

Business Market Availability and Disparity Study



NOVEMBER 2017

**Shelby County Schools
Board of Education**



ACKNOWLEDGEMENTS

MGT is a Tallahassee-based research and management consulting firm and has conducted disparity and disparity-related studies since 1990. The team who conducted the District's disparity study is the most experienced in the country. The experience of our team enables us to navigate challenges, obstacles, and volatility, which can easily derail the most well-planned and executed study.

The assistance of personnel within the District, especially the Procurement Department and Office of Project Management, made the successful completion of this project possible.

The team of experts that dedicated their time, attention, and expertise to this study include:

MGT OF AMERICA CONSULTING, LLC

▶ **Mr. Reggie Smith, Vice President, Disparity Research.**

Mr. Smith is the leader of MGT's disparity study business unit and is a nationally recognized expert in managing and directing disparity studies. Mr. Smith provided overall management and assistance to ensure the District's study was conducted in an accurate, reliable, valid, and legally defensible manner. Mr. Smith assisted in the qualitative data collection for the District. He has directed over three dozen studies and has managed some of the largest disparity studies in the country. Mr. Smith is a highly skilled project manager with the knowledge and skills necessary to oversee the complexity of a disparity study. In addition to his disparity study experience, Mr. Smith has extensive knowledge in consulting, training, and public relations services to private and public-sector agencies, particularly in local government. Mr. Smith also specializes in the management and direction of reengineering, operational assessments, organizational and performance reviews, and administrative technology projects for city, county, and state government agencies.

▶ **Ms. Vernetta Mitchell, Senior Consultant/Project Manager/Qualitative Team Leader.**

Ms. Mitchell was the day-to-day contact for the District. She managed and oversaw the assignments of MGT staff and subconsultants, maintained regular communications with District and MGT staff to ensure timely completion of deliverables, and the qualitative data collection and research. Ms. Mitchell has over 20 years experience administering, developing, and monitoring minority, women, small, and disadvantaged business programs within local government and private sector companies. In addition, her experience extends to the functional knowledge of government procurement for construction, services, and goods. She has extensive knowledge and experience in project management, project scheduling, analytical reporting, qualitative research, facilitation, and public relations. Ms. Mitchell's experience in procurement, construction, and program administration has expanded her expertise in the development and management of data collection processes that has led to more efficient analyses and reporting of business participation.

▶ **Mr. Andres Bernal, JD, Senior Consultant/Quantitative Analyst.**

Mr. Bernal conducted the quantitative data analyses for the District's study. Mr. Bernal has research experience in economic theories, including microeconomic theory, macroeconomic theory, econometrics, urban economics, experimental economics, human and labor resource economics, and regression analysis. He has done extensive research using statistics and mathematical computations to analyze data. Mr. Bernal has extensive experience in SAS, SPSS, database design, Excel, PowerPoint, File Maker Pro, Word Perfect, Microsoft Word, and conducting detailed research. Mr. Bernal provided technical

assistance on the legal framework of the quantitative analysis to ensure accuracy. He is bilingual with fluency in English and Spanish.

SUBCONSULTANTS

▶ **Ms. JANICE BANKS, SMALL PLANET WORKS (SPW).**

Ms. Banks was an instrumental partner for the District's study as she closely interacted and gathered qualitative data from the location business community. Ms. Banks conducted in-depth, one-on-one interviews with area businesses, managed public meetings, conducted interviews with area trade associations and business organizations (stakeholders). Ms. Banks also conducted a quantitative survey used to estimate marketplace availability. Small Planet Works is an industry-recognized organizational development and performance management firm. Founded in 1994, SPW serves federal, state and local governments in the Southeast region of the United States. SPW designs effective workplace solutions through managing process improvement. They possess over 20 years of experience in process design, IT management, and training. SPW assists organizations to achieve maximum performance from both their human and capital resources.

▶ **Ms. ANNELIESE OPPENHEIM, OPPENHEIM RESEARCH.**

Ms. Oppenheim conducted qualitative data collection by way of a comprehensive survey with area business owners in the District's relevant market area. Oppenheim Research is a full-service market research firm offering a complete range of research programs designed to provide its clients with clear, concise, and highly reliable information upon which they may formulate successful strategies and plans. Ms. Oppenheim has worked with MGT for more than 12 years on disparity studies and disparity-related research work. Because the firm believes an aware and informed client makes the most effective marketing, policy, and management decisions, Oppenheim Research also offers programs which accurately measure the potential and actual effectiveness of those plans. Based in Tallahassee, Florida, the firm serves both large and small clients at local, regional, and national levels for survey research and marketing projects.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ES-1
1. Introduction.....	ES-1
2. Findings for M/WBE Availability, Utilization, and Disparity	ES-1
3. Commendation and Recommendations.....	ES-3
4. Conclusion	ES-5
CHAPTER 1 INTRODUCTION.....	1-1
1. Introduction.....	1-1
2. Overview of Study Approach and Methodology	1-1
3. Report Organization	1-3
CHAPTER 2 LEGAL FRAMEWORK	2-1
1. Introduction.....	2-1
2. Methodology	2-2
3. Case Law Overview.....	2-3
4. Compelling Government Interest.....	2-7
5. Calculating Disparity.....	2-10
6. Narrow Tailoring.....	2-15
7. Small Business Procurement Preferences.....	2-19
8. Executive and Legislative Overview	2-20
9. Conclusion	2-22
CHAPTER 3 REVIEW OF POLICIES, PROCEDURES, AND PROGRAMS.....	3-1
1. Introduction.....	3-1
2. Methodology	3-1
3. Procurement Organization Structure and Environment	3-3
4. Procurement Policies and Procedures	3-6
5. M/WBE Outreach	3-16
6. Conclusion	3-18
CHAPTER 4 MARKET AREA AND UTILIZATION ANALYSES.....	4-1
1. Introduction.....	4-1
2. Data Collection and Management.....	4-1
3. Market Area Analysis.....	4-2
4. Utilization Analyses	4-6

CHAPTER 5 AVAILABILITY AND DISPARITY ANALYSES.....	5-1
1. Introduction.....	5-1
2. Methodology	5-1
3. Availability and Disparity Analysis	5-2
4. Conclusion	5-7
CHAPTER 6 PRIVATE SECTOR AND NON-GOAL ANALYSIS.....	6-1
1. Introduction.....	6-1
2. Collection and Management of Permits Data	6-2
3. Private Sector Disparities	6-3
4. Analysis of Race, Ethnicity, and Gender Effects on Self-Employment Rates.....	6-14
5. Conclusion	6-24
CHAPTER 7 ANECDOTAL ANALYSIS	7-1
1. Introduction.....	7-1
2. Methodology	7-1
3. Demographics.....	7-5
4. Reported Barriers to Doing Business with the District.....	7-8
5. Disparate Treatment	7-10
6. Suggested Remedies from Anecdotal Participants	7-10
7. Stakeholder Interviews.....	7-11
8. Conclusion	7-12
CHAPTER 8 FINDINGS AND RECOMMENDATIONS	8-1
1. Introduction.....	8-1
2. Findings.....	8-1
3. Commendations and Recommendations	8-4
4. Selected M/WBE and SLBE Practices.....	8-6
5. Conclusion	8-9
LIST OF EXHIBITS	
EXHIBIT 1-1: RESEARCH QUESTIONS.....	1-2
EXHIBIT 3-1: DISTRICT ADMINISTRATIVE ORGANIZATION CHART	3-5
EXHIBIT 3-2: PROCUREMENT SERVICES ORGANIZATION CHART	3-5
EXHIBIT 3-3: PROCUREMENT PURCHASING THRESHOLDS	3-11
EXHIBIT 3-4: DISTRICT PROCUREMENT PROCESS	3-16
EXHIBIT 7-1: SHELBY COUNTY SCHOOLS, SURVEY OF VENDORS DEMOGRAPHICS, BUSINESS INDUSTRY.....	7-6

LIST OF TABLES

TABLE 2-1: REFERENCE MATERIALS 2-2

TABLE 3-1: DOCUMENTS REVIEWED DURING POLICY AND PROCEDURES REVIEW 3-2

TABLE 4-1: MARKET AREA ANALYSIS, TOTAL CONTRACTS LEVEL DISTRIBUTION OF DOLLARS BY BUSINESS CATEGORY, SHELBY COUNTY MARKET AREA 4-5

TABLE 4-2: UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, ALL PROCUREMENT CATEGORIES..... 4-6

TABLE 5-1: PRIME DISPARITY, ARCHITECTURE & ENGINEERING 5-3

TABLE 5-2: PRIME DISPARITY, CONSTRUCTION 5-4

TABLE 5-3: PRIME DISPARITY, PROFESSIONAL SERVICES..... 5-5

TABLE 5-4: PRIME DISPARITY, NONPROFESSIONAL SERVICES 5-6

TABLE 5-5: PRIME DISPARITY, GOODS AND COMMODITIES..... 5-7

TABLE 6-1: PRIVATE SECTOR CENSUS DISPARITIES, NAICS CODE 23, CONSTRUCTION, U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, MEMPHIS, TN-MS-AR MSA MARKETPLACE 6-5

TABLE 6-2: PRIVATE SECTOR CENSUS DISPARITIES, NAICS CODE 42, WHOLESALE TRADE, U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, MEMPHIS, TN-MS-AR MSA MARKETPLACE 6-7

TABLE 6-3: PRIVATE SECTOR CENSUS DISPARITIES, NAICS CODE 54, PROFESSIONAL, SCIENTIFIC AND TECHNICAL SERVICES, U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, MEMPHIS, TN-MS-AR MSA MARKETPLACE..... 6-9

TABLE 6-4: PRIVATE SECTOR CENSUS DISPARITIES, NAICS CODE 56, ADMINISTRATIVE AND SUPPORT / WASTE MANAGEMENT AND REMEDIATION SERVICES, U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, MEMPHIS, TN-MS-AR MSA MARKETPLACE 6-11

TABLE 6-5: PRIVATE SECTOR CENSUS DISPARITIES, NAICS CODE 81, OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION), U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, MEMPHIS, TN-MS-AR MSA MARKETPLACE 6-13

TABLE 6-6: PERCENTAGE SELF-EMPLOYED EARNINGS BY RACIAL, ETHNIC, AND GENDER BUSINESS OWNERSHIP CLASSIFICATION..... 6-16

TABLE 6-7: SELF-EMPLOYMENT “ODDS RATIOS” OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER CONTROLLING FOR SELECTED DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS..... 6-20

TABLE 6-8: EARNINGS ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER CONTROLLING FOR SELECTED DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS 6-22

TABLE 6-9: OBSERVED AND PREDICTED SELF-EMPLOYMENT RATES, DISTRICT PUMA 6-23

TABLE 7-1: SHELBY COUNTY SCHOOLS, SURVEY OF VENDORS DEMOGRAPHICS, NUMBER OF RESPONDENTS 7-5

TABLE 7-2: SHELBY COUNTY SCHOOLS, SURVEY OF VENDORS DEMOGRAPHICS, NUMBER OF EMPLOYEES..... 7-7

TABLE 7-3: SHELBY COUNTY SCHOOLS, SURVEY OF VENDORS DEMOGRAPHICS, GROSS REVENUE PRIME 7-7

TABLE 7-4: SHELBY COUNTY SCHOOLS, DISPARATE TREATMENT 7-10

TABLE OF CONTENTS

TABLE 7-5: SHELBY COUNTY SCHOOLS, DISCRIMINATION 7-10

TABLE 8-1: UTILIZATION OF FIRMS ANALYSIS, PRIME LEVEL, DISTRIBUTION OF DOLLARS BY BUSINESS OWNERSHIP CLASSIFICATION..... 8-2

TABLE 8-2: UTILIZATION OF FIRMS ANALYSIS, PRIME LEVEL, DISTRIBUTION OF DOLLARS BY BUSINESS OWNERSHIP CLASSIFICATION BY FISCAL YEAR, ALL PROCUREMENT CATEGORIES COMBINED 8-3

TABLE 8-3: NARROWLY TAILORED M/WBE PROGRAM FEATURES 8-6

TABLE 8-4: PROPOSED MBE AND WBE GOALS 8-6

LIST OF FIGURES

FIGURE 4-1: SUMMARY OF DOLLARS, TOTAL EXPENDITURES BY BUSINESS CATEGORY, OVERALL MARKET AREA 4-4

FIGURE 4-2: UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, ARCHITECTURE & ENGINEERING 4-7

FIGURE 4-3: UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, CONSTRUCTION 4-8

FIGURE 4-4: UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, PROFESSIONAL SERVICES 4-9

FIGURE 4-5: UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, NONPROFESSIONAL SERVICES 4-10

FIGURE 4-6: UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, GOODS OR COMMMODITIES 4-11

APPENDICES

Appendix A – Glossary of Terms

Appendix B – Detailed Market Area Analyses - Shelby County, TN

Appendix C – Detailed Market Area Analyses - Metropolitan Statistical Area

Appendix D – Detailed Utilization Analyses – Shelby County, TN

Appendix E – Detailed Utilization Analyses – Metropolitan Statistical Area

Appendix F – Detailed Availability Analyses – Shelby County, TN

Appendix G – Detailed Disparity Analyses

Appendix H – Survey of Vendors Instrument

Appendix I – Survey of Vendors Results

Appendix J – Survey of Vendor Regression Analysis

Appendix K – Stakeholder Interview Guide

Appendix L – In-Depth Interview Guide

Appendix M – Public Use Microdata Sample (PUMS) Regression Analysis

Appendix N – U.S. Census Survey of Business Owners State of Tennessee

EXECUTIVE SUMMARY
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

In September 2016, Shelby County Schools Board of Education contracted MGT of America Consulting, LLC to conduct their **Business Market Availability and Disparity Study** (Study) for the Shelby County School District (District). The Study was conducted in a manner consistent with disparity study best practices, controlling local legal precedents, and constitutional law in order to properly advise the District about the legal basis for potential remedies, if necessary. This Study consisted of fact-finding to analyze District procurement trends and practices for the study period from July 1, 2011, through June 30, 2016; to evaluate the impact of race- and gender-neutral remedial efforts; and to evaluate various options for future program development. MGT's methodology included a review of the disparity study's legal framework; a policy and procedures review; analyses of utilization, availability, and statistical disparity; anecdotal research; private sector analyses; and findings, commendations, and recommendations.

2. FINDINGS FOR M/WBE AVAILABILITY, UTILIZATION, AND DISPARITY

FINDING E-1: GEOGRAPHIC MARKET AREA (*Reference Chapter 4*)

The District purchased the majority of its goods and services with firms located in the Shelby County, TN market area. Based on this analysis, the relevant market area for the District's Study is Shelby County. **Table ES-1** illustrates the distribution of dollars by procurement category.

TABLE ES-1
MARKET AREA ANALYSIS, TOTAL CONTRACTS LEVEL DISTRIBUTION OF DOLLARS
BY BUSINESS CATEGORY, SHELBY COUNTY MARKET AREA

CONSTRUCTION	Amount	Percent
<i>Inside of Shelby County</i>	\$116,721,651.36	95.09%
Outside of Shelby County	\$6,026,433.95	4.91%
Construction, Total	\$122,748,085.31	100.00%
ARCHITECTURE AND ENGINEERING	Amount	Percent
<i>Inside of Shelby County</i>	\$4,788,768.10	91.35%
Outside of Shelby County	\$453,499.38	8.65%
Architecture and Engineering, Total	\$5,242,267.48	100.00%
PROFESSIONAL SERVICES	Amount	Percent
<i>Inside of Shelby County</i>	\$108,639,663.89	63.76%
Outside of Shelby County	\$61,746,006.82	36.24%
Professional Services, Total	\$170,385,670.71	100.00%
NONPROFESSIONAL SERVICES	Amount	Percent
<i>Inside of Shelby County</i>	\$214,570,625.98	96.79%
Outside of Shelby County	\$7,119,977.69	3.21%
Nonprofessional Services, Total	\$221,690,603.67	100.00%
GOODS AND COMMODITIES	Amount	Percent
<i>Inside of Shelby County</i>	\$227,001,616.53	50.18%
Outside of Shelby County	\$225,361,550.32	49.82%
Goods and Commodities Total	\$452,363,166.85	100.00%
ALL BUSINESS CATEGORIES	Amount	Percent
<i>Inside of Shelby County</i>	\$671,722,325.86	69.08%
Outside of Shelby County	\$300,707,468.16	30.92%
All Business Categories, Total	\$972,429,794.02	100.00%

FINDING E-2: M/WBE PRIME UTILIZATION AND DISPARITY (Reference Chapter 4 and Chapter 5)

Minority and Women Business Enterprise (M/WBE) prime utilization is calculated by the dollars paid to firms by the District during the current study period. M/WBE utilization and disparity for firms located in the relevant market are as follows:

- ◆ MBE primes were paid \$3,970 in Architecture & Engineering contracts, 0.08 percent of Architecture & Engineering prime contract dollars; WBE primes were paid \$360,109 in Architecture & Engineering contracts, 7.52 percent of Architecture & Engineering prime contract dollars. There was disparity for all M/WBE groups.
- ◆ MBE primes were paid \$638,101 in Construction contracts, 0.55 percent of Construction prime contract dollars; WBEs were paid \$1.4 million on Construction prime contracts, 1.21 percent of Construction prime contract dollars. There was disparity for all M/WBE groups.
- ◆ MBE primes were paid \$33.3 million in Professional Services contracts, 30.70 percent of Professional Services prime contract dollars; WBE primes were paid \$847,161 in Professional Services contracts, 0.78 percent of Professional Services prime contract dollars. There was disparity for M/WBE groups except for Asian American firms.
- ◆ MBE primes were paid \$26.6 million in Nonprofessional Services contracts, 12.41 percent of Nonprofessional Services prime contract dollars; WBE primes were paid \$382,895 in Nonprofessional Services contracts, 0.18 percent of Nonprofessional Services prime contract dollars. There was disparity for M/WBE groups except for Asian American firms.
- ◆ MBE primes were paid \$29.4 million in Goods and Commodities contracts, 12.97 percent of Goods and Commodities prime contract dollars; WBE primes were paid \$5.8 million in Goods and Commodities contracts, 2.56 percent of Goods and Commodities prime contract dollars. There was disparity for M/WBE groups except for Asian American firms.

FINDING E-3: M/WBE PRIME AVAILABILITY (Reference Chapter 5)

TABLE ES-2
M/WBE AVAILABILITY
SHELBY COUNTY MARKET AREA

Business Ownership Classification	Architecture & Engineering	Construction	Professional Services	Nonprofessional Services	Goods & Commodities
African American	10.37%	33.68%	26.96%	39.94%	23.83%
Asian American	2.22%	1.03%	1.73%	1.36%	0.67%
Hispanic American	0.74%	2.63%	0.89%	0.77%	0.35%
Native American	0.37%	0.38%	0.12%	0.06%	0.04%
Total Minority Firms	13.70%	37.72%	29.70%	41.13%	24.89%
Nonminority Women	4.81%	5.74%	9.23%	9.41%	7.49%
Total M/WBE Firms	18.52%	43.46%	38.93%	51.54%	32.37%

FINDING E-4: DISPARITIES IN SELF-EMPLOYMENT (Reference Chapter 6)

Econometric analysis using data from the 2011-2015 American Community Survey data for the Memphis Public Use Microdata Area found statistically significant disparities for entry into self-employment for African Americans and Nonminority Women. There were also statistically significant disparities in earnings from self-employment for African Americans and Nonminority Women.

FINDINGS E-5: ANECDOTAL COMMENTS (Reference Chapter 7)

Among the M/WBEs who responded to questions about barriers to doing business with the District, the biggest concern for both responding prime contractors and subcontractors was competing with large firms (47% of M/WBE primes and 36% of M/WBE subcontractors). Other issues noted by M/WBE respondents included:

Primes:

- ◆ Slow payment – 28%.
- ◆ Short or limited time given to prepare bid package or quote – 26%
- ◆ Selection process/evaluation criteria – 26%.

Subcontractors:

- ◆ Short or limited time given to prepare bid package or quote – 20%.
- ◆ Financing – 15%.
- ◆ With respect to disparate treatment, M/WBE respondents in the survey reported:
 - Discriminatory experiences in dealing with prime contractor – 2.55%.
 - Discriminatory experiences in the private sector – 13.61%.

