.43%	26.01%	55.58%	25.31%	33.30%	30.55%
Equally Non-White & White	0.42%	0.13%	0.59%	0.11%	0.34%	0.24%
Equally Women & Men	10.12%	3.06%	13.10%	2.84%	5.23%	3.44%
Firms Not Classifiable	2.18%	65.25%	8.16%	66.64%	51.44%	58.71%
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 5-2 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.¹⁴² 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 5-3:

- 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.

142. 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.

To better explain the data in Table 5-3, its first column of data represents a ratio indicating the share of all sales and receipts held by a demographic group divided by that group's share of all firms. For Blacks, this ratio is 7.67%. This is derived by taking numbers presented in Table 5-2. As shown in Table 5-2, the Black share of sales and receipts for all firms is 0.5%; the Black share of total number of all firms is 7.0%. With 0.5% in the numerator and 7.0% in the denominator, the ratio is 7.67.¹⁴³ 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. 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.¹⁴⁴ All disparity ratios for Non-White firms and White Women firms are below this threshold.¹⁴⁵

Table 5-2: 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	7.0%	0.5%	1.3%	0.5%	0.8%	0.6%
Latino	2.8%	0.3%	1.4%	0.2%	0.6%	0.4%
Native American	0.4%	0.0%	0.2%	0.0%	0.1%	0.1%
Asian	2.5%	0.9%	3.7%	0.8%	1.4%	1.0%
Panel B: Distribution of All Firms						
Non-White	12.8%	1.8%	6.8%	1.6%	3.1%	2.1%

143. Please note: while the tables present values that are rounded to the two-digit level, the actual values are not. Hence, using the example presented above, 0.5 divided by 7.0 equals 7.14; however, with the unrounded versions of the data, the result is 7.67.

144. 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.").

145. Because the data in this tables are presented for descriptive purposes, significance tests on these results are not conducted.

	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)
White Women	27.0%	3.8%	15.7%	3.5%	6.6%	5.0%
Not Non-White/Not White Women	60.2%	94.4%	77.5%	94.9%	90.3%	93.0%
All Firms	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

Table 5-3: 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	7.67%	36.97%	69.91%
Latino	10.43%	16.76%	59.47%
Native American	9.17%	14.66%	67.86%
Asian	34.91%	22.75%	69.84%
Panel B: Disparity Ratios for All Firms			
Non-Whites	13.95%	23.50%	67.16%
White Women	13.95%	22.22%	75.44%
Not Non-White/Not White Women	156.93%	122.52%	102.91%
All Firms	100.0%	100.0%	100.0%

Source: CHA calculations from Survey of Business Owners

C. Disparate Treatment in the Marketplace: Evidence from the Census Bureau's 2012 - 2016 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. In this section, we explore this question using the Census Bureau's *American Community Survey* data to address other aspects of this question. One element asks if demographic differences exist in the wage and salary income received by private sector workers. Beyond the issue of bias in the incomes generated in the private sector, this exploration is important for the issue of possible variations in the rate of business formation by different demographic groups. One of the determinants of business formation is the pool of financial capital at the disposal of the prospective entrepreneur. The size of this pool is related to the income level of the individual either because the income level impacts the amount of personal savings that can be used for start-up capital or the income level affects one's ability to borrow funds. Consequently, if particular demographic groups receive lower wages and salaries, then they would have access to a smaller pool of financial capital, and thus reduce the likelihood of business formation.

The *American Community Survey* ("ACS") *Public Use Microdata Sample* ("PUMS") is useful in addressing these issues. The ACS is an annual survey of one percent of the population and the PUMS provides detailed information at the individual level. In order to obtain robust results from our analysis, we used the file that combines the most recent data available for the years 2012 through 2016.¹⁴⁶ 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 and extending beyond, race and gender. To provide a simple example, two people who differ by race or gender may receive different wages. This difference may simply reflect that the individuals work in different industries. If this underlying difference is not known, one might assert the wage differential is the result of race or gender difference. To better understand the impact of race or gender on wages, it is important to compare individuals of different races or genders who work in the same industry. Of course, wages are determined by a broad set of factors beyond race, gender, and industry. With the ACS PUMS, we can include a wide range of additional variables such as age, education, occupation, and state of residence in the analysis.

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

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 percent 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 percent 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 percent confident that the relationship is different from zero.¹⁴⁷

In the next section, we report: 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). The

147. Most social scientists do not endorse utilizing a confidence level of less than 95 percent. (Another way of stating a confidence level of 95 percent is to state the results are statistically significance at the 0.05 level.) Appendix C explains more about statistical significance.

small number of observations restricted our ability to produce reliable estimates of any industry sector below the aggregation level of All Industries.

One method of exploring differences in economic outcomes is to examine the rate at which different demographic groups form businesses. We developed these business formation rates using data from the U.S. Bureau of the Census' *American Community Survey*. Table 5-4 presents these results. The table indicates that White men have higher business formation rates compared to all other groups except for Asians. Table 5-5 utilizes probit regression analysis to examine the probability of forming a business after controlling for important factors beyond race and gender.¹⁴⁸ This table indicates that Blacks, Latinos, and White Women are less likely to form businesses compared to similarly situated White men. The reduced probabilities of business formation were 2.8 percent for Blacks and 1.8 percent for Latinos and White Women. These results for Blacks and White Women were statistically significant at the 0.001 level; the results for Latino were statistically significant at the 0.01 level. Another way to measure equity is to examine how the wage and salary incomes and business earnings of particular demographic groups compare to White men. Multiple regression statistical techniques allowed us to examine the impact of race and gender on economic outcome while controlling for other factors, such as education, that might impact outcomes.¹⁴⁹ Tables 5-6 and 5-7 present this data on wage and salary incomes and business earnings respectively. Table 5-6 indicates that Non-whites and White women earn less than White men. The reduction in earnings range from 35.6 percent to 14.6 percent and all of the results are statistically significant at the 0.001 level. Table 5-7 indicates that except for Asians and Others, Non-whites and White women receive business earnings less than White men. However, only the result for White women are statistically significant at the 0.001 level.¹⁵⁰

Table 5-4: Business Formation Rates
All Industries, 2012 - 2016

Demographic Group	Business Formation Rates
Black	1.3%
Latino	2.0%
Native American	1.8%
Asian/Pacific Islander	4.6%
Other	2.4%

148. Appendix B provides a "Further Explanation of Probit Regression Analysis."

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

150. The proper way to interpret a coefficient that is less than -100 percent like the value of the coefficient for Native American in Table 5-7, is the percentage is the amount non-M/WBEs earn more than the group in question. In this case, non-M/WBEs earn 572 percent more than Native American.