3. COMMENDATION AND RECOMMENDATIONS

Most of the following commendations and recommendations are based on multiple findings and do not necessarily tie to one finding. The District should be commended on engaging a Disparity Study to determine if there are barriers to minority and women businesses doing business with the District, and whether there is a factual predicate to establish a minority and women business program.

RECOMMENDATION A: SUBCONTRACTOR PROJECT GOALS

In response to the primary research question, this Study provides evidence to support a District M/WBE program. This conclusion is based primarily on statistical disparities in current M/WBE utilization; evidence of discrimination in business formation and revenue earned from self-employment; and anecdotal evidence of disparate treatment. The District should tailor its M/WBE participation policy to remedy each of these specific disparities. The core theme should be that prime contractors should document their outreach efforts and the reasons why they may have rejected qualified M/WBEs and M/WBEs who were the low-bidding or most qualified subcontractors.

RECOMMENDATION B: DATA MANAGEMENT

The District should develop methods to track subcontractor utilization for M/WBE and non-M/WBE firms. In particular, the District should:

- ◆ Require the reporting of all subcontractor utilization.
- ◆ Validate subcontractor utilization using compliance reporting.
- ◆ Produce comprehensive reports on MBE utilization. Maintain a list of certified M/WBE firms using other governmental and certification organizations in the Memphis area.

RECOMMENDATION C: SLBE PROGRAM

The District should consider adding a Small Local Business Enterprise (SLBE) program, including SLBE project goals and SLBE set-asides. SLBE programs have the advantage that they are generally not subject to constitutional challenge. Combining SLBE programs and M/WBE programs has become common across agencies that maintain M/WBE programs. Further ideas on SLBE programs are discussed in the **Selected M/WBE and SLBE Practices** section located in **Chapter 8**.

RECOMMENDATION D: NARROW TAILORED M/WBE PROGRAM

Developments in court cases involving federal disadvantaged business enterprise (DBE) programs provide important insight into the design of local M/WBE programs. Federal courts have consistently found DBE regulations in 49 CFR 26 to be narrowly tailored.¹ The federal DBE program has the features shown in **Table ES-3** that contribute to this characterization as a narrowly tailored remedial procurement preference program. The District should adopt these features in any new M/WBE program.

TABLE ES-3
NARROWLY TAILORED M/WBE PROGRAM FEATURES

	NARROWLY TAILORED GOAL-SETTING FEATURES	DBE REGULATIONS
1.	The District should not use M/WBE quotas.	49 CFR 26(43)(a)
2.	The District should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
3.	The District should meet the maximum amount of M/WBE goals through race-neutral means.	49 CFR 26(51)(a)

Source: Suggested features in a proposed narrowly tailored M/WBE program based on USDOT 49 CFR 26.

RECOMMENDATION E: ASPIRATIONAL M/WBE GOALS

The District should be commended for its aspirational goals and the revisions of its aspirational goals. The District should consider establishing annual aspirational MBE and WBE goals by business category. Proposed goals are listed in **Table ES-4**. The proposed goals are based on a weighted average of M/WBE utilization and availability. These aspirational goals should not be applied rigidly to every individual District project. Instead, MBE and WBE goals should vary from project to project. Aspirational goals should be based on relative MBE and WBE availability. The primary means for achieving these aspirational goals

¹ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Gross Seed. v. State of Nebraska*, 345 F.3d 968 (8th Cir. 2003); cert denied, 158 L.Ed. 2d 729 (2004).

should be an SBE program, outreach, and adjustments in District procurement policy in addition to M/WBE project goals.

TABLE ES-4
PROPOSED MBE AND WBE GOALS

Procurement Category	M/WBE Goals
Architecture and Engineering	13.68%
Construction	24.17%
Professional Services	35.24%
Nonprofessional Services	32.57%
Goods or Commodities	24.02%

RECOMMENDATION F: OUTREACH

The District should utilize available resources such as industry-specific trade associations and business organizations to inform members about procurement opportunities with the District. Occasionally, the District should host “How to Do Business” workshops for interested firms. It will be equally important to educate District staff on any new M/WBE or SLBE programs established by the District for discretionary spending.

RECOMMENDATION G: STAFFING

To increase efforts on M/WBE inclusion, the District should consider adding three staff to assist with outreach, reporting, and monitoring. The District needs staff to manage and implement Study recommendations and provide oversight and management of the program that results from the Study.

RECOMMENDATION H: CERTIFICATION

The District should use existing certification agencies to identify certified minority and women business enterprises in the Memphis area. Agencies to consider:

- ◆ City of Memphis
- ◆ Departments of Transportation for Arkansas, Mississippi, and Tennessee
- ◆ Tennessee Governor’s Office of Diversity Business Enterprise
- ◆ Tri-state Minority Supplier’s Development Council

This list can be expanded per the District’s requirements.

4. CONCLUSION

The results of this Study and conclusions drawn are presented in detail in **Chapters 3** through **7** of this report. This **Executive Summary** summarizes the evidence on the central research question: *is there factual predicate evidence to support a race- and gender-conscious M/WBE program for the District?* MGT found sufficient evidence of disparity and recommends the District establish a race- and gender-based procurement program to address identified disparities.

CHAPTER I: Introduction

BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

In September 2016, Shelby County Schools Board of Education contracted MGT of America Consulting, LLC to conduct their **Business Market Availability and Disparity Study** (Study) for the Shelby County School District (District). The District’s Study was conducted in a manner consistent with disparity study best practices, controlling local legal precedents, and constitutional law in order to properly advise the District about the legal basis for potential remedies, if necessary.

MGT’s methodology included a legal framework review, a policy and procedures review, a utilization, availability, and statistical disparity analyses, anecdotal research, a private sector analysis, industry best practices, findings, commendations, and recommendations.

The objectives of this Study were:

- ◆ Determine whether the District, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts in Construction, Architecture and Engineering, Professional Services, Nonprofessional Services, and Goods and Commodities to M/WBEs.
- ◆ Determine if a legally justified need exists for the establishment of an M/WBE program in accordance with the guidelines set forth by the Supreme Court and relevant subsequent cases including the consideration of race- and gender-based programs based on the study’s findings.
- ◆ Provide recommendations regarding suggested modifications to the District’s procurement policies.

The Supreme Court decisions in *City of Richmond v. J.A. Croson Company*² (*Croson*) and subsequent cases have established and applied the constitutional standards for government contracting affirmative action programs. The courts have determined that an affirmative action program involving governmental procurement of goods or services must demonstrate a compelling governmental interest in the program and narrow tailoring of the program. This report provides justification for the establishment of a narrowly tailored M/WBE program for District spending.

2. OVERVIEW OF STUDY APPROACH AND METHODOLOGY

MGT’s overall approach and methodology utilized research methods consistent with predominant, controlling, and relevant legal precedents. Specifically, MGT’s approach addressed these precedents by analyzing prime and subcontract data, disaggregating data by procurement type, examining contracts of a certain size, obtaining capacity information by surveying vendors, and conducting multiple regression analyses. MGT’s approach and methodology was shaped by the research questions listed in **Exhibit 1**.

CHAPTER SECTIONS

1. Introduction
2. Overview of Study Approach and Methodology
3. Report Organization

² Richmond v. Croson, 488 U.S. 469 (1989).

EXHIBIT 1-1
RESEARCH QUESTIONS

These research questions are embedded in relevant chapters throughout this report.

1. Is there factual predicate evidence to support a race- and/or gender-conscious M/WBE remedial program for the District?
2. How does case law inform the research methodology for the District's disparity study?
3. Is there statistical evidence of disparity between the availability and utilization of M/WBEs? If so, what are the most relevant causal factors that contribute directly or indirectly to the disparities between the availability and utilization of M/WBEs?
4. Does the District passively engage in practices that result in disparities?
5. Are there statistically significant disparities in the utilization of M/WBEs by prime contractors on projects where there are no M/WBE goals?
6. Is there qualitative/anecdotal evidence of disparate treatment of M/WBE subcontractors by prime contractors?

The District's report analyzes five industry categories of procurement opportunities for Fiscal Years 2012–2016:

- ◆ Architecture & Engineering
- ◆ Construction
- ◆ Professional Services
- ◆ Nonprofessional Services
- ◆ Goods and Commodities

Part of this approach entailed close communication with the District to ensure full and complete understanding and acceptance of these methodologies before they were deployed. MGT's methodology includes incorporating project management as an objective to ensure ongoing communications regarding project expectations, deliverables, and methodologies. A comprehensive work plan with specific tasks was utilized by study team members to complete study components required to address the research questions in Exhibit 1-1.

MGT's work plan consisted of, but was not limited to, the following major tasks:

- ◆ Establish data parameters and finalize a work plan.
- ◆ Review policies, procedures, and programs.
- ◆ Conduct market area and utilization analysis.
- ◆ Determine the availability of qualified firms.
- ◆ Analyze the utilization and availability data for disparity.
- ◆ Conduct a survey of business owners.
- ◆ Collect and analyze anecdotal information.
- ◆ Prepare and present the final report for the study.

After MGT deployed these methodologies and collected and analyzed data, the study team reviewed the data and preliminary findings with the District to address any inaccuracies prior to producing a draft report for review and comment.

3. REPORT ORGANIZATION

In addition to this introductory chapter, this report consists of:

CHAPTER 2.0 LEGAL FRAMEWORK

Presents the legal framework and an overview of the controlling legal precedents that impact remedial procurement programs, with an emphasis on the Sixth Circuit.

CHAPTER 3.0 REVIEW OF POLICIES, PROCEDURES, AND PROGRAMS

Provides a review of the District’s policies, procedures, programs, and race- and gender-neutral efforts.

CHAPTER 4.0 MARKET AREA AND UTILIZATION ANALYSES

The Market Area Analysis presents the methodology used to determine the District’s relevant market area, and the analyses for the procurement of contracting, goods, and services activities.

The Utilization Analysis presents the methodology used to determine the statistical analysis of vendor utilization by the District.

CHAPTER 5.0 AVAILABILITY AND DISPARITY ANALYSES

Provides a discussion of the availability of firms and the levels of disparity for vendors, as well as a review of the multivariate analysis for the District.

CHAPTER 6.0 PRIVATE SECTOR AND NON-GOAL ANALYSIS

Presents an analysis of disparity in the private sector and its effect on the ability of firms to win procurement contracts from the District.

CHAPTER 7.0 ANECDOTAL ANALYSIS

Presents an analysis of anecdotal data collected from the survey of business owners, personal interviews, focus groups, and public hearings.

CHAPTER 8.0 FINDINGS AND RECOMMENDATIONS

Provides a summary of the findings presented in previous chapters, along with commendations and recommendations.

APPENDICES Presents additional analyses, documents used to conduct the study, and supplemental documentation.

The consultant team recommends reading the report in its entirety to understand the basis for the findings and conclusions presented in **Chapter 8.0, Findings and Recommendations**.

MGT of America Consulting, LLC (MGT) is pleased to submit the **Business Market Availability and Disparity Study** to the Shelby County Schools Board of Education.

CHAPTER 2: Legal Framework
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

Chapter 2 provides the legal background for the Shelby County School District (District) Business Market Availability and Disparity Study. The material that follows does not constitute legal advice to the District on minority business programs, affirmative action, or any other matter. Instead, it provides the context for the statistical and anecdotal analyses that appear in subsequent chapters of this report.

The Supreme Court decisions in *City of Richmond v. J.A. Croson Company*³ (*Croson*) and subsequent cases established and applied the constitutional standards for government contracting affirmative action programs. This chapter identifies and analyzes those decisions, summarizing how courts evaluate the constitutionality of race-specific and gender-specific programs.

By way of a preliminary outline, the courts have determined that an affirmative action program involving governmental procurement of goods or services must meet the following standards:

- ♦ A remedial race-conscious program is subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
 - Strict scrutiny has two basic components: a compelling governmental interest in the program and narrow tailoring of the program.
 - First, to survive the strict scrutiny standard, a remedial race-conscious program must be based on a compelling governmental interest.
 - “Compelling interest” means the government must prove past or present racial discrimination requiring remedial attention.
 - There must be a specific “strong basis in the evidence” for the compelling governmental interest.
 - Statistical evidence is preferred and possibly necessary as a practical matter; anecdotal evidence is permissible and can offer substantial support, but it probably cannot stand on its own.
 - Second, to survive the strict scrutiny standard, a program designed to address compelling governmental interest must be narrowly tailored to remedy the identified discrimination. “Narrow tailoring” means the remedy must fit the findings.
 - The evidence showing compelling interest must guide the tailoring very closely.
 - Race-neutral alternatives must be considered first.
 - A lesser standard, intermediate judicial scrutiny, applies to programs that establish gender preferences.

CHAPTER SECTIONS

1. Introduction
2. Methodology
3. Case Law Overview
4. Compelling Government Interest
5. Calculating Disparity
6. Narrow Tailoring
7. Small Business Procurement Preferences
8. Executive and Legislative Overview
9. Conclusion

³ *Richmond v. Croson*, 488 U.S. 469 (1989).

- To survive the intermediate scrutiny standard, a remedial gender-conscious program must serve important governmental objectives and be substantially related to the achievement of those objectives.
- The evidence does not need to be as strong and the tailoring does not need to be as specific under the standard for gender as compared to the stricter standard for race.

2. METHODOLOGY

To provide a complete legal framework, a thorough review of applicable case law, statutes, provisions, rules, and reference materials on government contracting and affirmative action was completed. United States Supreme Court decisions and decisions of the Sixth Circuit, which includes Shelby County, offer the most directly binding authority; however, where those decisions leave issues unsettled, decisions from other circuits courts and district courts were considered.

While the legal framework focuses on public contracts with minority- and women-owned business enterprises (M/WBEs), case law in other areas of affirmative action was assessed for its potential impact on the framework. Tennessee legislative and executive provisions were also reviewed, including executive orders, procurement manuals, the Tennessee Code, and proposed legislation. The reference sources in Table 2-1 were used in preparing the legal review in the sections which follow.

TABLE 2-1
REFERENCE MATERIALS

INDEX	DESCRIPTION
1	15 U.S.C. § 631(a).
2	15 U.S.C. § 637(b)(11)
3	32 C.F.R. §§ 1-701.1 to 1-707.7
4	49 C.F.R., Section 26
5	<i>Adarand Constructors, Inc. v. Peña</i> , 515 U.S. 200 (1995)
6	<i>Adarand v. Slater</i> , 228 F.3d 1147 (10th Cir. 2000)
7	Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(E) (1976)
8	Armed Forces Procurement Act, 10 U.S.C. § 2301 et seq. (1976)
9	<i>Associated Gen. Contractors of Ca. v. Coalition for Economic Equity</i> , 950 F.2d 1401 (9th Cir. 1991)
10	<i>Associated Gen. Contractors of Ohio, Inc. v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000)
11	<i>Associated Utility Contractors of Md. v. Mayor</i> , 83 F. Supp. 2d 613 (D. Md. 2000)
12	<i>Builders Ass’n of Greater Chi., v. Cook County</i> , 256 F.3d 642 (7th Cir. 2001)
13	<i>City of Richmond v. Croson</i> , 488 U.S. 469 (1989)
14	<i>Concrete Works v. City and County of Denver</i> , 124 S.Ct. 556 (2003)
15	<i>Concrete Works II. v. City & County of Denver</i> , 36 F.3d 1513 (10th Cir. 1994)
16	<i>Concrete Works IV, v. City and County of Denver</i> , 321 F.3d 950 (10th Cir. 2003)
17	<i>Cone Corp. v. Hillsborough County</i> , 908 F.2d 908 (11th Cir. 1990)
18	<i>Contractors Ass’n of Eastern Pa. v. City of Phila.</i> , 91 F.3d 586 (3rd Cir. 1996)
19	<i>Coral Constr. v. King County</i> , 941 F.2d 910 (9th Cir. 1991)
20	<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)
21	<i>Engineering Contractors of S. Florida v. Dade County</i> , 122 F.3d 895 (11th Cir. 1997)
22	Executive Order 14
23	Federal Acquisition Regulations 19.502-2
24	<i>Fisher v. University of Texas at Austin</i> , 579 U.S. ____ (2016).

INDEX	DESCRIPTION
25	Governors Office of Diversity Business Enterprise Annual Report
26	<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)
27	<i>Hazelwood Sch. Dist. v. United States</i> , 433 U.S. 299 (1977)
28	<i>H.B. Rowe v. Tippett</i> , 615 F.3d 233 (4 th Cir 2010)
29	<i>Hunter v. Regents of Univ. of Ca.</i> , 190 F.3d 1061 (9 th Cir. 1999)
30	<i>J.H. Rutter v. United States</i> , 706 F.2d 702 (5 th Cir. 1983)
31	Minority Business Enterprise Development and the Small Business Administration’s 8(a) Program: Past, Present, and (Is There a) Future?” <i>Military Law Review</i> 145 (Summer 1994)
32	<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982)
33	<i>Nguyen v. U.S.</i> , 533 U.S. 53 (2001)
34	<i>Peightal v. Metropolitan Dade County</i> , 26 F.3d 1545 (11 th Cir. 1994)
35	<i>Petit v. Chicago</i> , 352 F.3d 1111 (7 th Cir. 2003)
36	<i>Scott v. Jackson</i> , 199 F.3d 206 (5 th Cir. 1999)
37	SCS Diversity Policy
38	<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996)
39	<i>Sherbrooke Turf v. Minn. Dep’t of Transp.</i> , 345 F.3d 964 (8 th Cir. 2003)
40	Small Business Act, 15 U.S.C. § 631 et seq. (1976).
41	<i>Tennessee Asphalt v. Farris</i> , 942 F.2d 969 (6 th Cir. 1991)
42	Tennessee Code, Title 12, Chapter 3, Part 11
43	Tennessee Code, Title 49, Chapter 3, Part 3
44	Tennessee Procurement Services Reference Manual
45	Tennessee House Bill 2463 (2016)
46	Tennessee Senate Bill 2040 (2016)
47	“The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting,” 24 <i>N. Ill. U. L. Rev.</i> 509 (Summer 2004)
48	<i>United States v. Virginia</i> , 518 U.S. 515 (1996)
49	<i>W. Tenn. Associated Builders & Contrs., Inc. v. Memphis</i> , 64 F.Supp.2d 714 (W.D. Tenn. 1999)
50	<i>W. Tenn. Builders & Contractors v. Memphis</i> , 293 F.3d 345 (6 th Cir 2002)
51	<i>Western States Paving Co v. Washington</i> , 407 F.3d 983 (9 th Cir. 2005)
52	“When Does Private Discrimination Justify Public Affirmative Action?” 98 <i>Columbia Law Review</i> 1577 (1998)
53	“Who Counts? Determining the Availability of Minority Businesses for Contracting After Croson,” 21 <i>Harvard Journal of Law and Public Policy</i> 793 (1998)

3. CASE LAW OVERVIEW

To determine the constitutionality of a government program, courts must first determine the appropriate standard of equal protection review by examining whether the program involves one of the protected classes embodied in the statute, thus requiring a higher level of review than the deference usually given to government programs by the courts. When an ordinance includes a race-based preference scheme, the courts apply *strict scrutiny* to review the ordinance and inquire whether the law is narrowly tailored to achieve a compelling governmental interest.

Conversely, gender-based classifications are evaluated under the *intermediate scrutiny* rubric, which provides that the statute must be substantially related to an important governmental objective. Therefore, race-conscious affirmative action is subject to a much higher standard of judicial review than gender-conscious affirmative action.

3.1 RACE-SPECIFIC PROGRAMS: THE CROSON DECISION

City of Richmond v. Croson, 488 U.S. 469 (1989) (*Croson*), established the strict scrutiny framework for testing the validity of programs based on racial discrimination. It held that programs established by local governments to set goals for the participation of minority- and woman-owned companies must be supported by evidence of past discrimination in the awarding of their contracts.

In 1983, the Richmond City Council adopted a Minority Business Utilization Plan (the Plan) following a public hearing in which seven citizens testified about historical societal discrimination. In adopting the Plan, the council also relied on a study indicating that “while the general population of Richmond was 50 percent African American, only 0.67 percent of the city’s prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983.”⁴

The evidence before the council also established that a variety of state and local contractor associations had little or no minority business membership. The council relied on statements by a council member whose opinion was that “the general conduct of the construction industry in this area, the state, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.”⁵ There was, however, no direct evidence of race discrimination on the part of the city in its contracting activities, and no evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.⁶ The Court noted that a generalized assertion that there has been past discrimination in an entire industry provided no guidance to determine the present scope of the injury a race-conscious program seeks to remedy.

The Plan required the city’s prime contractors to subcontract at least 30 percent of the dollar amount of each contract to one or more minority-owned business enterprises (MBEs). The Plan did not establish any geographic limits for eligibility. Therefore, an otherwise qualified MBE from anywhere in the United States could benefit from the 30 percent set-aside.

J.A. Croson Company, a non-MBE contractor, filed a lawsuit against the city of Richmond alleging that the Plan was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. After a considerable record of litigation and appeals, the Fourth Circuit struck down the Plan and the Supreme Court affirmed this decision.⁷ The Supreme Court determined that strict scrutiny was the appropriate standard of judicial review for MBE programs, so that a race-conscious program must be based on a compelling governmental interest and be narrowly tailored to achieve its objectives. This standard requires a firm evidentiary basis for concluding that the underutilization of minorities is a product of past discrimination.⁸

In striking down the city’s plan, *Croson* established that a local government could not rely on society-wide discrimination as the basis for a race-based program but, instead, was required to identify discrimination within the company’s jurisdiction,⁹ such as the local construction market.

⁴ *Croson*, at 479-80.

⁵ *Id.* at 480.

⁶ *Id.*

⁷ *Id.* at 511.

⁸ *Id.* at 493.

⁹ *Id.* at 497 (1989).

3.2 GENDER-SPECIFIC PROGRAMS

The Supreme Court has not addressed the specific issue of a gender-based classification in the context of a woman-owned business enterprise (WBE) program. *Croson* was limited to the review of an MBE program. In evaluating gender-based classifications, the Court has used “intermediate scrutiny,” a less stringent standard of review than the “strict scrutiny” applied to race-based classifications. Intermediate scrutiny requires that classifying persons based on gender “must carry the burden of showing an exceedingly persuasive justification for the classification.”¹⁰ The classification meets this burden “only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹¹

3.3 AN OVERVIEW OF THE APPLICABLE CASE LAW

Croson did not find a compelling justification for a complete MBE program. *Croson* found the city of Richmond’s evidence to be inadequate as a matter of law. Nevertheless, more recent cases in other federal circuits have addressed applications of the law that were not considered in *Croson*. Thus, it becomes necessary to look to the decisions of other federal circuits to predict the level of evidence that might be required to establish a government contracting affirmative action program.

The discussion in this review will also attend closely to the most relevant decisions in the area of government contracting. Justice O’Connor, distinguishing her majority opinion on affirmative action in law school admissions from her opinions in government contracting cases, wrote:

*Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . 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.*¹²

Further, some caution must be exercised in relying upon opinions of the federal district courts, which, as trial courts, make both findings of fact and holdings of law. As to holdings of law, the district courts must follow and are ultimately subject to the legal rulings by their circuit courts, wherein matters are appealed. As to matters of fact, the decisions of the federal district courts depend heavily on the precise evidence before them, frequently including matters such as evaluations of the credibility and expertise of witnesses in these cases. Such findings are not binding precedents outside the particular district, but may indicate the kind of evidence and arguments that might succeed elsewhere.

Finally, the ways in which municipalities participate in national disadvantaged business enterprise (DBE) programs is a specialized issue distinct from that of supporting municipal programs, even if the same kinds of evidence and same levels of review apply. In *Adarand Constructors, Inc. v. Peña*,¹³ the Supreme Court decided that federal DBE programs should be examined by the same strict scrutiny standard that *Croson* mandated for state and local programs and sent the case back to the lower court to apply the strict scrutiny standard. Nevertheless, cases considering national DBE programs have many important

¹⁰ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); see also *United States v. Virginia*, 518 U.S. 515, 531 (1996), *Nguyen v. U.S.*, 533 U.S. 53, 60 (2001).

¹¹ *Miss. Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)); see also *Virginia*, *supra*, at 533, *Nguyen*, *supra*, at 60.

¹² *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

¹³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

distinctions from cases considering municipal programs, particularly when it comes to finding a compelling governmental interest.¹⁴ Courts have found that states participating in a federal DBE program do not need to independently show a compelling governmental interest, however the Court would examine a state's implementation to determine if a program was narrowly tailored.¹⁵

While other cases are useful as to particular points, only a handful of circuit court cases have reviewed strictly local M/WBE programs and given clear, specific, and binding guidance about the adequacy of a complete factual record including thorough, local disparity studies with at least some statistical analysis.¹⁶

Three important circuit court decisions since *Croson* have passed definitively on thorough, strictly local disparity studies: *Engineering Contractors Association of South Florida, Inc.*,¹⁷ *Concrete Works IV*,¹⁸ and *H.B. Rowe*.¹⁹ In *Concrete Works IV*, the Tenth Circuit evaluated the evidence and determined that it was adequate as a matter of law to establish a compelling justification for Denver's program and that Denver did not need to conclusively prove the existence of racial discrimination. The Supreme Court refused to hear the appeal in *Concrete Works IV*.²⁰ By contrast, in *Engineering Contractors*, the Eleventh Circuit ultimately upheld the district court finding that Dade County's (FL) disparity studies were not adequate to support an M/WBE program, at least in the face of rebuttal evidence.²¹

In *H.B. Rowe*, the Fourth Circuit upheld North Carolina's M/WBE program for state-funded construction projects as applied to ethnic groups with sufficient statistical and anecdotal factual predicate evidence. The program, which was found constitutional, mandated contract specific goals where significant disparity existed; narrowed the definition of minority to match those identified in the study; required reevaluation over time with a new study every five years and a review to determine whether the program should stay in force; and included sunset and good faith exemption provisions.²²

The decision of the Sixth Circuit in *AGC v. Drabik* is of limited applicability because the state of Ohio had not performed a comprehensive disparity study.²³ In *Drabik*, the state of Ohio passed an MBE act that set aside five percent of state construction projects for exclusive bidding by certified MBEs.²⁴ The court found that Ohio's statistical evidence was not strong because it included the percentage of minority owned businesses, but did not take into account how many of those businesses were in the construction industry and were qualified, willing, and able to do the work, and the state had not performed a recent study.²⁵

¹⁴ See, e.g., *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. granted in part sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001); cert. dismissed as improvidently granted, 534 U.S. 103 (2001); *Sherbrooke Turf v. Minn. Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003).

¹⁵ *Id.*

¹⁶ In one of the three directly applicable circuit court cases, the Third Circuit evaded the issue of compelling justification after lengthy discussion, holding that the Philadelphia M/WBE program was unconstitutional because it was not narrowly tailored. See *Contractors Ass'n of Eastern Pa. v. City of Phila.*, 91 F.3d 586, 605 (3rd Cir. 1996).

¹⁷ 122 F.3d 895 (11th Cir. 1997).

¹⁸ 321 F.3d 950 (10th Cir. 2003).

¹⁹ *H.B. Rowe v. Tippett*, 615 F.3d 233 (4th Cir 2010).

²⁰ *Concrete Works v. City and County of Denver*, Scalia, J. dissenting, 124 S.Ct. 556, 557-60 (2003). Although the refusal itself has no precedential effect, the dissent to that denial, written by Justice Scalia with the Chief Justice joining, argues that these cases may mark a split in approach among the circuit courts that will need to be reconciled.

²¹ Compare *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990), an earlier decision of the Eleventh Circuit reversing summary judgment against an MBE program where more limited statistical evidence was found adequate to require a trial on the merits in the face of a relatively weak challenge.

²² *H.B. Rowe*, 615 F.3d at 239.

²³ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-35 (6th Cir. 2000).

²⁴ *Id.* at 733.

²⁵ *Id.* at 736.

The court additionally found the program was not narrowly tailored because it was overinclusive, did not contain a sunset provision, and there was no evidence that race-neutral means had been considered.²⁶

In *Scott v. Jackson*, the Fifth Circuit struck down the city of Jackson, Mississippi's, M/WBE program because of the lack of requisite findings to justify the 15 percent goal, and the court did not reach the issue of narrow tailoring since it found no compelling interest.²⁷ The court also noted that the city used the wrong statistical pool as the city did not analyze the utilization and availability of qualified minority subcontractors.²⁸

4. COMPELLING GOVERNMENT INTEREST

To Withstand Strict Scrutiny, an MBE Program Must Be Based on Thorough Evidence Showing a Compelling Governmental Interest

Croson identified two necessary factors for establishing racial discrimination sufficiently enough to demonstrate a compelling governmental interest in establishing an M/WBE program. First, there needs to be identified discrimination in the relevant market.²⁹ Second, "the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program,"³⁰ either actively or at least passively with "the infusion of tax dollars into a discriminatory industry."³¹

Although the Supreme Court in *Croson* did not specifically define the methodology that should be used to establish the evidentiary basis required by strict scrutiny, the Court did outline governing principles. Lower courts have expanded the Supreme Court's *Croson* guidelines and have applied or distinguished these principles when asked to decide the constitutionality of programs that seek to enhance opportunities for minorities and women.

4.1 THE GOVERNMENTAL ENTITY MUST HAVE ACTIVELY OR PASSIVELY PERPETUATED THE DISCRIMINATION

In *Croson*, the Supreme Court stated, "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."³² *Croson* provided that the government "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment."³³ The government agency's active or passive participation in discriminatory practices in the marketplace may show the compelling interest. That is, courts mainly seek to ensure that M/WBE programs are based on findings of active or passive discrimination in the government contracting marketplace, and not simply attempts to remedy general societal discrimination.

²⁶ *Id.* at 737-38.

²⁷ *Scott*, 199 F.3d 206, 215 (5th Cir. 1999).

²⁸ *Id.* at 218.

²⁹ *Croson*, 488 U.S. at 492, 509-10.

³⁰ *Coral Constr. v. King County*, 941 F.2d 910, 918 (9th Cir. 1991).

³¹ *Id.* at 922.

³² *Coral Constr.*, 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).

³³ See *Croson*; see generally I. Ayres and F. Vars, "When Does Private Discrimination Justify Public Affirmative Action?" 98 *Columbia Law Review* 1577 (1998).

Defining passive participation, *Croson* stated, “Thus, if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”³⁴

The Tenth Circuit decision in *Adarand v. Slater* concluded that evidence of private sector discrimination provided a compelling interest for a DBE program.³⁵ In *Concrete Works IV*, the Tenth Circuit upheld the relevance of data from the private marketplace to establish a factual predicate for M/WBE programs.³⁶ Later cases have reaffirmed that the government has a compelling interest in avoiding the financing of private discrimination with public dollars.³⁷ As the *Tennessee Asphalt* court noted, “governmental entities are not restricted to eradicating the effects only of their own discriminatory acts.”³⁸

Concrete Works IV expressly cited as evidence of discrimination that M/WBE contractors used for business with the city of Denver were not used by the same prime contractors for private sector contracts.³⁹ The Tenth Circuit in *Concrete Works IV* also found a decline in M/WBE utilization following program termination was evidence that prime contractors were not willing to use M/WBEs in the absence of legal requirements.⁴⁰

Finally, some courts have been willing to see capital market discrimination as part of the required nexus between private and public contracting discrimination, even if capital market discrimination could arguably be seen as simply part of broader societal discrimination. In *Adarand v. Slater*, the Tenth Circuit favorably cited evidence of capital market discrimination as relevant in establishing the factual predicate for the federal DBE program.⁴¹ The same court, in *Concrete Works IV*, found that barriers to business formation were relevant insofar as this evidence demonstrated that M/WBEs were “precluded from the outset from competing for public construction contracts.”⁴² Along related lines, the court also found a regression analysis of census data to be relevant evidence showing barriers to M/WBE formation.⁴³

4.2 RACIAL CLASSIFICATIONS SUBJECT TO STRICT SCRUTINY

In *Scott v. Jackson*,⁴⁴ the city argued that its DBE program was not a racial classification subject to strict scrutiny because (1) it was based upon disadvantage, not race, and (2) it was a goals program and not a quota. The Fifth Circuit disagreed with the claim that the Jackson program was not a racial classification because the city used the federal Section 8(d), which grants a rebuttable presumption of social and economic disadvantage to firms owned by minorities.⁴⁵ Such a presumption is subject to strict scrutiny.

³⁴ *Croson*, 488 U.S. at 492.

³⁵ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

³⁶ *Concrete Works IV*, 321 F.3d at 69.

³⁷ *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734-35 (6th Cir. 2000). See also *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1529 (10th Cir. 1994); *Coral Constr.*, 941 F.2d at 916; *AGC v. New Haven*, 791 F.Supp. 941, 947 (D.Conn. 1992).

³⁸ *Tennessee Asphalt v. Farris*, 942 F.2d 969, 974 (6th Cir. 1991).

³⁹ *Concrete Works IV*, 321 F.3d at 984-85.

⁴⁰ *Concrete Works IV*, 321 F.3d at 985; see also *Sherbrooke Turf*, 345 F.3d at 973.

⁴¹ *Adarand v. Slater*, 228 F.3d at 1169-70 (10th Cir. 2000).

⁴² *Concrete Works IV*, 321 F.2d at 977. The district court had rejected evidence of credit market discrimination as adequate to provide a factual predicate for an M/W program. *Concrete Works v. City and County of Denver*, 86 F.Supp.2d 1042 (D. Colo. 2000) (*Concrete Works I*).

⁴³ *Id.* at 977.

⁴⁴ *Scott v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999).

⁴⁵ *Id.* at 216-17.

The Fifth Circuit also noted that strict scrutiny applied not only when race-conscious measures were required, but also when such measures were authorized or encouraged.⁴⁶

4.3 BURDEN OF PROOF

The Tenth Circuit in *Concrete Works IV* ruled that the district court should only have asked whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn in reviewing the evidence.⁴⁷ Denver was not required to prove the existence of discrimination. The Tenth Circuit went on to state that Denver did not have the “burden of establishing by a preponderance that not only were there inferences to discrimination, but in fact that the inferences were correct.”⁴⁸ Although *Croson* places the burden on the government to demonstrate a “strong basis in evidence,” the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination. The Tenth Circuit also clarified the burden faced by the plaintiff in these cases, so that “once Denver meets its burden, [the plaintiff] must introduce credible particularized evidence to rebut [the city’s] initial showing of the existence of a compelling interest.”⁴⁹

4.4 POST-ENACTMENT EVIDENCE

The Supreme Court in *Croson* found pre-enactment evidence of discrimination insufficient to justify the program. The defendant in *Croson* did not seek to defend its program based on post-enactment evidence. However, following *Croson*, a number of circuits did defend the use of post-enactment evidence to support the establishment of a local public affirmative action program.⁵⁰ Some cases required both pre-enactment and post-enactment evidence.⁵¹

The Supreme Court case of *Shaw v. Hunt (Shaw)* raised anew the issue of post-enactment evidence in defending local public sector affirmative action programs.⁵² *Shaw* involved the use of racial factors in drawing voting districts in North Carolina. In *Shaw*, the Supreme Court rejected the use of reports providing evidence of discrimination in North Carolina because the reports were not developed before the voting districts were designed. Thus, the critical issue was whether the legislative body believed that discrimination had existed before the districts were drafted.⁵³ Following the *Shaw* decision, two district courts, one in the Sixth Circuit, rejected the use of post-enactment evidence in the evaluation of the constitutionality of local minority business programs.⁵⁴ The Sixth Circuit noted that “although *Drabik* did not directly address the admissibility of post-enactment evidence, it held that a governmental entity must

⁴⁶ *Id.* at 215 (quoting *Bras v. Cal. Pub. Utilities Comm’n.*, 59 F.3d 869, 875 (9th Cir. 1995)).

⁴⁷ *Concrete Works IV*, 321 F.2d at 970 (10th Cir. 2003).

⁴⁸ *Id.*

⁴⁹ *Concrete Works IV*, 321 F.2d at 959.

⁵⁰ See, e.g., *Eng’g Contractors v. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n v. Phila.*, 6 F.3d 990, 1009 n. 18 (3rd Cir. 1993); *Concrete Works v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994).

⁵¹ See, e.g., *Coral Constr. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991).

⁵² *Shaw v. Hunt*, 517 U.S. 899 (1996).

⁵³ *Id.* at 910.

⁵⁴ *Associated Util. Contrs. of Md., Inc. v. Mayor of Baltimore*, 83 F.Supp.2d 613, 620-22 (D.Md. 2000) (saying that inquiry must be restricted to evidence which the City actually considered before enacting the numerical goals); *W. Tenn. Chapter of Associated Builders & Contrs., Inc. v. Me. City Sch.*, 64 F.Supp.2d 714, 718-21 (W.D. Tenn. 1999) (concluding that admitting post-enactment evidence to show a compelling interest was contrary to federal precedent and, therefore, post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling).

have pre-enactment evidence sufficient to justify a racially conscious statute. It also indicates that this circuit would not favor using post-enactment evidence to make that showing.”⁵⁵

4.5 COMPELLING INTERESTS OTHER THAN REMEDYING DISCRIMINATION

For government contracting programs, courts have yet to find a compelling governmental interest for affirmative action other than remedying discrimination in the relevant marketplace. In other arenas, diversity has served as a compelling governmental interest for affirmative action. For example, the Ninth Circuit upheld race-based admission standards at an experimental elementary school in order to provide a more real-world education experience.⁵⁶ In *Petit v. Chicago*,⁵⁷ the Seventh Circuit relied on *Grutter v. Bollinger* in stating that urban police departments had “an even more compelling need for diversity” than universities and upheld the Chicago program “under the *Grutter* standards.”⁵⁸

In 2016, the United States Supreme Court examined the issue of affirmative action in higher education in *Fisher v. University of Texas*.⁵⁹ The Court reaffirmed that strict scrutiny applied to race-conscious decisions; however, the case is of limited applicability as the compelling government interest of diversity in higher education is different and offered more judicial deference than the compelling interest in public contracts. The recent holdings that other compelling interests may support affirmative action does not yet appear to have any application to public contracting.⁶⁰

5. CALCULATING DISPARITY

Sufficiently Strong Evidence of Significant Statistical Disparities Between Qualified Minorities Available and Minorities Utilized Will Satisfy Strict Scrutiny and Justify a Narrowly Tailored M/WBE Program

The Supreme Court in *Croson* stated that “where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”⁶¹ But the statistics must go well beyond comparing the rate of minority presence in the general population to the rate of prime construction contracts awarded to MBEs. The Court in *Croson* objected to such a comparison, indicating that the proper statistical evaluation would compare the percentage of qualified MBEs in the relevant market with the percentage of total municipal construction dollars awarded to them.⁶² Justice O’Conner did opine, however, what evidence might indicate a proper statistical comparison: “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

⁵⁵ *West Tennessee Builders & Contractors v. Memphis*, 293 F.3d 345, 351 (6th Cir 2002).

⁵⁶ *Hunter v. Regents of Univ. of Ca.*, 190 F.3d 1061 (9th Cir. 1999).

⁵⁷ *Petit v. Chi.*, 352 F.3d 1111 (7th Cir. 2003).

⁵⁸ *Id.*

⁵⁹ *Fisher v. University of Texas at Austin*, 579 U.S. ____ (2016).

⁶⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003). For an argument that other bases could serve as a compelling interest in public contracting, see Michael K. Fridkin, “The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting,” 24 *N. Ill. U. L. Rev.* 509 (Summer 2004).

⁶¹ *Croson*, 488 U.S. at 501, (quoting *Hazelwood Sch. Div. v. United States*, 433 U.S. 299, 307-308 (1977)).

⁶² *Id.* at 501.

engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.”

5.1 DISPARITY INDEX

To meet this more precise requirement of a strong basis in evidence, courts have accepted the use of a disparity index.⁶³ The Supreme Court in *Croson* recognized statistical measures of disparity that compared the number of qualified and available M/WBEs with the rate of municipal construction dollars actually awarded to M/WBEs in order to demonstrate discrimination in a local construction industry.⁶⁴ To demonstrate the underutilization of M/WBEs in a particular area, parties can employ a statistical device known as the "disparity index". The disparity index is calculated by dividing the percentage of M/WBE participation in government contracts by the percentage of M/WBEs in the relevant population of local firms. A disparity index of one (1) demonstrates full M/WBE participation, whereas the closer the index is to zero, the greater the M/WBE underutilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100.