Demographic Group	Business Formation Rates
White Women	2.2%
Non-White Male	2.1%
White Male	4.5%

Source: CHA calculations from the American Community Survey

**Table 5-5: Business Formation Probabilities
Relative to White Males, All Industries, 2012 - 2016**

Demographic Group	Probability of Forming a Business Relative to White Men
Black	-2.8%***
Latino	-1.8%**
Native American	-2.1%
Asian/Pacific Islander	0.3%
Other	0.2%
White Women	-1.8%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

** Indicates statistical significance at the 0.01 level

**Table 5-6: Wage Differentials for Selected Groups
Relative to White Males, All Industries, 2012 - 2016**

Demographic Group	Wages Relative to White Men (% Change)
Black	-33.4%***
Latino	-14.6%***
Native American	-23.5%***
Asian/Pacific Islander	-27.5%***
Other	-35.6%***
White Women	-35.5%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

**Table 5-7: Business Earnings Differentials for Selected Groups
Relative to White Males, All Industries**

Demographic Group	Earnings Relative to White Men (% Change)
Black	-54.0%
Latino	-59.1%
Native American	-572.0%*
Asian/Pacific Islander	3.5%
Other	55.3%
White Women	-77.9%***

Source: CHA calculations from the American Community Survey

*** Indicates statistical significance at the 0.001 level

* Indicates statistical significance at the 0.05 level

D. Evidence of Disparities in Access to Business Capital

Capital is the lifeblood of any business. Participants in the anecdotal data collection universally agreed to this fundamental fact. The interviews with business owners conducted as part of this Study confirmed that small firms, especially minority- and women-owned firms, had difficulties obtaining needed working capital to perform on City contracts and subcontracts, as well as expand the capacities of their firms. As discussed above, discrimination may even prevent firms from forming in the first place.

There is an extensive body of scholarly work on the relationship between personal wealth and successful entrepreneurship. There is a general consensus that disparities in personal wealth translate into disparities in business creation and ownership.¹⁵¹

The Federal Reserve Board and the U.S. Small Business Administration have conducted surveys of discrimination in the small business credit market for 1993, 1998 and 2003. These *Surveys of Small Business Finances* (“SSBF”) are based on a large representative sample of firms with fewer than 500 employees. The main finding from these Surveys is that MBEs experience higher loan denial probabilities and pay higher interest rates than white-owned businesses, even after controlling for differences in credit worthiness and other factors. Blacks, Hispanics and Asians were more likely to be denied credit than Whites, even after controlling for firm

151. See, e.g., Evans, David S. and Jovanovic, Boyan, “An Estimated Model of Entrepreneurial Choice under Liquidity Constraints,” *Journal of Political Economy*, (1989); Evans, David S. and Leighton, Linda “Some empirical aspects of entrepreneurship,” *American Economic Review*, (1989).

characteristics like credit history, credit score and wealth. Blacks and Hispanics were also more likely to pay higher interest rates on the loans they did receive.¹⁵²

A recent report to the U.S. Department of Commerce summarizes these Surveys, results from the Kauffman Firm Survey,¹⁵³ data from the U.S. Small Business Administration's Certified Development Company/504 Guaranteed Loan Program¹⁵⁴ and additional extensive research on the effects of discrimination on opportunities for MBEs. The most comprehensive report of its kind, "Disparities in Capital Access Between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs", found that

Low levels of wealth and liquidity constraints create a substantial barrier to entry for minority entrepreneurs because the owner's wealth can be invested directly in the business, used as collateral to obtain business loans or use to acquire other businesses.... [T]he largest single actor explaining racial disparities in business creation rates are differences in asset levels."¹⁵⁵

Some of the key findings of the Report include:

- Minority-owned firms are less likely to receive loans than non minority-owned firms regardless of firm size. According to an analysis of data from the *Survey of Small Business Finances*, for firms with gross receipts over \$500,000, 52 percent of non minority-owned firms received loans compared to 41 percent of minority-owned firms.
- When minority-owned firms do receive financing, it is for less money and at a higher interest rate than non minority-owned firms regardless of the size of the firm. Minority-owned firms paid an average of 7.8 percent in interest rates for loans compared to 6.4 percent for non minority-owned firms. Among firms with gross receipts under \$500,000, minority-owned firms paid an average of 9.1 percent in interest rates compared to 6.9 percent for non minority-owned firms.
- Minority owned firms are more likely to be denied loans. Among firms with gross receipts under \$500,000, loan denial rates for minority firms were about three times higher, at 42 percent, compared to those of non minority-

152. See Blanchflower, D. G., Levine. P. and Zimmerman, D., "Discrimination In The Small Business Credit Market," *Review of Economics and Statistics*, (2003); Cavalluzzo, K. S. and Cavalluzzo, L. C. ("Market structure and discrimination, the case of small businesses," *Journal of Money, Credit, and Banking*, (1998)

153. http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2013/06/kauffmanfirmsurvey2013.pdf.

154. <http://www.sba.gov/category/navigation-structure/loans-grants/small-business-loans/sba-loan-programs/real-estate-and-eq>.

155. Fairlie, R. W. and Robb, A., "Disparities in Capital Access Between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs," U.S. Department of Commerce, Minority Business Development Agency, 2010, pp. 22-23.

owned firm, at 16 percent. For high sales firms, the rates of loan denial were almost twice as high for MBEs as for non-MBEs.

- MBEs pay higher interest rates for business loans. For all firms, MBEs paid 7.8 percent on average for loans compared with 6.4 percent for non-MBEs. The difference was smaller, but still high, between MBEs and non-MBEs with high sales volumes.
- Minority-owned firms receive smaller equity investments than non minority-owned firms even when controlling for detailed business and owner characteristics. The differences are large and statistically significant. The average amount of new equity investments in minority-owned firms receiving equity is 43 percent of the average of new equity investments in non minority-owned firms. The differences were even larger for loans received by firms with high sales volumes. Yet, venture capital funds focusing on investing in minority firms provide returns that are comparable to mainstream venture capital firms.¹⁵⁶
- Disparities in total investments in minority-owned firms compared to those in non minority-owned firms grew after the first year of business operations. According to the analysis of the data from the Kauffman Firm Survey, minority-owned firms' investments into their firms were about 18 percent lower in the first year of operations compared to those of non minority-owned firms. This disparity grew in the subsequent three years of operations, where minorities' investments into their firms were about 36 percent lower compared to those of non minority-owned firms.

Minority entrepreneurs face challenges (including lower family wealth and difficulty penetrating financial markets and networks) directly related to race that limit their ability to secure financing for their businesses.¹⁵⁷

These findings are consistent with those of the 2012 study. The *Survey of Small Business Finances* ("SSBF"), conducted by the Federal Reserve Board and the U.S. Small Business Administration from 1999-2003, found that MBEs experience significant barriers compared to similar non-M/WBEs. When minority-owned firms did apply for a loan, their loan requests were substantially more likely to be denied than non-minorities, even after accounting for differences like firm size and credit history. Loan denial rate ranged from 8 to 24 percentage points higher than for non-minority male-owned small businesses. When minority-owned firms did receive a loan, they were obligated to pay higher interest rates on the loans than comparable non minority-owned firms. These results strongly suggest that MBEs

156. See Bates, T., "Venture Capital Investment in Minority Business," *Journal of Money Credit and Banking* 40, 2-3 (2008).

157. Fairlie, R.W. and Robb, A., *"Race and Entrepreneurial Success: Black-, Asian- and White-Owned Businesses in the United States"*, (Cambridge: MIT Press, 2008).

do not enjoy full and fair access to the credit necessary to perform on City prime contracts and associated subcontractors.

E. Evidence of Disparities in Access to Human Capital

There is a strong intergenerational correlation with business ownership. The probability of self-employment is significantly higher among the children of the self-employed. This was evident in the large number of non-M/WBEs in our interview groups who were second or even higher generation firms doing business for the market area. This disadvantages minorities, whose earlier generations were denied business ownership through either *de jure* segregation or *de facto* exclusion.

There is evidence that current racial patterns of self-employment are in part determined by racial patterns of self-employment in the previous generation.¹⁵⁸ Black men have been found to face a “triple disadvantage”: they are less likely than White men to: 1. Have self-employed fathers; 2. Become self-employed if their fathers were not self-employed; and 3. To follow their fathers into self-employment.¹⁵⁹

Intergenerational links are also critical to the success of the businesses that do form.¹⁶⁰ Working in a family business leads to more successful firms by new owners. One study found that only 12.6 percent of Black business owners had prior work experiences in a family business as compared to 23.3 percent of White business owners.¹⁶¹ This creates a cycle of low rates of minority ownership and worse outcomes being passed from one generation to the next, with the corresponding perpetuation of advantages to White-owned firms.

Similarly, unequal access to business networks reinforces exclusionary patterns. The composition and size of business networks are associated with self-employment rates.¹⁶² The U.S. Department of Commerce has reported that the ability to form strategic alliances with other firms is important for success.¹⁶³ MBEs in our interviews reported that they felt excluded from the networks that help to create success in the highway construction industry.

158. Fairlie, R.W., “The Absence of the African American Owned Business, An Analysis of the Dynamics of Self-Employment,” *Journal of Labor Economics*, (1999).

159. Hout, M. and Rosen, H. S., “Self-employment, Family Background, and Race,” *Journal of Human Resources* 35, no.4 (2000).

160. Fairlie, R.W. and Robb, A., “Why are black-owned businesses less successful than White-owned businesses? The role of families, inheritances, and business human capital,” *Journal of Labor Economics*, (2007).

161. *Id.*

162. Allen, W. D., “Social Networks and Self-Employment,” *Journal of Socio-Economics* 29, no.5 (2000).

163. “Increasing MBE Competitiveness through Strategic Alliances”, Minority Business Development Agency, 2008.

F. Conclusion

The economy-wide data, taken as a whole, paint a picture of systemic and endemic inequalities in the ability of firms owned by minorities and women to have full and fair access to City contracts and associated subcontracts. This evidence supports the conclusion that absent some affirmative City measures, these inequities create disparate impacts on M/WBEs and may render the City of South Bend a passive participant in overall market-wide discrimination.



VI. RECOMMENDATIONS FOR A MINORITY- AND WOMEN- OWNED BUSINESS ENTERPRISE PROGRAM FOR THE CITY OF SOUTH BEND

The quantitative and qualitative data presented in this Study provide a thorough examination of whether minority- and women-owned business enterprises (“M/WBEs”) operating in the City of South Bend’s geographic and procurement markets have full and fair opportunities to compete for its prime contracts and associated sub-contracts. As required by strict scrutiny, we analyzed evidence of such firms’ utilization by the City as compared to their availability in the market area, as well as business owners’ experiences in obtaining City work. We further analyzed M/WBEs’ opportunities in the overall South Bend economy. These statistical and anecdotal data provide the evidence necessary to determine whether there is a strong basis in evidence that M/WBEs continue to suffer discrimination in access to City contracts on the basis of race or gender, and if so, what narrowly tailored remedies are appropriate.