Courts have used these M/WBE disparity indices to apply the "strong basis in evidence" standard in *Croson*. The *H.B. Rowe* court stated that “Generally, courts consider a disparity index lower than 80 as an indication of discrimination.”⁶⁵ For instance, the Eleventh Circuit held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under *Croson*.⁶⁶ Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.⁶⁷ Accordingly, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry.”⁶⁸

5.2 DETERMINING AVAILABILITY

To perform proper disparity analysis, the government must determine “availability”—the number of qualified minority contractors willing and able to perform a particular service for the municipality. In *Croson*, the Court stated, “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.”⁶⁹

An accurate determination of availability also permits the government to meet the requirement that it “determine the precise scope of the injury it seeks to remedy” by its program.⁷⁰ Following *Croson*’s statements on availability, lower courts have considered how legislative bodies may determine the precise scope of the injury sought to be remedied by an MBE program. Nevertheless, the federal courts have not provided clear guidance on the best data sources or techniques for measuring M/WBE availability.

⁶³ See, e.g., *Eng’g. Contractors Ass’n of S. Fla., Inc.*, 122 F.3d at 914; *Concrete Works IV*, 321 F.3d at 964-69.

⁶⁴ *Croson*, 488 U.S. at 503-504.

⁶⁵ *H.B. Rowe*, 615 F.3d at 244.

⁶⁶ *Cone Corp v. Hillsborough.*, 908 F.2d 908, 916 (11th Cir. 1990).

⁶⁷ *AGC v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991).

⁶⁸ *Contractors Assn v. Eastern Pennsylvania*, 6 F.3d 990, 1005 (3rd Cir. 1993).

⁶⁹ *Croson*, 488 U.S. at 509 (emphasis added).

⁷⁰ *Id.* at 498.

In *Drabik*, the Sixth Circuit ruled that the state of Ohio failed to satisfy the strict scrutiny standard to justify the state's minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The court stated that "although Ohio's most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses...the problem is that the percentage of minority-owned businesses in Ohio (7% of 1978) did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts."⁷¹ Although this was more data than was submitted in *Croson*, it was still insufficient under strict scrutiny, according to the court.

At least one commentator has suggested using bidder data to measure M/WBE availability,⁷² but *Croson* does not require the use of bidder data to determine availability, and bidder data was not at issue in *Drabik*. In *Concrete Works IV*, in the context of plaintiffs' complaint that the city of Denver had not used bidder data, the Tenth Circuit noted that bid information also has its limits. Firms that bid may not be qualified or able, and firms that do not bid may be qualified and able, to undertake agency contracts.⁷³

5.3 RACIAL CLASSIFICATIONS

In determining availability, choosing the appropriate racial groups to consider becomes an important threshold interest.⁷⁴ In *Croson*, the Supreme Court criticized the city of Richmond's inclusion of "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons" in its affirmative action program.⁷⁵ These groups had not previously participated in city contracting, and "the random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."⁷⁶ To evaluate availability properly, data must be gathered for each racial group in the marketplace.

5.4 RELEVANT MARKET AREA

Another issue in availability analysis is the definition of the relevant market area. Specifically, the question is whether the relevant market area should be defined as the area from which a specific percentage of purchases are made, the area in which a specific percentage of willing and able contractors may be located, or the area determined by a fixed geopolitical boundary.

The Supreme Court did not establish how the relevant market area should be defined. The Tenth Circuit in *Concrete Works II*, interpreting *Croson*, concluded, "The relevant area in which to measure discrimination . . . is the local construction market, but that is not necessarily confined by jurisdictional boundaries."⁷⁷ The court further stated, "It is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program we scrutinize, but here Denver's contracting activity, insofar as construction work is concerned, is closely related to the Denver MSA."⁷⁸ The Tenth Circuit ruled that since

⁷¹ *Drabik*, 214 F.3d at 736.

⁷² G. LaNoue, "Who Counts? Determining the Availability of Minority Businesses for Contracting After *Croson*," 21 *Harvard Journal of Law and Public Policy* 793, 833 (1998).

⁷³ *Concrete Works II*, 36 F.3d at 89-90; *Concrete Works IV*, 321 F.3d at 983-84.

⁷⁴ Racial Groups, as the term is used herein, include both racial and ethnic categories.

⁷⁵ *Croson*, 488 U.S. at 506.

⁷⁶ *Id.*

⁷⁷ *Concrete Works II*, at 1520.

⁷⁸ *Id.*

more than 80 percent of Denver Department of Public Works construction and design contracts were awarded to firms located within the Denver MSA, the appropriate market area should be the Denver MSA, not the city and county of Denver alone.⁷⁹ Accordingly, data from the Denver MSA was “adequately particularized for strict scrutiny purposes.”⁸⁰

5.5 FIRM QUALIFICATIONS

Another availability consideration is whether M/WBE firms are qualified to perform the required services. In *Croson*, the Supreme Court noted that although gross statistical disparities may demonstrate prima facie proof of discrimination, “when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”⁸¹ The Court, however, did not define the test for determining whether a firm is qualified.

Considering firm qualifications is important not only to assess whether M/WBEs in the relevant market area can provide the goods and services required, but also to ensure proper comparison between the number of qualified M/WBEs and the total number of similarly qualified contractors in the marketplace.⁸² In short, proper comparisons ensure the required integrity and specificity of the statistical analysis.

5.6 WILLINGNESS

Croson requires that an “available” firm must be not only qualified but also “willing” to provide the required services. In this context, it can be difficult to determine whether a business is willing. Some district courts have approved including businesses in the availability pool that may not be on the government’s certification list.⁸³

5.7 ABILITY

Another availability consideration is whether the firms being considered are able to perform a particular service. Those who challenge affirmative action often question whether M/WBE firms have the “capacity” to perform particular services. The Tenth Circuit in *Concrete Works II* and *IV* recognized the shortcomings of this treatment of firm size.⁸⁴ In *Concrete Works IV*, the court noted that the small size of such firms can itself be a result of discrimination.⁸⁵ The Tenth Circuit acknowledged the city of Denver’s argument that a small construction firm’s precise capacity can be highly elastic.⁸⁶ Under this view, the relevance of firm size may be somewhat diminished.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Croson*, 488 U.S. at 501, (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308, n.13 (1977)).

⁸² See *Hazelwood Sch. Dist.*, 433 U.S. at 308; *Contractors Ass’n*, 91 F.3d at 603.

⁸³ In *Concrete Works II*, Denver’s availability analysis indicated that while most MBEs and WBEs had never participated in city contracts, “almost all firms contacted indicated that they were interested in municipal work. (*Concrete Works II*, 36 F.3d at 1529).

⁸⁴ *Concrete Works II*, 36 F.3d at 1528-29; *Concrete Works IV*, 321 F.3d at 980-92.

⁸⁵ *Concrete Works IV*, 321 F.3d at 980-84.

⁸⁶ *Id.* at 981.

The Sixth Circuit had the following to say about firm size,

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get three percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete. Any time two non-minority firms merge, or a minority firm splits in two, the total proportion of minority contracting firms in the state increases; but it would be ludicrous to imagine that such alteration affects the overall degree of discrimination.⁸⁷

5.8 ANECDOTAL EVIDENCE OF DISCRIMINATION IN DISPARITY STUDIES

Most disparity studies present anecdotal evidence along with statistical data. The Supreme Court in *Croson* discussed the relevance of anecdotal evidence and explained, “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.”⁸⁸

Croson did not expressly consider the form or level of specificity required for anecdotal evidence. Not only have courts found that a municipality does not have to specifically identify all the discriminatory practices impeding M/WBE utilization, but the Tenth Circuit in *Concrete Works IV* also held that anecdotal evidence collected by a municipality did not have to be verified. The court stated:

There is no merit to the [plaintiff’s] argument that witnesses’ accounts must be verified to provide support for Denver’s burden. Anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions...Denver was not required to present corroborating evidence and [the 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.⁸⁹

In *H.B. Rowe*, there was evidence from a telephone survey, interviews, and focus groups.⁹⁰ The Fourth Circuit favorably cited survey evidence of a “good old boys” network excluding MBEs from work, double standards in qualifications, primes viewing MBEs as less qualified, dropping MBEs after contract award, and the firms changing their behavior when not required to use MBEs, which was affirmed in interviews and focus groups.⁹¹ The Fourth Circuit also seemed to give some weight to the differences in responses between ethnic/gender groups regarding the aforementioned barriers.⁹² The Fourth Circuit concluded

⁸⁷ *Drabik*, at 736-37.

⁸⁸ *Croson*, 488 U.S. at 509.

⁸⁹ *Concrete Works IV*, 321 F.3d at 989.

⁹⁰ *H.B. Rowe*, at 248.

⁹¹ *Id.* at 251.

⁹² *Id.* at 248.

that, “The survey in the 2004 study exposed an informal, racially exclusive network that systematically disadvantaged minority subcontractors.”

6. NARROW TAILORING

6.1 TO WITHSTAND STRICT SCRUTINY, AN M/WBE PROGRAM MUST BE NARROWLY TAILORED TO REMEDY IDENTIFIED DISCRIMINATION

The discussion of compelling interest in the court cases has been extensive, but narrowly tailoring may be the more critical issue.⁹³

Many courts have found that even when an entity has a compelling interest to enact an M/WBE program, these programs are not narrowly tailored.⁹⁴ The Sixth Circuit in *Drabik*, affirmed the district court's finding that the state of Ohio's minority business enterprise statute (MBEA) was not narrowly tailored to remedy past discrimination. The court found the statute lacked narrow tailoring because (1) the MBEA suffered from under-inclusiveness and over-inclusiveness, (lumping together racial and ethnic groups without identified discrimination); (2) the MBEA lacked a sunset date; and (3) the state failed to provide specific evidence that Ohio had considered race-neutral alternatives before adopting the plan to increase minority participation. In discussing narrow tailoring, the *Drabik* court stated,

Adarand teaches that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting, Croson, [488 U.S.] at 507 . . . or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate,' Fullilove, [448 U.S.] at 513. . . ." Adarand, 515 U.S. at 237-38. A narrowly-tailored set-aside program must be "linked to identified discrimination." Croson, 488 U.S. at 507. Its criteria and measures of success must be particularized, not reduced to rigid quotas driven by "simple administrative convenience." Id. at 508. It must also not suffer from "overinclusiveness." Id. at 506.⁹⁵

Following Supreme Court precedent, the Tenth Circuit has identified the following elements of narrow tailoring: the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.⁹⁶

⁹³ See *Croson*, 488 U.S. at 493

⁹⁴ See *Eng'g Contractors Ass'n of S. Fla., Inc.*, 122 F.3d at 926-29; *Contractors Ass'n of E. Pa., Inc.*, 91 F.3d at 605.

⁹⁵ *Drabik*, at 737.

⁹⁶ *Adarand v. Slater*, 228 F.3d at 1177 (10th Cir. 2000) (citing *U.S. v. Paradise*, 480 U.S. 149, 171 (1987)).

6.2 RACE-NEUTRAL ALTERNATIVES

Concerning race-neutral alternatives, the Supreme Court in *Croson* concluded that a governmental entity must demonstrate that it has evaluated the use of race-neutral means to increase minority business participation in contracting or purchasing activities. In *Drabik*, the Sixth Circuit observed that,

*one of the factors Croson identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. See 488 U.S. at 507. Yet...the historical record contains no evidence 'that the Ohio General Assembly gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas.'*⁹⁷

In upholding the narrow tailoring of federal DBE regulations, the Tenth Circuit stated that “if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures, and enumerate a list of race-neutral measures.”⁹⁸ Those measures included “helping overcome bonding and financing obstacles, providing technical assistance, [and] establishing programs to assist start-up firms.”⁹⁹

Strict scrutiny does not mandate that every race-neutral measure be considered and found wanting. The Eighth Circuit also affirmed that “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” but it does require “serious, good faith consideration of workable race-neutral alternatives.”¹⁰⁰

Where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable.¹⁰¹

6.3 FLEXIBILITY AND DURATION OF THE REMEDY

DBE and M/WBE programs achieve flexibility by using waivers and variable project goals to avoid merely setting a quota. *Croson* favorably mentioned the contract-by-contract waivers in the federal Department of Transportation (DOT) DBE program.¹⁰² Virtually all successful MBE programs have this waiver feature in their enabling legislation. As for project goals, the approved DBE provisions set aspirational, not mandatory, goals; expressly forbid quotas; and use overall goals simply as a framework for setting local contract goals, if any, based on local data.

⁹⁷ *Drabik*, at 737.

⁹⁸ *Adarand v. Slater*, 228 F.3d. at 1179.

⁹⁹ *Id.*

¹⁰⁰ *Sherbrooke Turf*, at 972 (citing *Grutter*, 123 S. Ct. at 2344-45). See also *Coral Construction*, 941 F.2d at 923; *AGCC II*, 950 F.2d at 1417. The Tenth Circuit has not opined on this issue.

¹⁰¹ See *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (treating such recruiting and outreach efforts as “race-neutral”).

¹⁰² *Croson*, 488 U.S. at 489.

Additionally, programs that limit preferences to small businesses under a certain earnings threshold or individuals with net worth under a certain threshold have been approved.¹⁰³ All of these factors have impressed the courts that have upheld the constitutionality of the revised DOT DBE program.¹⁰⁴

With respect to program duration, in *Adarand v. Peña*, the Supreme Court wrote that a program should be “appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.”¹⁰⁵ With regard to duration, the Sixth Circuit in *Drabik* stated that,

Narrow tailoring also implies some sensitivity to the possibility that a program might someday have satisfied its purposes. As previously noted, a race-based preference program must be “appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’” Adarand, 515 U.S. at 238 (quoting Fullilove v. Klutznick, 448 U.S. 448, 513, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)). The district court in this case took note of the outdated character of any evidence that might have been marshaled in support of the MBEA and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. During the debate over the bill in 1980, an amendment had been offered to include a three-year “sunset” provision; this was defeated. The MBEA has remained in effect for twenty years and has no set expiration.¹⁰⁶

The Tenth Circuit noted the limits in the revised federal DBE program, in the fact that the DBE program is subject to periodic congressional reauthorization and contains DBE graduation provisions.¹⁰⁷ Other appellate courts have noted possible mechanisms for limiting program duration: required termination if goals have been met¹⁰⁸ and decertification of MBEs who achieve certain levels of success, or mandatory review of MBE certification at regular, relatively brief periods.¹⁰⁹ Governments thus have some duty to ensure that they update their evidence of discrimination regularly enough to review the need for their programs and to revise programs by narrowly tailoring them to fit the fresh evidence. Whether all of these provisions are necessary in every case remains an open question.

6.4 RELATIONSHIP OF GOALS TO AVAILABILITY

Narrow tailoring under the *Croson* standard requires that remedial goals be in line with measured availability. Merely setting percentages without a carefully selected basis in statistical studies, as the city of Richmond did in *Croson* itself, has played a strong part in decisions finding other programs unconstitutional.¹¹⁰

By contrast, the Eighth, Ninth, and Tenth Circuits have approved the goal-setting process for the federal DOT DBE program, as revised in 1999.¹¹¹ The approved DOT DBE regulations require that goals be based

¹⁰³ *Adarand v. Slater*, 228 F.3d at 1181. See also *Sherbrooke Turf*, at 972.

¹⁰⁴ *Id.*

¹⁰⁵ *Adarand Constructors v. Peña*, 515 U.S. at 238 (internal quotations and citations omitted).

¹⁰⁶ *Drabik*, at 737-38.

¹⁰⁷ *Adarand v. Slater*, 228 F.3d at 1180-81.

¹⁰⁸ *Sherbrooke*, 345 F.3d at 972.

¹⁰⁹ *Adarand v. Slater*, 228 F.3d at 1179, 1180.

¹¹⁰ See, e.g., *Builders Ass’n of Greater Chi., v. Cook County*, 256 F.3d 642, 647 (7th Cir. 2001).

¹¹¹ *Adarand v. Slater*, 228 F.3d at 1182; *Sherbrooke Turf*, 345 F.3d at 972; *Western States Paving Co v. Washington*, 407 F.3d 983, 995 (9th Cir. 2005).

on one of several methods for measuring DBE availability.¹¹² The Tenth Circuit noted that the DBE goals are tied to the relevant markets and there “is little danger of arbitrariness in the setting of such goals, as was the case in *Croscon*.”¹¹³

Moreover, the approved DBE regulations use built-in mechanisms to ensure that DBE goals are not set excessively high relative to DBE availability. For example, the approved DBE goals are to be set aside if the overall goal has been met for two consecutive years by race-neutral means. The approved DBE contract goals also must be reduced if overall goals have been exceeded with race-conscious means for two consecutive years.

6.5 BURDEN ON THIRD PARTIES

Narrow tailoring also requires minimizing the burden of the program on third parties. The Eighth Circuit stated the following with respect to the revised DBE program:

*Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.*¹¹⁴

Waivers and good faith compliance are also tools that serve this purpose of reducing the burden on third parties.¹¹⁵ In determining if a good faith exemption applied, the program in *H.B. Rowe* considered an evaluation of whether the bidder solicited M/WBEs; followed up on solicitations; provided adequate information; selected M/WBEs, negotiated in good faith and accepted quotes; and assisted M/WBEs in obtaining bonding, lines of credit, and insurance.¹¹⁶ The DOT DBE regulations have also sought to reduce the program burden on non-DBEs by avoiding DBE concentration in certain specialty areas.¹¹⁷ These features have gained the approval of the Tenth Circuit.¹¹⁸

6.6 OVERINCLUSION

Narrow tailoring also involves limiting the number and type of beneficiaries of the program. As noted above, there has to be evidence of discrimination to justify a group-based remedy, and over-inclusion of uninjured individuals or groups can endanger the entire program.¹¹⁹ Federal DBE programs have succeeded in part because regulations covering DBE certification do not provide blanket protection to minorities.¹²⁰ Moreover, the Tenth Circuit noted that, “the Constitution does not erect a barrier to the

¹¹² 49 CFR, Section 26, Part 45.

¹¹³ *Adarand v. Slater*, 228 F.3d at 1182.

¹¹⁴ *Sherbrooke Turf*, 345 F.3d at 973.

¹¹⁵ 49 CFR, Section 26, Part 53.

¹¹⁶ *H.B. Rowe*, 615 F.3d at 239.

¹¹⁷ 49 CFR, Section 26, Part 33.

¹¹⁸ *Adarand v. Slater*, 228 F.3d at 1182.

¹¹⁹ See, e.g., *Builders Ass’n of Greater Chi.*, 256 F.3d at 647.

¹²⁰ *Sherbrooke Turf*, 345 F.3d 964, 972-73.

government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.”¹²¹

Critically, the MBE program must be limited in its geographical scope to the boundaries of the enacting government’s marketplace. The Supreme Court indicated in *Croson* that a local agency has the power to address discrimination only within its own marketplace. One fault of the Richmond MBE program was that minority firms were certified from around the United States.¹²² With regard to over-inclusiveness, the Sixth Circuit concluded that, “the MBEA suffers from defects both of over -- and underinclusiveness. By lumping together the groups of Blacks, Native Americans, Hispanics, and Orientals (and leaving unclear the exact extent of the last two designations), the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven.”¹²³

7. SMALL BUSINESS PROCUREMENT PREFERENCES

Small business procurement preferences have existed since the 1940s. The first small business program had its origins in the Smaller War Plants Corporation (SWPC), established during World War II.¹²⁴ The SWPC was created to channel war contracts to small business. In 1947, Congress passed the Armed Forces Procurement Act, declaring, “It is the policy of Congress that a fair proportion of the purchases and contracts under this chapter be placed with small business concerns.”¹²⁵ Continuing this policy, the 1958 Small Business Act requires that government agencies award a “fair proportion” of procurement contracts to small business concerns.¹²⁶ The regulations are designed to implement this general policy.¹²⁷

Section 8(b)(11) of the Small Business Act authorizes the Small Business Administration (SBA) to set aside contracts for placement with small business concerns. The SBA has the power:

*...to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share materials, supplies, and equipment to small-business concerns.*¹²⁸

Every acquisition of goods and services anticipated to be between \$2,500 and \$100,000 is set aside exclusively for small business unless the contracting officer has a reasonable expectation of fewer than two bids by small businesses.¹²⁹

¹²¹ *Adarand v. Slater*, 228 F.3d at 1186.

¹²² *Croson*, 488 U.S. at 508.

¹²³ *Drabik*, 214 F.3d at 737.

¹²⁴ See, generally, Thomas J. Hasty III, “Minority Business Enterprise Development and the Small Business Administration’s 8(a) Program: Past, Present, and (Is There a) Future?” *Military Law Review* 145 (Summer 1994): 1-112.

¹²⁵ 10 U.S.C. § 2301 (1976).

¹²⁶ 15 U.S.C. § 631(a).

¹²⁷ See 32 C.F.R. §§ 1-701.1 to 1-707.7.

¹²⁸ 15 U.S.C. § 637(b)(11).

¹²⁹ *Federal Acquisition Regulations* 19.502-2.

There has been only one constitutional challenge to the long-standing federal SBE programs. In *J.H. Rutter Rex Manufacturing v. United States*,¹³⁰ a federal vendor unsuccessfully challenged the Army's small business set-aside as in violation of the due process clause of the Fifth Amendment to the U.S. Constitution, as well as the Administrative Procedures Act and the Armed Forces Procurement Act.¹³¹ The court held that classifying businesses as small was not a "suspect classification" subject to strict scrutiny. Instead, the court ruled:

*Since no fundamental rights are implicated, we need only determine whether the contested socioeconomic legislation rationally relates to a legitimate governmental purpose... Our previous discussion adequately demonstrates that the procurement statutes and the regulations promulgated there under are rationally related to the sound legislative purpose of promoting small businesses in order to contribute to the security and economic health of this Nation.*¹³²

A large number of state and local governments have maintained small business preference programs for many years.¹³³ No district court cases were found overturning a state and local small business reference program. One reason for the low level of litigation in this area is that there is no significant organizational opposition to SBE programs. There are no reported cases of Associated General Contractors (AGC) litigation against local SBE programs. And the legal foundations that have typically sued M/WBE programs have actually promoted SBE procurement preference programs as a race-neutral substitute for M/WBE programs.

8. EXECUTIVE AND LEGISLATIVE OVERVIEW

8.1 EXECUTIVE BRANCH OVERVIEW

Tennessee Executive Order 14, issued by Governor Phil Bredesen on December 8, 2003, created the Governor's Office of Diversity Business Enterprise (GoDBE) which "is charged with coordinating and directing the Executive Branch's efforts in assisting small businesses and businesses owned by minorities and women to develop into viable, successful businesses."¹³⁴ The order references the history of economic discrimination that has faced "minority and other protected groups" and directs the state's agencies to fully cooperate with ensuring an optimal level of business contracting and procurement with small and minority- and women-owned businesses.¹³⁵ GoDBE's annual report for 2015 reflects that 12 percent of state agency spending went toward certified diversity businesses.¹³⁶

¹³⁰ 706 F.2d 702 (5th Cir. 1983), cert. denied, 464 U.S. 1008 (1983).

¹³¹ Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(E) (1976) and the "fair proportion" language of the Armed Forces Procurement Act, 10 U.S.C. § 2301 et seq. (1976), and the Small Business Act, 15 U.S.C. § 631 et seq. (1976).

¹³² *J. H. Rutter Rex Mfg.*, at 706 F.2d at 730 (emphasis added). See also *Dandridge v. Williams*, 397 U.S. 471 (1970).

¹³³ For example, Florida started a small business preference program in 1985 (FL St Sec. 287); Minnesota, in 1979 (Mn Stat 137.31); New Jersey, in 1993 (N.J.S.A 52:32-17).

¹³⁴ Tennessee Executive Order 14, <http://share.tn.gov/sos/pub/execorders/exec-orders-bred14.pdf> (last visited Nov. 4, 2016).

¹³⁵ American Bar Association, Section on Legal Education and Admissions to the Bar, Statistics, http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited Aug. 31, 2015).

¹³⁶ *Id.*

¹³⁶ GoDBE Annual Report http://www.tennessee.gov/assets/entities/generalservices/cpo/attachments/Ex_Go-DBE_Annual_Report_Final_12-11-151-Adjusted.pdf (last visited Nov. 4, 2016).

The Central Procurement Office Manual requires agencies to fully document their good faith effort to solicit, when bids are not obtained from minority-owned, woman-owned, Tennessee service-disabled veteran-owned, or small businesses.¹³⁷ The manual also references a listing of active and certified diverse businesses listed on GoDBE's website. M/WBEs are also offered new business and technical assistance.

8.2 LEGISLATIVE BRANCH OVERVIEW

Tennessee Code Annotated Section 49-3-322 (2016) allows a Local Education Agency (LEA) to set aside an amount for contracts with small businesses and minority-owned businesses and provides:

(a) Notwithstanding any law to the contrary, an LEA may set aside an amount not to exceed ten percent (10%) of the total amount of funds allocated for the procurement of personal property and services for the purpose of entering into contracts with small businesses and minority owned businesses. The contracts shall be competitively bid among small businesses and minority owned businesses.

(b) For the purposes of this section, "small businesses" and "minority owned businesses" mean a business that is solely owned, or at least fifty-one percent (51%) of the outstanding stock of which is owned, by a person who is impeded from normal entry into the economic mainstream because of past practices of discrimination based on race, religion, ethnic background, sex or service in the armed forces during the Vietnam War; provided, that it is not the policy of the state to encourage employment outside the home of mothers of minor children.

The 2016 Tennessee Code, Title 12, Chapter 3, Part 11 provides legislation regarding the Tennessee Minority Owned, Women Owned and Small Business Procurement and Contracting Act (Act). Tenn. Code Ann. §12-3-1104 (2016) requires that state agencies actively solicit bids and proposals "from a minority-owned business, woman-owned business, service-disabled veteran-owned business, or small business in order to strive to obtain a fair proportion of procurements." The code explicitly states that "nothing in this part shall be construed as establishing any mandatory goal or quota."¹³⁸

Active solicitation "may include contacting the governor's office of diversity business enterprises; reviewing compiled directories of a minority-owned business, woman-owned business, service-disabled veteran-owned business, or small business; purchasing publication of notices within newspapers of general circulation or through electronic media; and inviting any minority-owned business, woman-owned business, service-disabled veteran-owned business, or small business to submit bids or to obtain information pertaining to the submission of bids."

Tennessee Senate Bill 2040 and House Bill 2463 would have "require[d] each state agency to strive to ensure that at least 12.5 percent of all agency contracts are awarded to minority-owned businesses,

¹³⁷ Amended Central Procurement Manual

[http://tennessee.gov/assets/entities/generalservices/cpo/attachments/Procurement Procedures Manual of the CPO final copy 3.24.16.pdf](http://tennessee.gov/assets/entities/generalservices/cpo/attachments/Procurement_Procedures_Manual_of_the_CPO_final_copy_3.24.16.pdf) (last visited Nov. 4, 2016).

¹³⁸ *Id.*

woman-owned businesses, service-disabled veteran-owned businesses, or small businesses.”¹³⁹ However, the Bills did not pass during Tennessee’s 2016 legislative session.¹⁴⁰

9. CONCLUSION

As summarized earlier, when governments develop and implement a contracting program that is sensitive to race and gender, they must do so with a full and complete understanding of the case law. The cases discussed in the preceding sections establish specific requirements that must be addressed so that such programs can withstand judicial review for constitutionality and proven to be just and fair. Based upon the case law, local governments must engage in specific fact-finding processes to compile a thorough, accurate, and specific evidentiary foundation to determine whether there is, in fact, discrimination sufficient to justify a remedial program. Further, local governments must continue to update this information and revise their programs accordingly.

While the Supreme Court has yet to return to this exact area of law to sort out some of the conflicts, the circuit courts have settled on the core standards. Though there are differences among the circuits in the level of deference granted to the finder of fact, these differences do not appear to be profound. The differences in the individual outcomes have been, overwhelmingly, differences in the level of evidence, mostly concerning the rigor with which disparity studies have been conducted and then used as the foundation for narrowly tailored remedies. Ultimately, MBE and WBE programs can withstand challenges if local governments comply with the requirements outlined by the courts.

These requirements include that race-conscious programs satisfy strict scrutiny by demonstrating a compelling government interest and narrow tailoring of the program. Remedying past or present racial discrimination is a compelling government interest, but an inference of discrimination must be shown, usually through statistical disparity studies supported by anecdotal evidence. Gender-conscious programs must satisfy the lesser standard of intermediate scrutiny by ensuring that the program serves an important government interest and the means are substantially related to that interest.

¹³⁹ Senate Bill 2040 <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2040> (last visited Nov. 4, 2016).

¹⁴⁰ *Id.*

**CHAPTER 3: Review of Policies, Procedures, and
Programs**

**BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY**

Shelby County Schools Board of Education



I. INTRODUCTION

Chapter 3 includes a review of procurement policies and procedures used by the Shelby County School District (District). It provides a brief description of the policies and procedures and examines the routine application and use of policies, and the impact these policies have on District end-users and businesses seeking to participate in District procurement and contracting.

MGT's review of policies and procedures is presented in six major sections. **Section 2** describes the methodology used to conduct the review of procurement policies and procedures. The remaining sections summarize the District's procurement policies and efforts related to participation of small and minority- and women-owned businesses. The review and examination of policies in this chapter is intended to provide the foundation for the analysis of utilization and availability and the findings and recommendations chapters of this report.

CHAPTER SECTIONS

1. Introduction
2. Methodology
3. Procurement Structure and Environment
4. Procurement Policies and Procedures
5. M/WBE Outreach
6. Conclusion

2. METHODOLOGY

This section discusses the steps undertaken to review and summarize the District's procurement policies and practices. In examining the application of policies and procedures, MGT's review also focused on developing an understanding of the organization environment in which policies and procedures are carried out and the impact of policies on internal and external users and stakeholders. To conduct the review and to prepare this summary, MGT's approach included collecting and reviewing source documents and materials related to procurement policies and procedures. Procurement policies and procedures were also reviewed and discussed with District staff to better understand District procurement operations and practices. However, the full impact of these policies and procedures can only be made in conjunction with the statistical and anecdotal evidence chapters of this report. The review included the following major steps:

- ◆ Collection, review, and summarization of the District's purchasing policies, procedures, and practices currently in use.
- ◆ Collection and review of policies, procedures, and other information and data pertaining to the District's procurement functions and operations.
- ◆ Review of applicable laws and regulations governing the District's procurement.
- ◆ Interviews with District staff regarding the application of policies and procedures; anticipated changes in policies, procedures, or practices; and the impact of policies and procedures on key users. Interviews were held with District staff during the month of September 2016. In addition to soliciting input about procurement operations, the interviews were also used to develop a better understanding of the organization environment in which procurement takes place. Interviews were conducted with the following:
 - Director of Procurement Services.

- Deputy Chief Financial Officer.
- Executive Director of Facilities Planning and Management.
- General Counsel.
- Director of Nutrition Finance.

Finally, MGT collected and reviewed copies of previous disparity studies conducted in the geographic region and other source documents and information pertinent to the study that are itemized in **Table 3-1**.

TABLE 3-1
DOCUMENTS REVIEWED DURING POLICY AND PROCEDURES REVIEW

INDEX	DESCRIPTION
SCS Procurement Related Documents	
1.	Procurement Services Reference Manual
2.	2006 Purchasing Authority, Revised 04/26/16;06/25/13;03/25/14
3.	2012 Contract Requirement, Approval and Signatory Authority, Issued Date: 03/26/13; Revised 03/25/14; 10/28/13; 06/25/13
4.	2010 Minority, Women, and Disadvantaged Business Enterprise Participation; Issued Date: 01/29/13
5.	2013 Professional Services Contracts; Issued Date: 03/26/13; Revised 03/25/14; 06/25/13
6.	Contract Management and Compliance-Contracting Procedures
7.	SCS Webpage-Doing Business with SCS
8.	Destination 2025, "Pathways to Excellence," Doing Business with Shelby County Schools
9.	Procurement Planning and Forecasting 2015
10.	Procurement Opportunity Forecast 2015
11.	PO Terms and Conditions
12.	Purchase Order Exemption List
Related Source Documents	
13.	<i>Vendor Electronic Application Instructions</i>
14.	Bid # 100516-Miscellaneous Commercial Food Bid for the 2016-2017 School Year
15.	Bid # 090416 –Armed and Unarmed Guard Services for Various Locations AZW
16.	Non-Discrimination Statements; Revised 10/27/15;06/11/13
17.	<i>Blocked Items From Office Depot/Premier Group Purchase With Blanket Purchase Orders, September 29, 2016</i>
18.	Bid #1312 07/22/13-Printer and Scanner Annual Contract
19.	Vital Records Control Shredding Services Agreement;05/12/16
20.	Tennessee Code Annotated 12-4-106
21.	Tennessee Code Annotated 12-3-1004
22.	Tennessee Code Annotated 62-2-107
23.	Tennessee Code Annotated 49-2-203 ;49-2-206

INDEX	DESCRIPTION
24.	Tennessee Code Annotated 29-20-1004
25.	Local Preference Purchasing, Issued Date: 01/29/13
26.	Shelby County Board of Education Policy Manual
27.	SCS Webpage-Vendor Registration
	<i>Disparity Studies</i>
28.	2016 Griffin & Strong, City of Memphis Disparity Study
29.	2012 MGT of America, Memphis Light, Gas, & Water Disparity Study
	<i>Other Documents</i>
30.	Shelby County Board of Education District Budget Fiscal Year 2015-2016
31.	Code of Federal Regulations (School Meals Programs, 7 CFR Parts 210, 215, 220, 235, 245)
32.	Consolidation of Memphis City Schools & Shelby County Schools

3. PROCUREMENT ORGANIZATION STRUCTURE AND ENVIRONMENT

SHELBY COUNTY SCHOOLS PROCUREMENT STRUCTURE

For this policy review, the District’s organization structure and environment is important. Following months of intense public debate and litigation, in July 2013 Memphis City Schools and Shelby County Schools were merged into one school system—Shelby County Schools. With over 120,000 students and almost 15,000 employees, the District is now one of the nation’s largest public school systems. In fact, the merger of Memphis City Schools and Shelby County Schools represent the largest consolidation of public school systems that has ever taken place in this country. Any massive consolidation or reorganization can be a huge undertaking that involves merging organizational cultures as well as realigning personnel and organization functions, operations, processes, and systems. Based upon MGT’s organizational restructuring experience, even the most well designed and well-crafted change management process can take three years or more to fully embed within an organization before consolidation or reorganization can be declared a “success.” The District is three years into the merger and, based on discussions during meetings and interviews with District staff, there have been some “growing pains” and certain areas of realignment are still in process, which is to be expected and is not uncommon or unusual. **Exhibit 3-1** shows the District’s administrative and schools’ organization structure that purchase a diverse range of goods and services to enable the District to operate and function. While all the organizational units shown in **Exhibit 3-1** engage in purchasing to meet a variety of needs, a significant amount of the District’s procurement activity comes from units such as Facilities and Maintenance and Nutrition Services, both of which are housed in Business Operations.

Procurement Services is also housed in Business Operations and is responsible for purchasing all goods and services for the District and obtaining maximum value for each dollar spent. The Director of Procurement Services, along with staff, performs a broad spectrum of functions as required in coordinating procurement for a school system as large as the District with a budget over \$1.3 billion dollars. Through the acquisition of goods and services, Procurement Services perform an essential and

vital role in the District and the community at large. Procurement Services' "Mission" emphasizes its "role is to ensure that our customers have the appropriate tools to teach our children and to lead them into a successful future beyond their years with the Shelby County Schools." Procurement Services' "Vision" also emphasizes the importance of community in stating, "the department will demonstrate commitment to the Community by implementing new strategies that will increase levels of spending with Local Small Business Enterprises."¹⁴¹

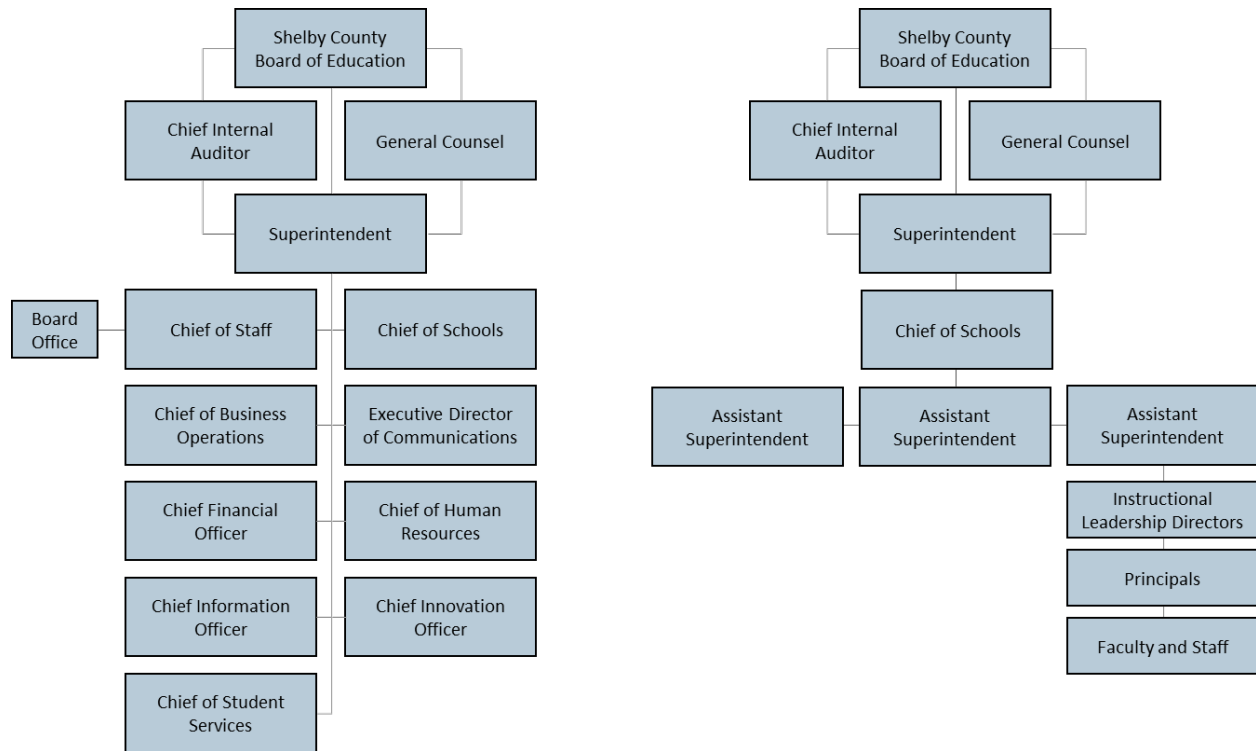
In providing functional and operational procurement support, Procurement Services is responsible for the acquisition and procurement of all District goods and services according to established policies and procedures for advertisement, solicitation, and approval. In carrying out its procurement functions, Procurement Services subscribes to the standards set forth by the National Association of Purchasing Management and the National Institute of Governmental Purchasing. Within this context, the primary role of Procurement Services is as follows:

- ◆ Coordination of all phases of the purchasing and acquisitions process.
- ◆ Purchase of all goods, services, and equipment used by the District.
- ◆ Coordination, support, and technical assistance to end users within the District.

Exhibit 3-2 illustrates the organizational structure of Procurement Services. It should be noted **Exhibit 3-2** reflects 17 positions, including the director and asset management staff. However, asset management does not play a direct role in procuring goods and services, only 13 staff are directly involved in procurement. The majority of procurement staff, including the director, have been in their positions for two years or more.