The Study results support the City’s compelling interest in implementing a new race- and gender-conscious M/WBE program. The statistical data and the anecdotal testimony provide a sufficient basis for the use of narrowly tailored remedial race- and gender-based measures to ensure equal opportunities for all firms to do business with South Bend.

The City has initiated some efforts to level the playing field. These include establishing the position of *Diversity and Inclusion Officer*; participating in vendor outreach fairs; and providing information on how to conduct business with the City. However, much more could be done. In our judgment, the results of this report provide the constitutionally required information to sustain a new and broad approach to contracting equity and inclusion.

The Study’s data support the determination that the City has a strong basis in evidence to implement a race- and gender-conscious program. The record— both quantitative and qualitative— establishes that M/WBEs in several sectors in the City’s market area continue to experience significant disparities in their access to City 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 in many industries suffered significant disparities on City-funded jobs. Without the use of contract goals to level the playing field, the City would likely function as a “passive participant” in the “market failure” of discrimination. We therefore recommend the implementation of a program that contains the necessary elements for greater success in reducing barriers and that employs national best practices to increase inclusion in government contracting.

As a general matter, South Bend should model its program on the elements of the Disadvantaged Business Enterprise (“DBE”) Program for federally-assisted transportation contracts.¹⁶⁴ Courts have pointed to the agency’s reliance on Part 26 as a guide as evidence that the local agency’s program is constitutional.

The Law Department should review all contracts to ensure that goal setting has been properly conducted and that provisions reflect the program.

Based on this case law and national best practices for M/WBE program, we recommend the following elements of a narrowly tailored M/WBE program:

A. Implement 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 City’s remedial purposes. Increased participation by M/WBEs through race-neutral measures will also reduce the need to set M/WBE contract goals.

The following enhancements of the City’s current efforts, based on the business owner interviews, the input from senior City management, and national best practices for M/WBE programs, will help to meet these standards.

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. As is very common, the City did not have the information needed for the inclusion of subcontractor payments in the analysis. There was no centralized database to track contract data, and the City did not track subcontractor data. All required information had to be created manually. Further, the City could not provide

164. 49 C.F.R. Part 26.

verified data on what it had paid to prime contractors. This required the City to devise a system for researching and eventually providing this information to CHA.

These problems led to major delays in conducting the study. In addition to hindering research, the lack of a system will also make it more difficult to monitor, enforce and review any new initiatives. A good system is the most critical first step that South Bend can take.

The City should immediately procure and implement an electronic data collection system with at least the following functionality:

- Full contact information for all firms, including email addresses, NAICS codes, race and gender ownership, and M/WBE/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 the City, 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 notification and reminder engine to inform 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 City staff, prime contractors and subcontractors to perform all necessary activities.

2. Commit additional resources to M/WBE and small business program management and implementation

The City should formally create an office of Diversity and Inclusion and increase staff and resources dedicated to this function. Staff should be responsible for the contract award process (outreach, goal setting, bid and proposal review for compliance, etc.) and the contract performance process (goal attainment, substitution reviews, prompt payment tracking, etc.), as they relate to M/WBE concerns. Functional areas must be separated by the type of program: labor compliance is very different from contract compliance, and personnel that specialize in each function are necessary for successful programs. The office should report directly to the Mayor to ensure the independence of the department and demonstrate the importance of this function and the City's commitment to inclusion.

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

Interviewees reported that their firms would like to perform as prime vendors on City contracts. Given the size of the City's budget, there are numerous opportunities for smaller firms to participate. Several steps should be implemented:

- Develop contract specifications with an eye towards unbundling projects into less complex scopes and lower dollar values.
- Review experience requirements 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.
- Review surety bonding and insurance requirements so they are no greater than necessary to protect South Bend's interests. These possible barriers to contracting by small firms 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 the lowest apparent bidder on appropriate solicitations.

4. Increase Vendor Communication and Outreach to M/WBEs and Small Firms

Increased communication with the contracting community is critical. City staff also stressed this point. In addition to continuing to notify minority- and women-focused organizations, the City should conduct more regularly sched-

uled vendor outreach events to provide information and address questions regarding upcoming opportunities, as well as facilitate “matchmaking” sessions between prime contractors and subcontractors.

Another improvement would be an annual contracting forecast of larger contracts to permit vendors to plan their work and form teams.

Further, as is the case with many governments, the study revealed that M/WBEs are receiving few opportunities in several industry codes. 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.

Many business owners reported they did not know how to obtain “debriefings” with the City when their firm was not successful in receiving a contract award. A process should be disseminated, and bidders encouraged to meet with the City to develop their expertise in submitting bids or proposals and in doing business with the City.

Further, potential vendors requested training in how to do business with South Bend. In addition to written materials, the City could hold in person sessions and create training videos that provide information on all aspects of City contracting.

5. Consider Partnering with Other Agencies and Local Organizations to Provide Bonding, Financing and Technical Assistance Programs

Both M/WBEs and majority-male owners supported services to assist M/WBEs to increase their skills and capabilities. Bonding and financing programs assist small firms by providing loans and issuing surety bonds to certified contractors, with low interest rates. The programs may also provide general banking services on favorable terms to applicant firms. In addition, technical assistance with critical business skills such as estimating, accounting, safety, marketing, legal compliance, etc., could be made available in conjunction with the existing efforts of South Bend area organizations such as chambers of commerce, professional associations, community-based organizations, etc. For example, the City should consider working with St. Mary’s College’s SPARK program. SPARK is a partnership of community education and business assistance programs designed to assist women in developing the necessary skills to launch and expand their own businesses. This particular initiative is designed to expand the entrepreneurial capacity of women by providing education, ongoing mentoring and business training encompassing financial accounting, management

and planning, marketing and other business tools necessary to run a successful business. Partnering with these types of programs will allow the City to leverage their expertise, knowledge and experience in assisting these types of businesses.