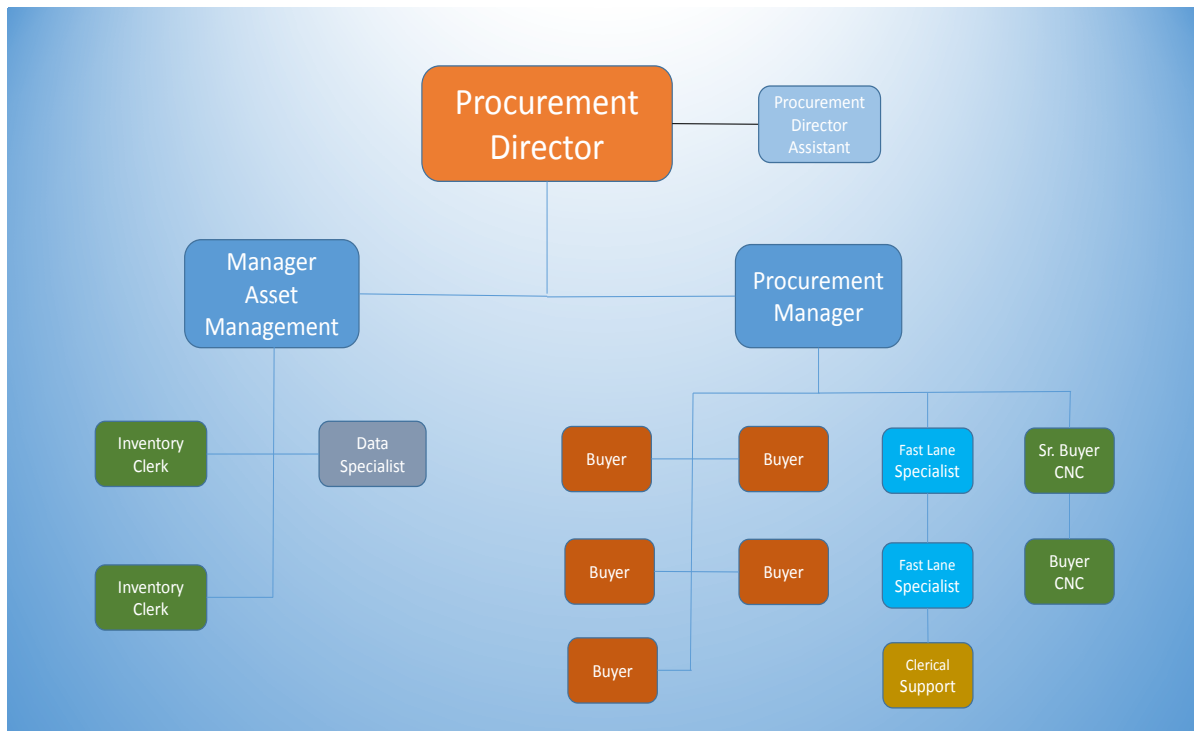
¹⁴¹ Procurement Services Reference Manual.

EXHIBIT 3-1
DISTRICT ADMINISTRATIVE ORGANIZATION CHART



Source: Shelby County Schools Board of Education District Budget Fiscal Year 2015-2016.

EXHIBIT 3-2
PROCUREMENT SERVICES ORGANIZATION CHART



Source: Procurement Services Department.

In the structure shown in **Exhibit 3-2**, “buyers” play a pivotal role in coordinating and working with individuals and departments within the District to purchase goods and services. In some instances, buyers tend to work exclusively with certain departments or organizational units such as Nutrition Services or Facilities and Maintenance. The interviews conducted by MGT with District staff yielded a diverse range of input, perceptions, and opinions about District procurement operations, practices, and processes and the challenges and opportunities associated with the greater utilization of minority- and women-owned businesses (M/WBES) in District procurement and contracting. Based on the comments and input received from staff, continuous improvement of procurement operations and building a procurement team that is professional and responsive to the needs of all end users in a timely manner is a major focus. In addition to continuous improvement and making certain that policies and procedures are consistently and routinely applied and followed, ensuring that the District aggressively support and encourage participation of M/WBES is a critical priority.

4. PROCUREMENT POLICIES AND PROCEDURES

The review of District procurement policies is narrowly focused on policies which have direct impact in terms of shaping District procurement processes and practices. Although MGT reviewed a variety of procurement related documents and information listed in **Table 3-1**, the sections which follow are intended to provide a high-level summary of policies, procedures, and practices. It is not intended to provide a detailed discussion about the processes associated with each policy or the “nuts and bolts” of how each policy is carried out. Instead, the focus is on what policies are in place and what are the ramifications for how they are carried out. Key District procurement-related documents reviewed for the study include the following:

- ◆ Procurement Services Reference Manual.
- ◆ 2006 Purchasing Authority.
- ◆ 2012 Contract Requirements, Approval and Signatory Authority.
- ◆ 2013 Professional Services Contracts.
- ◆ 2011 Local Preference Purchasing.
- ◆ 2010 Minority, Women, and Disadvantaged Business Enterprise Participation.
- ◆ Non-Discrimination Statements.
- ◆ Requisition Portal Business User Guide.
- ◆ Destination 2025 - Pathways to Excellence – “Doing Business with Shelby County Schools.”

In addition to the above, MGT reviewed a variety of documents and other information listed in **Table 3-1**. As mentioned earlier, applicable federal and state laws and regulations listed in **Table 3-1** are referenced, as appropriate, in District procurement-related policy documents.

PROCUREMENT PROCESS OVERVIEW

The Procurement Services Reference Manual (Manual) is a key document that was under revision when this policy review was initially conducted. Since the submission of the draft policy chapter, which was based on the current Manual at the time and discussions with staff, MGT revised portions of this policy

and procedures review to reflect revisions to the Manual. MGT noted the revisions to the Manual provided more policy guidance and direction to internal end users, particularly in terms of outlining responsibilities, conduct and ethical considerations, and the importance of “procurement planning” on the part of requestors. These and other substantive changes and additions will be highlighted in the sections which follow. According to the Manual, “Procurement Services is responsible for purchasing all goods and services for schools, offices, teachers and staff of the Shelby County Schools for the best dollar.” In carrying out its role of coordinating all phases of purchasing, as outlined in the Manual, the District performs the following specific functions:

- ◆ Coordinates all phases of centralized purchasing, bids, proposals, and contracts as established by board policy and at the direction of the Chief of Business Operations.
- ◆ Purchases all goods, services, and equipment used in the school system upon receipt of properly approved requisitions.
- ◆ Assists cooperatively with the end-users in developing specifications that are descriptive of materials requisitioned and are sufficiently broad to promote competitive bidding.
- ◆ Constantly strives to maintain an up-to-date file of responsible bidders to assure securing the best prices available on the desired product, consistent with quality, service, and timely delivery.
- ◆ Tabulates bids and prepares recommendations for presentation at the Board meetings.
- ◆ Coordinates with various departments and schools to schedule yearly requests at appropriate buying intervals.
- ◆ Conducts such tests as may be necessary to assure compliance with specifications to protect the school system from fraud and deceit and to protect bidders who bid on those specifications.
- ◆ Assists in the preparation of budgets by furnishing descriptions and estimated costs on goods and services to the various departments.
- ◆ Maintains adequate records on all transactions.
- ◆ Assists Parent-Teacher Organizations and other school groups in the selection and purchase of items for their particular school, provided proper approval for such purchases has been received.
- ◆ Contracts for the removal of structures that have been properly approved for removal.
- ◆ Directs sales personnel to appropriate department managers.
- ◆ Develops and maintains successful vendor relationships.
- ◆ Assumes responsibility for the efficiency, productivity, and integrity of the operations of the Department of Procurement Services.¹⁴²

To assist Procurement Services in carrying out the above responsibilities, the revised Manual includes sections that focus on planning ahead and procurement planning that emphasize several key points, including planning ahead to ensure competitive procurement that is timely and efficient and the “urgency of a purchase is not an acceptable reason to rush a purchase through.” There also is a very strong and emphatic emphasis on the importance and value of competition, indicating that “competition is the cornerstone of [the District’s] procurement system” and that competition helps to “guard against favoritism” and achieve the goal of “obtaining the best quality and service at minimum cost.”

¹⁴² Procurement Services Reference Manual.

PURCHASING AUTHORITY

Policies that delineate purchasing authority provide guidance and direction for all District procurement activity. District purchasing authority is found in Policy 2006-Purchasing Authority (Revised January 2017) and applies to the following:

- ◆ Bid and purchase of goods such as supplies, furniture, fixtures, equipment, and material.
- ◆ Purchase of services including professional services subject to Policy 2013-Professional Services.
- ◆ Lease of equipment and contracts for more than one year.

To put the provisions outlined in Policy 2006 into proper context, the following definitions in Policy 2006 are restated below:

- ◆ **Non-Professional Service** – Services based on skill(s) of a repetitive nature for which there is marketplace competition to set a market price (e.g., painting, roofing, cleaning, etc.).
- ◆ **Sole Source Provider** – Goods and services exempt from the bid process in the absence of another supplier capable of providing the sole source product or service.
- ◆ **Single- Source Provider** – Single supplier of goods and services with predominant qualifications and unique attributes only possessed by that source.
- ◆ **Emergency Purchases** – Purchases made because of an emergency or danger to life, health, safety, or property.
- ◆ **Professional Services** – Services provided by individuals or groups with specialized knowledge and expertise such as auditing, insurance, accounting and financial services, business consulting services, educational consulting services, etc. The term implies professional attainment in specialized knowledge as distinguished from mere skill.

COMPETITIVE BID REQUIREMENTS

According to Policy 2006, competitive bid requirements apply to the purchase of equipment, supplies, materials, and non-professional services based upon the following guidelines:

- ◆ **Equipment, Supplies, and Materials** – All purchases of supplies, furniture, fixtures, equipment, and material more than ten thousand dollars (\$10,000), including purchases by individual schools.
- ◆ **Non-Professional Services** – All contracts for non-professional services more than ten thousand dollars (\$10,000).

As stated in Policy 2006, all items subject to competitive bid, which exceed one hundred thousand dollars (\$100,000), the following information must be provided on the District website, if applicable and/or obtainable:

- ◆ Total cost of purchase including any anticipated associated costs.
- ◆ Funding source.
- ◆ Sustainability of funding source.
- ◆ Number of students served and the student population in need of the item or service.

- ◆ Cost per student served and cost per total students in the school district.
- ◆ Cost for the previous three (3) years.
- ◆ Other options for addressing the need for the purchase.
- ◆ National annual cost trends for the past five (5) years.
- ◆ Measurable outcomes expected.
- ◆ Explanations for any assumptions (e.g., inflation rate) and any indices used (e.g., FCI).
- ◆ If the purchase relates to a “program,” the number of years the program will be needed.¹⁴³

EXCEPTIONS TO COMPETITIVE BIDDING

The following exceptions to the competitive bidding requirement are outlined in Policy 2006:

- ◆ Professional service contracts such as contracts for legal services and educational consultants secured through the RFP or RFQ process must be awarded based on recognized expertise, competence, and integrity or other unique qualities in accordance with provisions in the Tennessee Code.
- ◆ Liability insurance purchased through a plan authorized and approved by any organization of governmental entities representing cities and counties.
- ◆ Purchases of goods or contracts for services from sole source and single - source providers.
- ◆ Purchases of equipment under the same terms of a legal bid initiated by any other Local Education Agency (LEA) in Tennessee.
- ◆ Purchases of supplies, equipment, and services under a competitive bid issued by any municipality, county, utility district, or other local governmental unit of the state for the District (the “procuring entity”), such as applicable purchasing co-operatives, subject to the following requirements:
 - The purchases shall be made on the same terms and under the same rules and regulations as regular purchases of the procuring entity.
 - Where the District would otherwise be required to advertise and receive bids, it shall be sufficient for these purposes that the procuring entity has complied only with its own purchasing requirements.
 - The District shall provide a rationale documenting a justifiable benefit to the District.¹⁴⁴

SIGNATORY AUTHORITY

Policies related to signatory authority are equally important in providing guidance and direction for District procurement and contracting. Policy 2012 outlines the District’s Signatory Authority and is critical because it identifies when written contracts are required and who is authorized to approve and sign contracts on behalf of the Shelby County Schools Board of Education (SCBE). Policy 2012 applies to all written contracts, excluding purchase orders that legally obligate the SCBE. According to Policy 2012, “all

¹⁴³ Shelby County Schools Board of Education 2006 Purchasing Authority.

¹⁴⁴ Shelby County Schools Board of Education 2006 Purchasing Authority.

written contracts equal to or more than \$100,000 require Board approval and Executive Committee signatures. All written contracts less than \$99,999 can be approved by the Superintendent and/or designee.”

As stated in Policy 2012, written contracts are required for the following:

- ◆ The sale, exchange, transfer, lease/rent, or purchase of real property.
- ◆ No-cost contract where liability is involved.
- ◆ Construction, renovations, repairs, and maintenance of facilities.
- ◆ Contracts for energy-related services that include both engineering services and equipment.
- ◆ Charter School and Contract/Waiver School agreements.
- ◆ The use of District facilities.
- ◆ Equipment leases.
- ◆ Non-professional services performed on District property.
- ◆ Professional Services.
- ◆ Sponsorships, grants, or donations with specific terms and conditions.
- ◆ Revenue generating contracts.
- ◆ Master Contracts.
- ◆ Software contracts for purchase, license, maintenance, and development of software.
- ◆ Equipment purchases requiring vendor installation on district facilities.
- ◆ Settlements.
- ◆ Intergovernmental Agreements.
- ◆ Memorandums of Understanding.
- ◆ Memorandums of Agreement.

Policy 2012 includes the following exemptions:

- ◆ Contracts Over One Year.
- ◆ Settlements (Settlements under \$100,00 can be approved by the General Counsel).
- ◆ Blanket Exemptions – Apply to contracts and agreements in any amount for the following:
 - Real Property Contracts.
 - Exclusive Contracts and Naming Rights Agreements.
 - Construction Contracts-New Buildings.
 - Specific Energy-Related Services Contracts.
 - Contract/Waiver/Charter School Contracts.
 - Intergovernmental Contracts.

- Collaborative Conferencing Memorandums.¹⁴⁵

PROCUREMENT METHODS

The purchasing thresholds outlined in the Manual, shown in **Exhibit 3-3**, apply to the sourcing methods utilized by the District to purchase goods and services across all organizational units and District departments.

EXHIBIT 3-3
PROCUREMENT PURCHASING THRESHOLDS

FEDERAL FUNDS: <i>Supplies, Equipment, General Services</i>	
DOLLAR THRESHOLD	REQUIREMENTS
\$1 up to \$3,499	Department/School can purchase on the open market. Quotes are recommended for these purchases: verbal or written. Every effort should be made to reach out to M/WBEs.
\$3,500 up to \$9,999	Departments/Schools must solicit three written quotes from qualified vendors. The quotes must be attached to the requisition for approval. Every effort should be made to reach out to M/WBEs.
\$10,000 and above	Competitive procurement required (Bid, RFP, RFQ). Competitive procurements must be executed by Procurement Services.
GENERAL OR OTHER NON-FEDERAL FUNDS: <i>Supplies, Equipment, General Services</i>	
DOLLAR THRESHOLD	REQUIREMENTS
\$1 up to \$3,499	Department/School can purchase on the open market. Quotes are recommended for these purchases: verbal or written. Every effort should be made to reach out to M/WBEs.
\$3,500 up to \$9,999	Departments/Schools must solicit three written quotes from qualified vendors. The quotes must be attached to the requisition for approval. Every effort should be made to reach out to M/WBEs.
\$10,000 and above	Competitive procurement required (Bid, RFP, RFQ). Competitive procurements must be executed by Procurement Services.
FEDERAL FUNDS: <i>Professional Services</i>	
DOLLAR THRESHOLD	REQUIREMENTS
\$1 up to \$3,499	Department/School can purchase on the open market. Quotes are recommended for these purchases: verbal or written. Every effort should be made to reach out to M/WBEs.
\$3,500 up to \$49,999	Departments/Schools must solicit three written quotes from qualified vendors. The quotes must be attached to the requisition for approval. Pricing should be the predominant factor when selecting a vendor. Every effort should be made to reach out to M/WBEs.
\$50,000 up to \$149,999	Departments/Schools must use the District’s Professional Services Selection Process. Pricing should be the predominant factor when selecting a vendor. Every effort should be made to reach out to M/WBEs.

¹⁴⁵ Shelby County Board of Education 2012 Contract Requirements, Approval and Signatory Authority.

\$150,000 and above	Competitive procurement required (RFP). Competitive procurements must be executed by Procurement Services.
GENERAL AND OTHER NON-FEDERAL FUNDS: <i>Professional Services</i>	
DOLLAR THRESHOLD	REQUIREMENTS
\$1 up to \$49,999	Department/School can purchase on the open market from qualified vendors. Every effort should be made to reach out to M/WBEs.
\$50,000 and above	Departments/Schools must use the District’s Professional Services Selection Process. Every effort should be made to reach out to M/WBEs.

Source: Procurement Services Reference Manual.

According to the Manual, District purchase orders/contracts are awarded by one of the following methods unless authorized by law:

SMALL PURCHASES

Procurement Services make all procurements more than \$500. All procurements exceeding \$10,000 must be made through competitive bids.

MASTER PURCHASE ORDER (REPETITIVE PURCHASES FROM A SINGLE VENDOR)

Procurement Services may require a Master Purchase Order for repetitive purchases of goods such as supplies, furniture, fixtures, equipment, and material from one vendor.

SOLE SOURCE PROCUREMENT

Sole source is a “non-competitive purchase or procurement” with only one source. A contract may be awarded for a supply, service, or construction item without competition when, after a determination, there is only one source for the required supply, service, or construction item.

SINGLE- SOURCE

Single -source is different from sole source and may be selected for several reasons including availability, capacity, location, replacement parts, compatibility, quality, service, support, etc.

EMERGENCY PROCUREMENT

Emergency purchases are purchases made because of an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods.

Emergency purchases approved by the Director of Procurement Services may be made without a purchase order; however, if these purchases fall within the amounts that require Board approval, they are presented to the Board at the next regular meeting.

QUOTE

Quotes are bids for items totaling less than \$10,000. Purchases estimated to be from \$500 to \$9,999 are made by Procurement Services and informal quotes may be taken by phone or email from a minimum of three vendors.

Purchases valued from \$5,000 to \$10,000 may be made through quotes or competitive written bids; these may be emailed to Procurement Services by the vendor, but must meet bid deadlines. These bids are not read publicly. Currently, state law requires a minimum of three competitive bids for items that are under \$10,000.

COMPETITIVE SEALED BIDDING

The Tennessee Code requires all purchases for supplies, furniture, fixtures, equipment, material, and non-professional services of every kind exceeding ten thousand dollars (\$10,000), including those of individual schools, be based on competitive bids. State law also requires bids be advertised for a minimum of ten (10) days. Procurement Services advertises all significant formal bids and proposals whose total estimated value to be \$10,000 or more on the Procurement section of the District website. Large dollar bids or proposals that will have significant impact on the District are advertised in local newspapers.

Procurement Services utilizes an electronic bid process; invitations to bid are sent to prospective bidders electronically, and bids are received electronically. MGT reviewed several bid documents for goods and services. Overall the documents were straightforward and easy to follow. Bids include the required quantity, specifications, and directions for delivery of that commodity. Bids remain sealed until the bid deadline has expired. Bids are opened and evaluated by sourcing staff and, in some instances, the customer must have input into the evaluation process.

SPECIAL PROCUREMENTS

A special procurement is one in which the Director of Procurement determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding unnecessary. Any special procurement must be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the contractor must be included in the justification information.

PROFESSIONAL SERVICES PROCUREMENTS

Professional Services are those services provided by an individual or group of individuals that involve unique creativity, talents, and abilities or special training and/or skills. According to Policy 2013, Professional Services includes “insurance, auditing, accounting and financial services, professional development, business-consulting services, educational consulting services, insurance, research services, seminar leaders, surveys and studies, technical services, and software development.”

Typically, professional services are secured through the RFP process. Professional services contracts that exceed \$99,999 require Board approval. The superintendent may enter into professional services contracts up to \$99,999. As stipulated in Tennessee Code Annotated 12-4-106, professional services contracts are not to be based upon competitive bids. As mentioned, the District utilizes the RFP process to determine the best provider for the service is selected. Award shall be made based upon qualifications as well as pricing.

REQUEST FOR PROPOSAL

Request for Proposals (RFPs) are issued for certain competitively bid projects and are awarded based on the services offered and competence within the area of specialty. RFPs are evaluated by a team or committee convened for that purpose. The District convenes a Procurement Committee who meets to review certain projects as part of the overall evaluation process. The Procurement Committee is

comprised of District staff and is led by a member of the Procurement Department. Proposals submitted through the RFP process may be awarded on criteria other than low bid dollar amount.

CONSTRUCTION BID PROCESS

One section of the Manual is devoted to the construction bid process. The District unit responsible for construction is Facilities and Maintenance including new school construction and construction and maintenance at existing District schools and other facilities. According to the provisions outlined in the Manual, the District adheres to guidelines established by the Tennessee Board for Licensing Contractors and District policies and procedures when soliciting bids for construction projects. Overall, the bid process for construction bids is the same as the overall bid process except for the following additions:

- ◆ An extra form is provided with the bid to assist the bidder in providing certain state required information for projects that are \$25,000 or greater.
- ◆ For projects \$10,000 or greater, the successful bidder shall be required to provide a Performance Bond executed by a surety or bonding company in the full amount of the bid price of the project and the cost of the bond is to be included as part of the bid price.
- ◆ Proof of insurance in pre-determined amounts listing the District as the Certificate Holder is required.
- ◆ Projects such as re-roofing projects, large capital projects, or any so designated project, bidders may be required to include a “Bid Bond” for 5 percent of the total bid price with their bid.

The following items are required in order to have a valid and binding construction contract with the District:

- ◆ A vendor number on file in Procurement Services.
- ◆ A Tennessee Contractors License for projects that are \$25,000 or greater, proof of which must be documented/verified by the buyer prior to opening and/or accepting a bid from the contractor.
- ◆ A formal contract signed by an authorized official of the company and approved by an authorized District official.
- ◆ An official District purchase order document signed by the Director of Procurement Services.
- ◆ A District purchase order containing the date the project was approved by the Board of Commissioners for all projects \$100,000 or greater.
- ◆ A signed, numbered, and notarized performance bond executed by a surety or bonding company in the full amount of the project and containing the notary’s seal must be on file with the District for projects \$10,000 or greater. It was noted that bonding is an issue relative to increasing participation of M/WBEs in District construction projects.
- ◆ Proof of insurance on file documented by a “Certificate of Liability Insurance” issued by an authorized insurance company listing the vendor as the insured, the District as the Certificate Holder and listing the project(s) covered. Standard Operating Procedure (SOP) requires coverage of: Workmen’s Compensation Insurance in accordance with Tennessee State Law and General

(Public) Liability and Property Damage Insurance: \$1,000,000 limits—bodily injury, \$500,000—property damage.¹⁴⁶

As mentioned earlier, the Division of Nutrition Services engages in a significant amount of purchasing activity to obtain the commodities required to meet the nutrition needs of students. The bulk of purchasing by Nutrition Services occurs in a January to April timeframe and supplemental purchases may occur throughout the school year. For example, MGT reviewed an October 2016 “Request for Commercial Food Items” to purchase breakfast, lunch, and snack food items. The commodities purchased by Nutrition Services range from food and food-related products to cafeteria supplies and equipment, a majority of which are purchased through a straight-line bid process or line item bid process. Nutrition Services must comply with federal requirements that come under USDA regulations, but for policy purposes Nutrition Services operates like all other departments, and all purchasing is coordinated through Procurement Services.

PURCHASING PROCESS

The purchasing process for the District is spelled out in Policy 2006-Purchasing Authority. According to Policy 2006, purchases of less than ten thousand dollars (\$10,000) may be made in the open market without newspaper notice, but should be based upon at least three (3) competitive bids. Purchases \$500 or less do not require a purchase order and purchases over \$500 must be requested in E-Procurement and require a purchase order.

Purchases that are equal to or exceed one hundred thousand dollars (\$100,000) must be approved by the Board and the following information must be provided to the Board:

- ◆ District goal the request serves.
- ◆ Measurable outcomes expected.
- ◆ Cost for the previous three (3) years, where applicable.
- ◆ Cost per student served, where applicable.
- ◆ Explanation of expected benefits and why the specific item or service is the best purchase.
- ◆ Other options for addressing the need for the purchase.
- ◆ Sustainability Plan.
- ◆ Implementation Plan.
- ◆ Adverse impact on students and/or the district if not approved at the level requested.
- ◆ Number and description of staff positions to be created, where applicable.

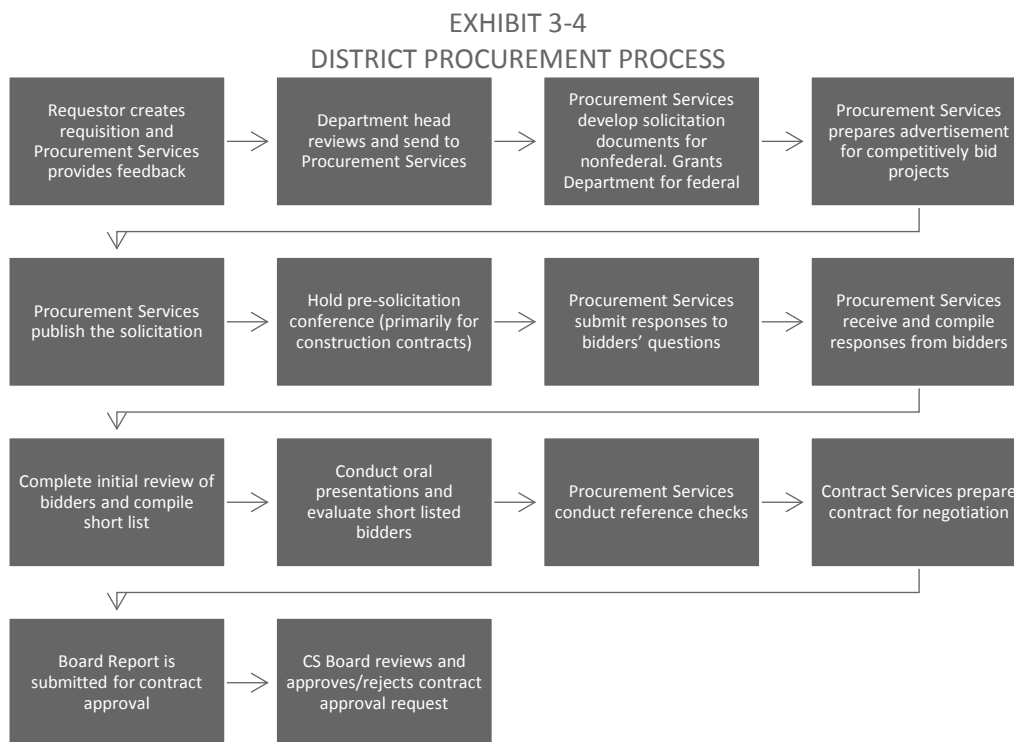
After the Board approves the bid/RFP, a purchase order is generated and issued to a vendor. If the Board does not approve the bid/RFP, the superintendent has the option to 1) address the Board's concerns and re-submit for approval, 2) instruct staff to re-issue the bid/RFP, or 3) forego the procurement. The approval process includes the following:

- ◆ Review by the superintendent's Executive Cabinet.

¹⁴⁶ Procurement Services Reference Manual.

- ◆ Review by board members at Board Work Session.
- ◆ Submit for approval by Board members at next Board Meeting.

Exhibit 3-4 shows the major steps involved in the District’s procurement process.



Source: Created by MGT.

5. M/WBE OUTREACH

The major impetus for this disparity study is greater participation and utilization of M/WBEs in District procurement and contracting. In fact, one of the major reasons for this disparity study is the District’s commitment to inclusion and economic empowerment through greater participation in District procurement and contracting which can ultimately impact the communities, families, and students served by the District. As such, MGT felt it was important to review the efforts currently being undertaken to increase participation of M/WBEs in District procurements, particularly in the absence of a strong M/WBE policy or race- and gender-based initiatives, which are dependent on the outcomes of this study. As discussed earlier, Procurement Services is responsible for coordinating all District procurement. The District does not have an M/WBE office or a formal M/WBE program and procurement takes place in a race- and gender-neutral environment. However, as mentioned earlier, Procurement Services’ “Vision” includes references to the former Memphis City Schools’ Fair Business Plan and the District’s Local Vendor Preference Program, both of which were intended to help facilitate participation of M/WBEs. In addition, Policy 2010-Minority, Women, and Disadvantaged Business Participation, includes a policy statement that recognize “minority, women and disadvantaged business owners frequently face unique problems that are not encountered by majority-owned businesses.”

Although the District has no race- and gender-specific programs that focus on M/WBE participation, there is a sense of urgency about increasing M/WBE participation. Procurement Services has played a major role in reaching out to M/WBEs and Board members have been very strong advocates for greater participation of M/WBEs.

According to District staff, outreach efforts are taking place to identify and encourage participation in District procurement and contracting opportunities. Procurement Services plays a role internally and externally in promoting the District as an organization committed to business diversity. This includes working with District departments, keeping departments informed about opportunities to utilize M/WBEs, conducting outreach aimed at educating and informing the business community about doing business with the District, providing information about navigating the District procurement process, and providing information about procurement opportunities. Externally and internally the goal is to improve and increase opportunities to participate in SCS procurements and to minimize barriers to participation. District efforts which facilitate achieving this goal include:

- ◆ **District Website**

In today's environment, an organization's website is an essential and vital tool and information resource. Typically, it is the first-place potential bidders go to for information about an organization and potential procurement opportunities. The "Procurement" and the "Contracts and Compliance Management" sites on the District's website provide a considerable amount of information, direction, and guidance to potential bidders, including information on vendor registration, bids and RFPs, doing business with the District, as well as other information that can be used by a prospective vendor to keep informed and to better understand the District's procurement process and opportunities to participate in District procurement.

- ◆ **Procurement Forecasting**

Procurement opportunity forecasts provide detailed information on upcoming procurements. The 2015 Procurement Opportunity Forecast reviewed by MGT listed the commodity by NIGP Code, the estimated dollar value, and the District organizational unit or department, such as Nutrition Services, Risk Management, etc. From the perspective of a potential bidder, this is very helpful and vital information if interested in participating in District procurement and contracting.

- ◆ **Doing Business With the District**

For some potential bidders navigating an organization's procurement system and processes can be a significant barrier to participation, particularly for M/WBEs and other businesses who are unaccustomed to bidding in the public sector. The "Doing Business with SCS" webpage on the Procurement site, reviewed by MGT, provides useful information and walks potential bidders through the necessary steps in a user-friendly manner including providing answers to typically asked questions. In addition to the information provided on the website, Procurement Services has conducted a "Doing Business with Shelby County Schools" seminar that Board members and staff from departments such as Facilities, IT, and Nutrition Services also participate in delivering. The seminar provides "face time" with Procurement Services and department staff as well as essential information. Key topics covered include:

- RFP/Bid Do's and Don'ts.
- RFP/Bid Pricing Do's and Don'ts.
- RFP/Bid Scope of Services Do's and Don'ts.
- Website Navigation.

In addition to the above topics, each of the aforementioned departments provided presentations related to requirements, opportunities, and what they are looking for in potential bidders.

- ◆ **Resources for District Employees**

Informed and knowledgeable employees are equally important in minimizing barriers to participation, particularly for M/WBEs. The Manager of Employee Resources on the Procurement page on the District’s website provide very useful and essential information for managers and employees that ultimately benefits potential bidders. There is information and guidance on everything from the APECS training schedule to commodity codes to how to search for a vendor.

In summary, current outreach activities underscore the District’s urgency to increase participation of M/WBEs in District procurements and contracts. Based on the discussions and meetings conducted by MGT, there is recognition that increasing participation of M/WBEs is an organization-wide shared responsibility and is not solely the responsibility of Procurement Services. As such, the following is important particularly in the absence of a race- and gender-specific program or race- and gender-specific policies:

- ◆ Continuously encouraging participation of M/WBEs in all District procurement and contracting.
- ◆ Interacting and communicating with District departments to provide assistance, advice, and support to encourage and facilitate participation in procurement and contracting.
- ◆ Planning and execution of outreach activities to promote and encourage participation of M/WBEs.

6. CONCLUSION

This review focused on District procurement policies and efforts being undertaken to increase participation of M/WBEs in the absence of a formal M/WBE program or race- and gender-specific policies or programs. Based upon MGT’s review, the District has written policies and procedures that govern all aspects of procurement, some of which are currently under revision. Procurement Services is responsible for procurement operations and appears to be appropriately staffed and structured to carry out its procurement functions. As stated earlier, the Procurement Reference Manual, which is a key document, has been revised and is indicative of Procurement Services’ emphasis on improving procurement operations to better meet the needs of end users and ultimately increase the utilization of M/WBEs.

Also, Policy 2010 is still in effect albeit without goals or remedies, which means the District has policies that focus on M/WBEs and Procurement Services has been very proactive in reaching out to M/WBEs. In addition, there are resources on the District’s website that can be accessed by all businesses, including M/WBEs. The extent to which the District can expand its current race- and gender-neutral efforts to include race- and gender-specific remedies will be determined by the results and outcomes of the disparity study. The disparity study’s availability and utilization analysis and other analyses will provide evidence, guidance, and direction for the District as it relates to the participation of M/WBEs. Until the disparity study is completed, current outreach efforts to increase awareness, interest, and participation in District procurements must be continuous, highly visible, and conducted on a regular basis if participation is to be impacted.

CHAPTER 4: Market Area and Utilization Analyses
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

This chapter presents the results of MGT of America Consulting, LLC (MGT) market area and utilization analyses of firms used on Shelby County Schools District (District) procurements during July 1, 2011, and June 30, 2016. The specific procurement categories analyzed were Architecture & Engineering, Construction, Professional Services, Nonprofessional Services, and Goods and Commodities.

The market area is essential to establishing the universe of available vendors and spending that will be considered in identification of any disparate treatment of assorted classifications of firms. Utilization data are central to defining this market area, and thus are first presented as a means of identifying the market area for consideration, and then are examined within that market area to assess levels of contracting activity as the first step in the quantitative determination of disparity.

CHAPTER SECTIONS

1. Introduction
2. Data Collection and Management
3. Market Area Analysis
4. Utilization Analysis
5. Definitions

2. DATA COLLECTION AND MANAGEMENT

To identify the most appropriate data sources to use for the study, MGT conducted data assessment interviews with key District staff knowledgeable about the prime contract, subcontract, and vendor data. Based on these interviews and follow-up discussions with District staff, MGT determined that contract expenditure data maintained in the APECS and Walker financial systems were the most accurate and comprehensive available to reflect prime activity. The Walker system maintained data for the study period of July 1, 2011, through June 30, 2013, and APECS maintained data for the period of July 1, 2013, through June 30, 2016. Electronic data on payment transactions at the prime levels was delivered to MGT in December 2016. Subcontractor data was not maintained in either system. During the data assessment interviews, District staff indicated that they did not have a consistent or complete process of maintaining data for subcontractors in electronic or hard copy files. Therefore, to collect subcontract data, MGT administered a survey to prime firms that were awarded contracts in Construction, Architecture & Engineering, and Professional Services. Of the 139 contracts awarded in these business categories:

- a. 33 completed responses to the survey; an overall response rate of nearly 24 percent.
- b. 21 indicated that they did not hire subcontractors during the designated study period.
- c. 11 indicated that they did hire subcontractors and would submit subcontractor lists.
- d. 5 of the 11 submitted their subcontractor data.

Due to the incomplete collection of subcontractor data, MGT could not and did not analyze spending by primes with subcontractors.

Upon receipt of the prime expenditure data, MGT compiled and reconciled the data and developed a master prime contract database (Master Utilization Database). This reconciliation included:

- ◆ Updating vendor address information;
- ◆ Merging all pertinent procurement files;

- ◆ Marking for exclusion those procurements that were not relevant to the study;
- ◆ Updating vendor race and ethnicity information; and
- ◆ Updating county information.

MGT collaborated extensively with the District’s Procurement and Information Technology staff to ensure appropriate understanding of data elements, assumptions, and relationships to maximize accuracy of findings.

3. MARKET AREA ANALYSIS

As prescribed by *Croson* and its progeny, a disparity study requires definition of a market area to ensure that a relevant pool of vendors is considered in assessments regarding which firms have been utilized versus which were available. If these boundaries are stretched too far, the universe of vendors becomes diluted with firms which have no interest or history working with the agency, and thus their demographics and experiences have little relevance to actual contracting activity or policy. On the other hand, a boundary set too narrowly risks the opposite circumstance of excluding a high proportion of firms who have contracted with, or bid for work with, the agency, and thus may also skew the prospective analyses of disparity.

3.1 METHODOLOGY

In the determination of a market area, MGT abides by a 75 percent rule of agency spending alongside historic programmatic considerations. This is supported by court decisions, such as *James C. Jones v. New York County Human Resources Administration (James C. Jones)*,¹⁴⁷ that have affirmed findings and policies based on market area definitions encompassing approximately 75 percent of agency spending. Additionally, in *James C. Jones*, the court accepted less than 100 percent of data when it was reasonable to assume that the missing data would not significantly change the results of the analysis.

To establish the appropriate geographic boundaries for the study’s analyses, an “overall” market area was first established to identify the full geographic extent of the District’s spending, and successively a “relevant” market area is isolated in accord with the 75 percent standard, eliminating many of the extraneous geographies. These market areas are defined by geographic units such as boroughs, counties, and states, supposed by the following considerations: 1) the courts have accepted the use of standard geographic units in conducting equal employment opportunity and disparity studies; 2) geographic units are externally determined, so there are no subjective determinations; and 3) U.S. Census and other federal agencies routinely collect data by geographic unit. The following presents the methodology used to determine the overall market area and relevant market area.

- ◆ **Overall Market Area.** To determine the full extent of the market area in which the District utilized firms, MGT staff determined geographic locations of utilized vendors by identifying firms’ county of operation using a ZIP Code database to map vendor addresses to county jurisdictions. The

¹⁴⁷ MGT uses the “75 percent rule” to determine the relevant market area. This rule is generally accepted in antitrust cases. In another relevant case, *James C. Jones v. New York County Human Resources Administration*, 528 F.2d 696 (.2d Cir. 1976), the court accepted less than 100 percent of the data when it was reasonable to assume that the missing data would not significantly change the results of the analysis.

overall market area presents the total dollars awarded for each procurement category. The overall market area results by procurement category are presented in **Section 3.2** of this chapter.

- ◆ **Relevant Market Area.** Once the overall market was established, the relevant market area was determined by examining several more proximate regions (focusing on areas with some known jurisdictional identity, such as the local Metropolitan Statistical Area and Shelby County to isolate a more specific region that would still meet the 75 percent standard. Based on the results of the market area analysis conducted for each procurement category, the relevant market area was defined as Shelby County.

Corresponding market area analyses showing the dollars awarded by county within each procurement category are presented in **Appendix B, Table B-1** through **Table B-5**.

- ◆ **Study Period.** MGT analyzed procurements awarded between July 1, 2011, and June 30, 2016.
- ◆ **Procurement Categories and Exclusions**
 - MGT analyzed the major procurement categories competitively bid by the District, encompassing Architecture & Engineering, Construction, Professional Services, Standardized Services, and Goods and Commodities.
 - Certain purchases were excluded from the analyses presented in the section that follows, which were used to determine the relevant market area. Examples include:
 - Transactions outside of the study period.
 - Transactions associated with firms located outside the U.S.
 - Administrative items such as utility payments, leases for real estate, or insurance.
 - Salary and fringe benefits, training, parking, or conference fees.
 - Transactions associated with non-procurement activities.
 - Transactions associated with nonprofit organizations and governmental agencies.