To further address these critical needs, the City should partner with other Indiana governments, such as the State of Indiana, the City of Indianapolis and other local agencies interested in ensuring equal opportunities and supplier diversity. The Indiana Department of Transportation, for example, receives federal funds to support the growth and development of disadvantaged business enterprises in the construction industry. South Bend should explore linking DBEs to its contracting opportunities.

6. Provide Training for all City Staff with Contracting Responsibilities or Vendor Interface

These significant changes will require a City-wide roll out of new initiatives, as well as training of all South Bend personnel with contracting responsibilities and vendor management. In addition to providing technical information on compliance, it is also an opportunity to reaffirm the City's commitment to supplier diversity and encourage all departments to buy into these values and objectives.

7. Adopt a Small Business Enterprise Target Market

An effective approach would be to set aside some smaller contracts for bidding only by small, local firms as prime contractors, if permitted under Indiana law. 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") setasides are especially useful for those industries that do not operate on a prime vendor-subcontractor model, such as consulting services. It will reduce the need to set contract goals to ensure equal opportunities, and is an approach specifically approved by the courts.

The City would have to determine the size limits for contracts (*e.g.* contracts under \$50,000 or those subject to informal procurement policies) 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.

An 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.

B. Implement Race- and Gender-Conscious Measures

1. Adopts Goals for a New M/WBE Program

The City should set an annual, overall target for M/WBE utilization in City contracts (prime contracts and subcontracts combined). The availability estimates in Chapter IV should be the basis for consideration of overall, annual spending targets for City funds. We found the availability of M/WBEs to be 14.91 percent. This target can be the City's goal for its overall spending with certified firms across all industry categories.

In addition to setting an overall, annual target, South Bend should use the study's detailed unweighted availability estimates as the starting point for contract specific goals: As discussed in Chapter II of the Study, the City's 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 the electronic system. This methodology involves four steps:

- Weight 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 City 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.
- Determine the availability of MBEs and WBEs in those scopes as estimated in the Study.
- Calculate a weighted goal based upon the scopes and the availability of firms.
- Adjust the resulting percentage based on current market conditions.

We urge the City to bid some contracts without goals that it determines have significant opportunities for M/WBE participation. 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.

To ensure program integrity and consistency, we suggest that the Law Department review all contracts with goals. This will ensure that the program is narrowly tailored.

2. Program Eligibility

The study found that, as a group, M/WBEs continue to suffer disparities in their access to City contracts. We therefore recommend that all racial and ethnic groups and White women be eligible for participation in the program on a presumptive basis.

Program eligibility should be limited to firms that have a business presence in the City's market area, as established by this study. This consists of the State of Indiana and the three counties of Berrien, MI; Wabash, IL; and Kankakee, IL.

The City's new program should continue to accept M/WBE certifications from the State of Indiana, the City of Indianapolis, and the Indiana Unified Certification Program, with the assurance that full and complete data will be collected on the firm's race and gender ownership, and the NAICS code(s). This information is necessary to fully monitor the program as required by the courts, so the City will have to gather these data from the firms directly. It will be the City's constitutional responsibility, however, to ensure that the certifications it accepts are from narrowly tailored programs with demonstrated integrity.

3. Compliance and Monitoring Policies and Procedures

In addition to ensuring that the new M/WBE program sets narrowly tailored goals and eligibility requirements, it is essential that the City adopt contract award and performance standards for program compliance and monitoring that are likewise narrowly tailored and embody best practices. In general, compliance and monitoring should include the following elements.

- Clearly delineated policies and forms by which a bidder or proposer can establish that it has either met the contract goal(s) or made good faith efforts to do so.
- Rules for how participation by certified firms will be counted towards the goal(s). A firm must perform a "commercially useful function" in order to be counted for goal attainment. How various types of goods or services will be credited towards meeting goals must be clearly spelled out (for example, whether full credit will be given for purchases from certified regular dealers or suppliers).
- Criteria and processes for how non-performing, certified firms can be substituted during performance.

- Contract closeout procedures and standards for sanctions for firms that fail to meet their contractual requirements under the program.
- A process to appeal adverse determinations under the program that meets due process standards.

C. Performance Standards and Review

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

South Bend should adopt a sunset date for the M/WBE program, when it will end unless reauthorized. This 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.

The City should develop quantitative performance measures for overall success of its race- and gender-neutral measures and any M/WBE program to evaluate the effectiveness of various approaches in reducing the systemic barriers identified by the study. In addition to meeting goals, possible benchmarks might be:

- Progress towards meeting the overall, annual M/WBE goal.
- The number of bids or proposals, industry 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 and industry rejected as non-responsive for failure to make good faith efforts to meet the goal.
- The number, industry and dollar amount of M/WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors, including awards through an 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 and occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

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

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

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

In order to complete the estimation, the set of independent variables must be operationalized. For demographic variables, the estimation used race, gender and age. For industry and occupation variables, the relevant industry and occupation were utilized. For the other variables, age and education were used.

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. This analysis used the most recent *American Community Survey* data downloaded from the IPUMS website and used data from the State of Indiana¹⁶⁵. Therefore, the coefficient for the new

165. IPUMS USA, University of Minnesota, www.ipums.org.

variable showed the impact of being a member of that race or gender in the State of Indiana.

The following chart lists the econometric technique and variables used to estimate each model. Because of the very large number of observations in the data set, the residuals of these equations were assumed to be distributed normally.

Model	Econometric Technique	Dependent Variable (DV)	Demographic Variables (D)	Industry/Occupation Variables (I)	Other Independent Variables (O)
Wage estimation	Ordinary Least Squares	Log wage income	Dummy Variables for Black; Hispanic; Native American; Asian; Other; White Women	Industrial and occupations dummy variables	Age ^a ; Education ^b
Business Income estimation	Ordinary Least Squares	Log business income	Dummy Variables for Black; Hispanic; Native American; Asian; Other; White Women	Industrial and occupations dummy variables	Age; Education
Probabilistic estimate of business formation	Probit	Dummy variable on business formation	Dummy Variables for Black; Hispanic; Native American; Asian; Other; White Women	Industrial and occupations dummy variables	Age; Education

a. The AGE vector captured the basic Mincer age equation: Age; Age², Age³, Age⁴

b. While Education is presented in the ACS data as discrete values from 1 through 11, our analysis converted this into 11 dummy variables.

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 and occupation variables; and O is a set of other independent variables.

The estimation process takes this equation and transforms it into:

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

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

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.¹⁶⁶ 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) occurring. 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 percent lower probability of forming a business compared to men.

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

APPENDIX C:

SIGNIFICANCE LEVELS

Many tables in this Report contain asterisks indicating that a number has statistical significance at 0.001, 0.01, or 0.05 levels (sometimes, this is presented as 99.9 percent; 99 percent and 95 percent, respectively) and the body of the report repeats these descriptions. While the use of the term seems important, it is not self-evident what the term means. This Appendix provides a general explanation of significance levels.

This Report seeks to address the question 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 the City of South Bend as it explores whether each racial and ethnic group and White women continue to experience discrimination in its markets is do non-Whites and White women receive lower wages than White men? As discussed in Appendix A, one way to uncover the relationship between the dependent variable (*e.g.*, wages) and the independent variable (*e.g.* non-Whites) is through multiple regression analysis. An example helps to explain this concept.

Let us say, for example, this analysis determines that non-Whites receive wages that are 35 percent less than White men after controlling for other factors, such as education and industry, which might account for the differences in wages. However, this finding is only an estimate of the relationship between the independent variable (*e.g.*, non-Whites) and the dependent variable (*e.g.*, wages) – the first sub-question. It is still important to determine how accurate 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 percent less than White men). This sometimes is called

the null hypothesis. We then calculate a confidence interval to find the probability that the observed relationship (e.g., - 35 percent) is between 0 and minus that confidence interval.¹⁶⁷ The confidence interval will vary depending upon the level of confidence (statistical significance) we wish to have in our conclusion. When a number is statistically significant at the 0.001 level, this indicates that we can be 99.9 percent certain that the number in question (in this example, -35 percent) lies outside of the confidence interval. When a number is statistically significant at the 0.01 level, this indicates that we can be 99.0 percent certain that the number in question lies outside of the confidence interval. When a number is statistically significant at the 0.05 level, this indicates that we can be 95.0 percent certain that the number in question lies outside of the confidence interval.

167. 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 UTILIZATION, AVAILABILITY, AND DISPARITY ANALYSES

This Appendix provides additional data on the distribution of contract dollars across NAICS codes. The tables contain every NAICS code in the City of South Bend's Final Contract Data File.

Table D-1: Industry Percentage Distribution of Contracts by Dollars Paid
All Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	16.302%	16.302%
238210	Electrical Contractors and Other Wiring Installation Contractors	9.841%	26.143%
541330	Engineering Services	6.611%	32.755%
237110	Water and Sewer Line and Related Structures Construction	6.439%	39.194%
238910	Site Preparation Contractors	5.236%	44.429%
238220	Plumbing, Heating, and Air-Conditioning Contractors	4.233%	48.662%
441110	New Car Dealers	3.724%	52.386%
333120	Construction Machinery Manufacturing	3.335%	55.720%
238310	Drywall and Insulation Contractors	3.018%	58.739%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	2.699%	61.437%
238990	All Other Specialty Trade Contractors	2.078%	63.516%
221310	Water Supply and Irrigation Systems	2.009%	65.524%
333517	Machine Tool Manufacturing	1.896%	67.420%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
423830	Industrial Machinery and Equipment Merchant Wholesalers	1.675%	69.095%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	1.666%	70.760%
336120	Heavy Duty Truck Manufacturing	1.461%	72.222%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	1.461%	73.682%
238140	Masonry Contractors	1.414%	75.097%
335999	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	1.293%	76.390%
561730	Landscaping Services	1.278%	77.668%
238160	Roofing Contractors	1.195%	78.863%
238110	Poured Concrete Foundation and Structure Contractors	1.184%	80.047%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	1.119%	81.166%
541511	Custom Computer Programming Services	1.111%	82.277%
541320	Landscape Architectural Services	1.082%	83.359%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	1.075%	84.434%
511210	Software Publishers	0.993%	85.427%
238290	Other Building Equipment Contractors	0.977%	86.404%
236220	Commercial and Institutional Building Construction	0.911%	87.314%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.838%	88.152%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.672%	88.824%
541611	Administrative Management and General Management Consulting Services	0.642%	89.467%
562910	Remediation Services	0.629%	90.095%
423840	Industrial Supplies Merchant Wholesalers	0.625%	90.721%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
327320	Ready-Mix Concrete Manufacturing	0.405%	91.126%
541620	Environmental Consulting Services	0.403%	91.529%
324122	Asphalt Shingle and Coating Materials Manufacturing	0.400%	91.929%
238190	Other Foundation, Structure, and Building Exterior Contractors	0.399%	92.328%
922160	Fire Protection	0.397%	92.724%
336112	Light Truck and Utility Vehicle Manufacturing	0.394%	93.119%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	0.393%	93.512%
237990	Other Heavy and Civil Engineering Construction	0.359%	93.871%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.358%	94.229%
541350	Building Inspection Services	0.356%	94.585%
541990	All Other Professional, Scientific, and Technical Services	0.347%	94.932%
541310	Architectural Services	0.343%	95.275%
237130	Power and Communication Line and Related Structures Construction	0.327%	95.602%
333923	Overhead Traveling Crane, Hoist, and Monorail System Manufacturing	0.319%	95.921%
541512	Computer Systems Design Services	0.312%	96.233%
518210	Data Processing, Hosting, and Related Services	0.305%	96.538%
333921	Elevator and Moving Stairway Manufacturing	0.252%	96.790%
332312	Fabricated Structural Metal Manufacturing	0.250%	97.040%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.241%	97.281%
333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	0.193%	97.474%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.181%	97.655%
237120	Oil and Gas Pipeline and Related Structures Construction	0.180%	97.835%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
541211	Offices of Certified Public Accountants	0.175%	98.009%
221320	Sewage Treatment Facilities	0.171%	98.180%
524210	Insurance Agencies and Brokerages	0.148%	98.328%
238330	Flooring Contractors	0.130%	98.458%
213111	Drilling Oil and Gas Wells	0.125%	98.583%
517311	Wired Telecommunications Carriers	0.123%	98.706%
325180	Other Basic Inorganic Chemical Manufacturing	0.121%	98.827%
541370	Surveying and Mapping (except Geophysical) Services	0.119%	98.946%
921130	Public Finance Activities	0.116%	99.062%
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	0.110%	99.172%
511199	All Other Publishers	0.109%	99.281%
541380	Testing Laboratories	0.105%	99.386%
444190	Other Building Material Dealers	0.088%	99.473%
238390	Other Building Finishing Contractors	0.079%	99.553%
424430	Dairy Product (except Dried or Canned) Merchant Wholesalers	0.051%	99.603%
237210	Land Subdivision	0.046%	99.649%
423490	Other Professional Equipment and Supplies Merchant Wholesalers	0.041%	99.690%
562111	Solid Waste Collection	0.038%	99.728%
337214	Office Furniture (except Wood) Manufacturing	0.034%	99.762%
423440	Other Commercial Equipment Merchant Wholesalers	0.031%	99.793%
238130	Framing Contractors	0.030%	99.823%
531320	Offices of Real Estate Appraisers	0.029%	99.853%
115112	Soil Preparation, Planting, and Cultivating	0.027%	99.879%
332999	All Other Miscellaneous Fabricated Metal Product Manufacturing	0.024%	99.903%
423330	Roofing, Siding, and Insulation Material Merchant Wholesalers	0.014%	99.917%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
541720	Research and Development in the Social Sciences and Humanities	0.013%	99.930%
238120	Structural Steel and Precast Concrete Contractors	0.011%	99.941%
442210	Floor Covering Stores	0.010%	99.952%
561621	Security Systems Services (except Locksmiths)	0.006%	99.958%
332813	Electroplating, Plating, Polishing, Anodizing, and Coloring	0.006%	99.964%
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	0.005%	99.969%
561612	Security Guards and Patrol Services	0.005%	99.973%
213112	Support Activities for Oil and Gas Operations	0.004%	99.978%
561710	Exterminating and Pest Control Services	0.004%	99.982%
339950	Sign Manufacturing	0.004%	99.986%
561990	All Other Support Services	0.004%	99.989%
512110	Motion Picture and Video Production	0.003%	99.992%
562119	Other Waste Collection	0.002%	99.994%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	0.002%	99.996%
524127	Direct Title Insurance Carriers	0.001%	99.997%
519190	All Other Information Services	0.001%	99.999%
522110	Commercial Banking	0.001%	100.000%
TOTAL			100.0%

Source: CHA analysis of City of South Bend's data

Table D-2: Industry Percentage Distribution of Contracts by Dollars Paid
Prime Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	19.90%	19.90%
237110	Water and Sewer Line and Related Structures Construction	8.11%	28.01%
541330	Engineering Services	7.25%	35.26%
441110	New Car Dealers	4.95%	40.20%
333120	Construction Machinery Manufacturing	4.43%	44.64%
238310	Drywall and Insulation Contractors	4.01%	48.65%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	3.59%	52.23%
238910	Site Preparation Contractors	3.36%	55.60%
238990	All Other Specialty Trade Contractors	2.55%	58.14%
333517	Machine Tool Manufacturing	2.52%	60.66%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	2.21%	62.88%
221310	Water Supply and Irrigation Systems	2.21%	65.08%
238210	Electrical Contractors and Other Wiring Installation Contractors	2.17%	67.25%
423830	Industrial Machinery and Equipment Merchant Wholesalers	2.10%	69.35%
336120	Heavy Duty Truck Manufacturing	1.94%	71.29%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	1.93%	73.22%
335999	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	1.72%	74.94%
238220	Plumbing, Heating, and Air-Conditioning Contractors	1.67%	76.62%
334514	Totalizing Fluid Meter and Counting Device Manufacturing	1.49%	78.10%
541511	Custom Computer Programming Services	1.44%	79.55%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	1.43%	80.97%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
541320	Landscape Architectural Services	1.34%	82.31%
511210	Software Publishers	1.32%	83.63%
236220	Commercial and Institutional Building Construction	1.00%	84.63%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.98%	85.61%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.89%	86.50%
541611	Administrative Management and General Management Consulting Services	0.85%	87.35%
423840	Industrial Supplies Merchant Wholesalers	0.83%	88.18%
238110	Poured Concrete Foundation and Structure Contractors	0.82%	89.01%
238160	Roofing Contractors	0.73%	89.73%
562910	Remediation Services	0.66%	90.39%
324122	Asphalt Shingle and Coating Materials Manufacturing	0.53%	90.92%
327320	Ready-Mix Concrete Manufacturing	0.53%	91.45%
238190	Other Foundation, Structure, and Building Exterior Contractors	0.53%	91.98%
922160	Fire Protection	0.53%	92.51%
336112	Light Truck and Utility Vehicle Manufacturing	0.52%	93.03%
423690	Other Electronic Parts and Equipment Merchant Wholesalers	0.52%	93.55%
237990	Other Heavy and Civil Engineering Construction	0.48%	94.03%
541350	Building Inspection Services	0.47%	94.50%
541990	All Other Professional, Scientific, and Technical Services	0.45%	94.96%
333923	Overhead Traveling Crane, Hoist, and Monorail System Manufacturing	0.42%	95.38%
541512	Computer Systems Design Services	0.41%	95.79%
518210	Data Processing, Hosting, and Related Services	0.41%	96.20%
333921	Elevator and Moving Stairway Manufacturing	0.33%	96.53%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
332312	Fabricated Structural Metal Manufacturing	0.33%	96.87%
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers	0.32%	97.19%
541310	Architectural Services	0.31%	97.50%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.24%	97.74%
238140	Masonry Contractors	0.24%	97.98%
541211	Offices of Certified Public Accountants	0.23%	98.21%
221320	Sewage Treatment Facilities	0.21%	98.42%
524210	Insurance Agencies and Brokerages	0.19%	98.62%
517311	Wired Telecommunications Carriers	0.16%	98.78%
325180	Other Basic Inorganic Chemical Manufacturing	0.16%	98.94%
921130	Public Finance Activities	0.15%	99.10%
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	0.15%	99.24%
511199	All Other Publishers	0.14%	99.39%
238390	Other Building Finishing Contractors	0.11%	99.49%
213111	Drilling Oil and Gas Wells	0.10%	99.59%
484220	Specialized Freight (except Used Goods) Trucking, Local	0.09%	99.69%
541620	Environmental Consulting Services	0.08%	99.77%
237120	Oil and Gas Pipeline and Related Structures Construction	0.08%	99.85%
238290	Other Building Equipment Contractors	0.07%	99.93%
424430	Dairy Product (except Dried or Canned) Merchant Wholesalers	0.07%	99.99%
213112	Support Activities for Oil and Gas Operations	0.01%	100.00%
TOTAL			100.0%

Source: CHA analysis of City of South Bend's data

**Table D-3: Industry Percentage Distribution of Contracts by Dollars Paid
Subcontracts**

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238210	Electrical Contractors and Other Wiring Installation Contractors	33.19%	33.19%
238220	Plumbing, Heating, and Air-Conditioning Contractors	12.01%	45.20%
238910	Site Preparation Contractors	10.93%	56.13%
237310	Highway, Street, and Bridge Construction	5.36%	61.49%
561730	Landscaping Services	5.17%	66.65%
238140	Masonry Contractors	5.00%	71.65%
541330	Engineering Services	4.68%	76.33%
238290	Other Building Equipment Contractors	3.72%	80.06%
238160	Roofing Contractors	2.62%	82.68%
238110	Poured Concrete Foundation and Structure Contractors	2.28%	84.96%
221310	Water Supply and Irrigation Systems	1.40%	86.36%
541620	Environmental Consulting Services	1.37%	87.73%
237110	Water and Sewer Line and Related Structures Construction	1.36%	89.09%
237130	Power and Communication Line and Related Structures Construction	1.32%	90.41%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.16%	91.57%
333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	0.78%	92.35%
238990	All Other Specialty Trade Contractors	0.65%	93.00%
236220	Commercial and Institutional Building Construction	0.65%	93.65%
562910	Remediation Services	0.55%	94.20%
238330	Flooring Contractors	0.53%	94.72%
541370	Surveying and Mapping (except Geophysical) Services	0.48%	95.20%
237120	Oil and Gas Pipeline and Related Structures Construction	0.47%	95.68%
541310	Architectural Services	0.43%	96.10%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
541380	Testing Laboratories	0.42%	96.53%
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	0.40%	96.93%
423830	Industrial Machinery and Equipment Merchant Wholesalers	0.38%	97.31%
444190	Other Building Material Dealers	0.35%	97.67%
541320	Landscape Architectural Services	0.30%	97.97%
213111	Drilling Oil and Gas Wells	0.20%	98.17%
237210	Land Subdivision	0.18%	98.35%
423490	Other Professional Equipment and Supplies Merchant Wholesalers	0.17%	98.52%
562111	Solid Waste Collection	0.15%	98.67%
337214	Office Furniture (except Wood) Manufacturing	0.14%	98.81%
423440	Other Commercial Equipment Merchant Wholesalers	0.13%	98.94%
238130	Framing Contractors	0.12%	99.06%
531320	Offices of Real Estate Appraisers	0.12%	99.18%
115112	Soil Preparation, Planting, and Cultivating	0.11%	99.29%
541511	Custom Computer Programming Services	0.11%	99.39%
332999	All Other Miscellaneous Fabricated Metal Product Manufacturing	0.10%	99.49%
423330	Roofing, Siding, and Insulation Material Merchant Wholesalers	0.06%	99.55%
541720	Research and Development in the Social Sciences and Humanities	0.05%	99.60%
238120	Structural Steel and Precast Concrete Contractors	0.04%	99.64%
221320	Sewage Treatment Facilities	0.04%	99.69%
442210	Floor Covering Stores	0.04%	99.73%
541990	All Other Professional, Scientific, and Technical Services	0.03%	99.76%
561621	Security Systems Services (except Locksmiths)	0.03%	99.78%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.02%	99.81%
332813	Electroplating, Plating, Polishing, Anodizing, and Coloring	0.02%	99.83%
327320	Ready-Mix Concrete Manufacturing	0.02%	99.86%
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	0.02%	99.88%
561612	Security Guards and Patrol Services	0.02%	99.89%
561710	Exterminating and Pest Control Services	0.02%	99.91%
339950	Sign Manufacturing	0.02%	99.93%
561990	All Other Support Services	0.02%	99.94%
512110	Motion Picture and Video Production	0.01%	99.95%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.01%	99.96%
562119	Other Waste Collection	0.01%	99.97%
331110	Iron and Steel Mills and Ferroalloy Manufacturing	0.01%	99.98%
524210	Insurance Agencies and Brokerages	0.01%	99.98%
524127	Direct Title Insurance Carriers	0.01%	99.99%
519190	All Other Information Services	0.01%	99.99%
522110	Commercial Banking	0.01%	100.00%
TOTAL			100.0%

Source: CHA analysis of City of South Bend's data