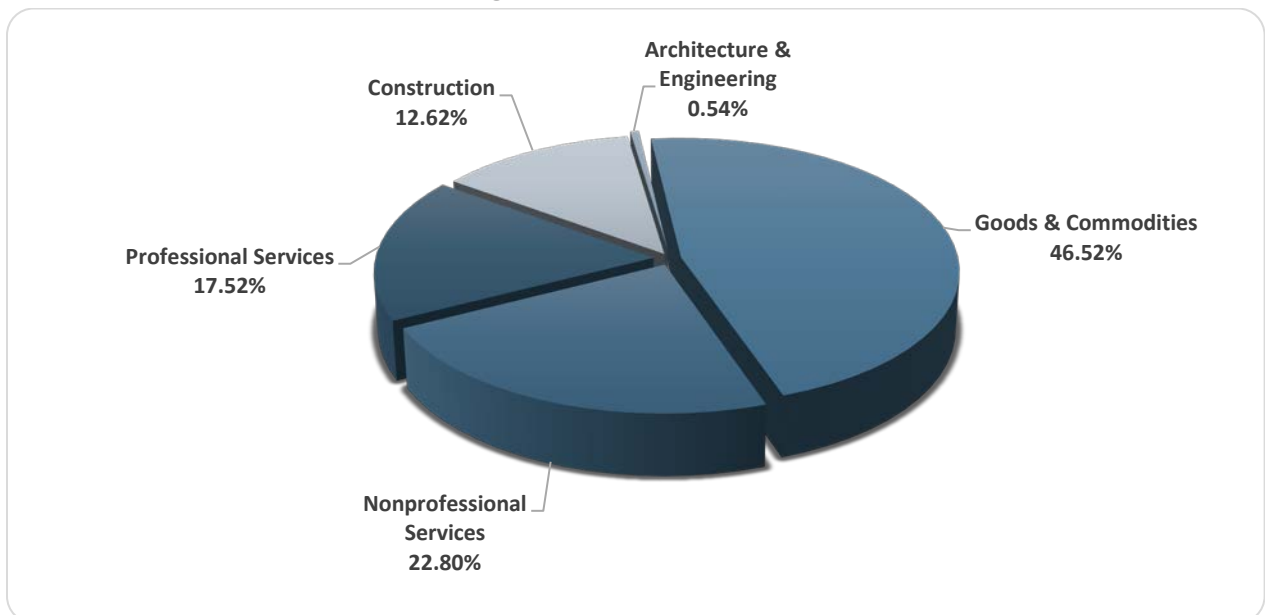
3.2 MARKET AREA ANALYSIS

As described in the preceding section, an overall market area was first established to account for all District spending, after which more specific regions were analyzed to arrive at a relevant market area to support the goals of the study. Detailed information supporting this market area analysis are presented in **Appendix B** to this report.

Figure 4-1 shows:

- ◆ \$972.4 million were awarded to firms located within the overall market area¹⁴⁸ between July 1, 2011, and June 30, 2016.
 - 0.54 percent of the dollars spent were in Architecture & Engineering;
 - 12.62 percent in Construction;
 - 17.52 percent in Professional Services;
 - 22.80 percent in Nonprofessional Services; and
 - 46.52 percent in Goods and Commodities.

FIGURE 4-1
SUMMARY OF DOLLARS
TOTAL EXPENDITURES BY BUSINESS CATEGORY
OVERALL MARKET AREA



Source: MGT developed a Master Utilization Database File based on dollars expended by the District between July 1, 2011, and June 30, 2016.

Table 4-1 shows firms located within the relevant market area accounted for 69.08 percent of spending across all procurement categories. Dividing by procurement area, firms located within the Shelby County Market Area accounted for:

- ◆ 91.35 percent of the dollars awarded were in Architecture & Engineering;
- ◆ 95.09 percent in Construction;
- ◆ 63.76 percent in Professional Services;
- ◆ 96.79 percent in Nonprofessional Services; and
- ◆ 50.18 percent in Goods and Commodities.

Corresponding market area analyses showing the dollars spent by District as total expenditures for each procurement category are presented in **Appendix B**.

TABLE 4-1
MARKET AREA ANALYSIS, TOTAL CONTRACTS LEVEL DISTRIBUTION OF DOLLARS
BY BUSINESS CATEGORY, SHELBY COUNTY MARKET AREA

CONSTRUCTION	Amount	Percent
<i>Inside of Shelby County</i>	\$116,721,651.36	95.09%
Outside of Shelby County	\$6,026,433.95	4.91%
Construction, Total	\$122,748,085.31	100.00%
ARCHITECTURE AND ENGINEERING	Amount	Percent
<i>Inside of Shelby County</i>	\$4,788,768.10	91.35%
Outside of Shelby County	\$453,499.38	8.65%
Architecture and Engineering, Total	\$5,242,267.48	100.00%
PROFESSIONAL SERVICES	Amount	Percent
<i>Inside of Shelby County</i>	\$108,639,663.89	63.76%
Outside of Shelby County	\$61,746,006.82	36.24%
Professional Services, Total	\$170,385,670.71	100.00%
NONPROFESSIONAL SERVICES	Amount	Percent
<i>Inside of Shelby County</i>	\$214,570,625.98	96.79%
Outside of Shelby County	\$7,119,977.69	3.21%
Nonprofessional Services, Total	\$221,690,603.67	100.00%
GOODS AND COMMODITIES	Amount	Percent
<i>Inside of Shelby County</i>	\$227,001,616.53	50.18%
Outside of Shelby County	\$225,361,550.32	49.82%
Goods and Commodities Total	\$452,363,166.85	100.00%
ALL BUSINESS CATEGORIES	Amount	Percent
<i>Inside of Shelby County</i>	\$671,722,325.86	69.08%
Outside of Shelby County	\$300,707,468.16	30.92%
All Business Categories, Total	\$972,429,794.02	100.00%

Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

4. UTILIZATION ANALYSIS

The utilization analysis presents a summary of expenditures within the study period and an initial assessment of the utilization of M/WBEs in the District's contracting and procurement activities. Effectiveness of assorted program initiatives are further examined and discussed in **Chapter 8, Findings and Recommendations**.

The utilization analysis is based on the defined Shelby County Market Area, as described in the preceding sections of this chapter. As such, expenditure data encompass dollars paid to primes located within the market area. The analysis is divided between the procurement categories of Architecture & Engineering, Construction, Professional Services, Nonprofessional Services, and Goods and Commodities, and encompasses awards between July 1, 2011, and June 30, 2016.

The District did not have records of subcontractor spending, therefore, MGT administered a survey to Construction, Architecture & Engineering, and Professional Services primes requesting subcontractor expenditure data.

4.1 OVERALL UTILIZATION

Table 4-2 shows the utilization of racial and ethnic minority firms was 13.41 percent in all procurement categories. Expanding consideration to include all women-owned firms within this proportion, M/WBE utilization amounted to 14.72 percent of total awards. Among M/WBE firms, utilization was highest for Asian American-owned firms (7.64%) followed by African American-owned firms (5.73%) and Nonminority women-owned firms (1.31%). The corresponding analyses showing the utilization of firms by business ownership classification and year are presented in **Appendix D, Detailed Utilization Analysis**.

TABLE 4-2
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,
ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	ALL PROCUREMENT CATEGORIES	
	DOLLARS PAID	PERCENT OF DOLLARS
African American Firms	\$38,510,725.21	5.73%
Asian American Firms	\$51,308,929.86	7.64%
Hispanic American Firms	\$130,555.66	0.02%
Native American Firms	\$102,660.60	0.02%
TOTAL MINORITY FIRMS	\$90,052,871.33	13.41%
Nonminority Women	\$8,807,956.72	1.31%
TOTAL M/WBE Firms	\$98,860,828.05	14.72%
Non-M/WBE Firms	\$572,861,497.81	85.28%
TOTAL	\$671,722,325.86	100.00%

Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

4.2 UTILIZATION BY PROCUREMENT CATEGORY

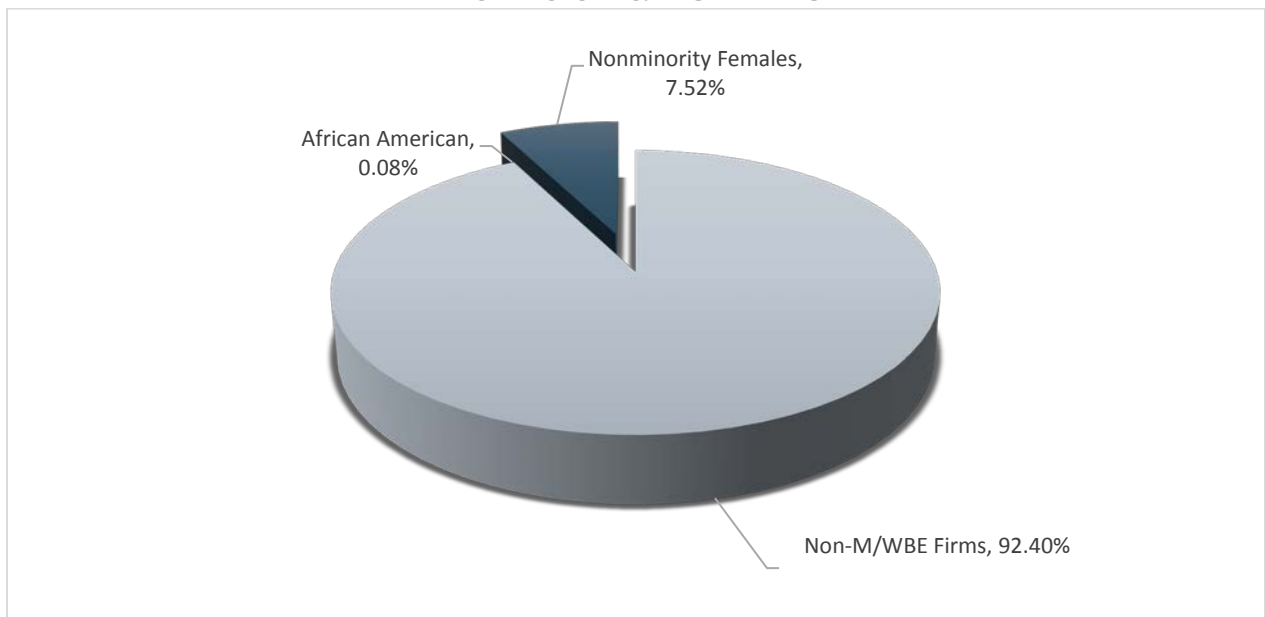
The next series of figures show the summary results of MGT’s utilization analysis of each of the procurement categories. The corresponding detailed analyses, showing the utilization of firms by business ownership classification and year for each procurement category, are presented in **Appendix D, Detailed Utilization Analyses**.

Spending in Architecture & Engineering during the study period was \$4.79 million. **Figure 4-2** shows the utilization M/WBEs at 7.60 percent which equates to \$364,079. in Architecture & Engineering M/WBE utilization by business ownership classification was:

- ◆ 7.52 percent for Nonminority Women firms (\$360,109);
- ◆ 0.08 percent for African American firms (\$3,970);

No Asian American, Hispanic American, or Native American firms were utilized for Architecture & Engineering services. The corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix D, Detailed Utilization Analyses**.

FIGURE 4-2
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,
ARCHITECTURE & ENGINEERING



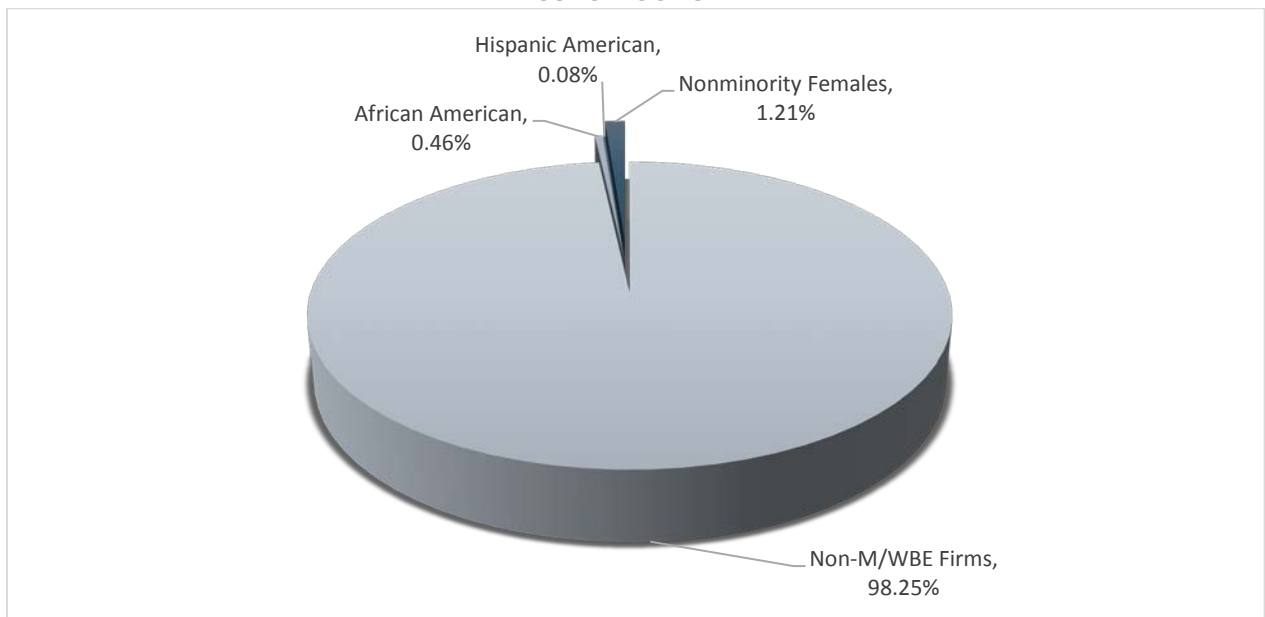
Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

Figure 4-3 shows the utilization of M/WBE firms was 1.75 percent or \$2.05 million of the \$116.72 million spent in Construction. M/WBE utilization by business ownership classification was:

- ♦ 1.21 percent for Nonminority Female firms (\$1.41 million);
- ♦ 0.46 percent for African American firms (\$540,255); and
- ♦ 0.08 percent for Hispanic American firms (\$96,875).

There was no utilization for Asian American or Native American firms. The corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix D, Detailed Utilization Analyses**.

FIGURE 4-3
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,
CONSTRUCTION



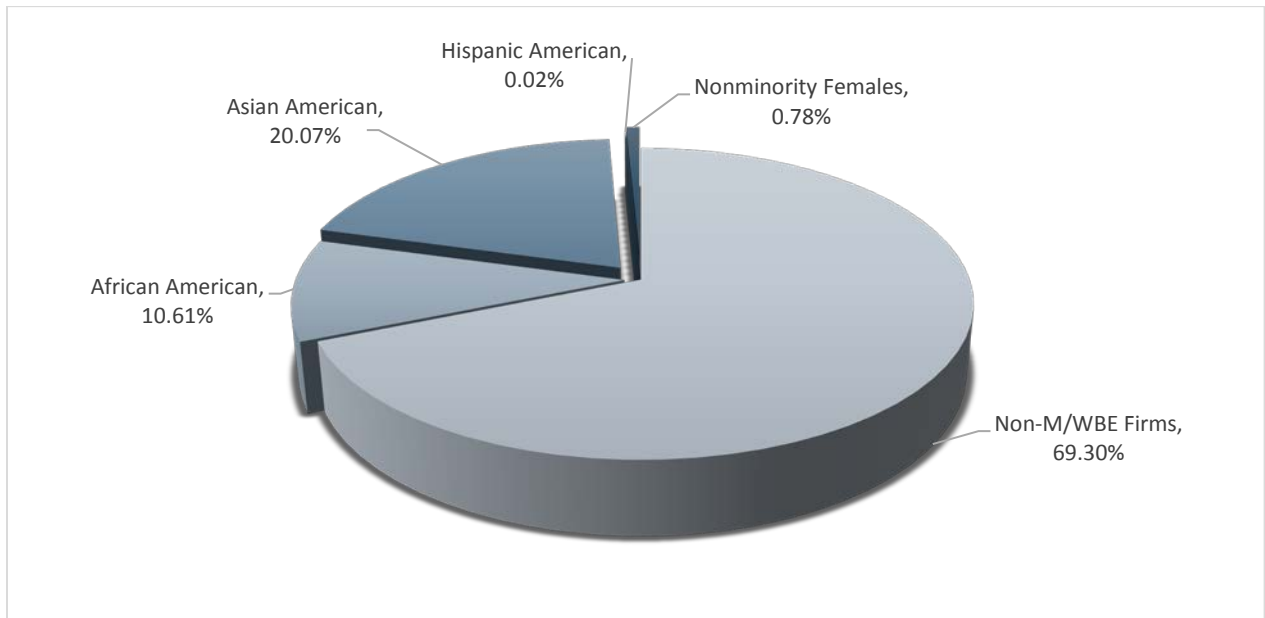
Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

In Professional Services, the District spent \$108.64 million during the study period. Shown in **Figure 4-4** the utilization of M/WBE firms was 31.48 percent, equaling \$34.20 million in Professional Services. M/WBE utilization by business ownership classification was:

- ♦ 20.07 percent for Asian American firms (\$21.81 million);
- ♦ 10.61 percent for African American firms (\$11.52 million);
- ♦ 0.78 percent for Nonminority Female firms (\$847,161); and
- ♦ 0.02 percent for Hispanic American firms (\$20,960).

There was no utilization of Native American firms. The corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix D, Detailed Utilization Analyses**.

FIGURE 4-4
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,
PROFESSIONAL SERVICES



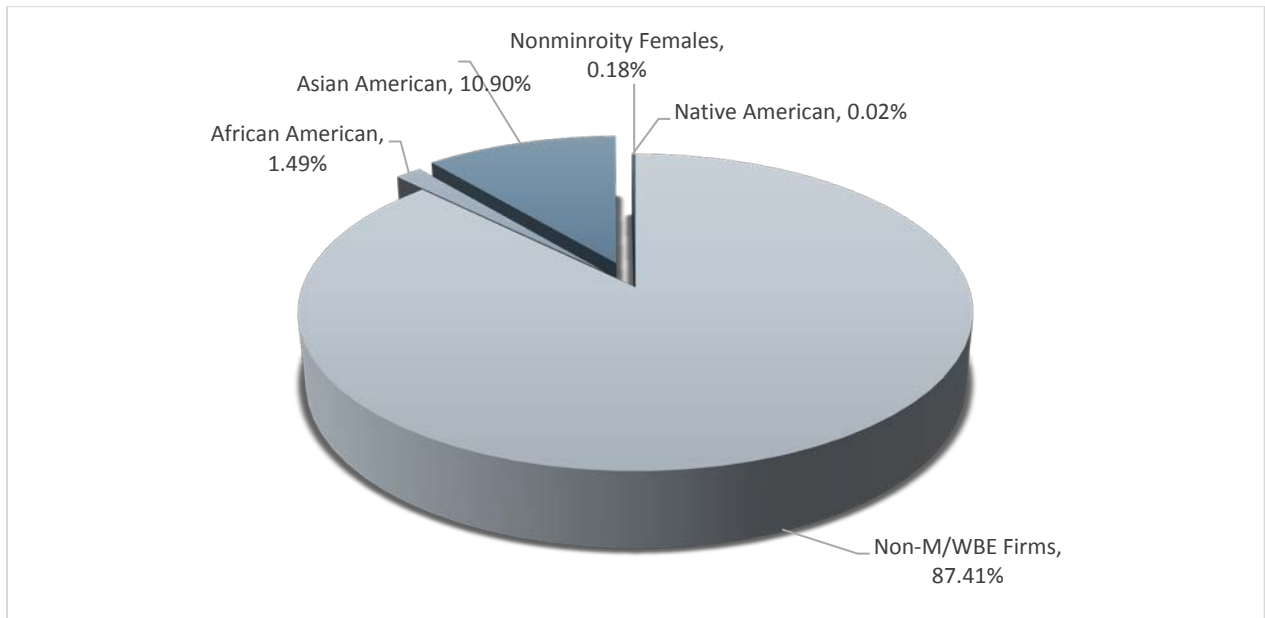
Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

Figure 4-5 shows the utilization of M/WBE firms was 12.41 percent or \$27 million of the \$214.57 million spent during the study period in Nonprofessional Services. The percentage of spending and total dollars with M/WBE firms by business ownership classification was:

- ◆ 10.90 percent for Asian American firms (\$23.82 million);
- ◆ 1.49 percent for African American firms (\$3.19 million);
- ◆ 0.18 percent for Nonminority Female firms (\$382,895); and
- ◆ 0.02 percent for Native American Firms (\$46,885).

There was no utilization of Hispanic American firms. The corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix D, Detailed Utilization Analyses**.

FIGURE 4-5
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,
NONPROFESSIONAL SERVICES



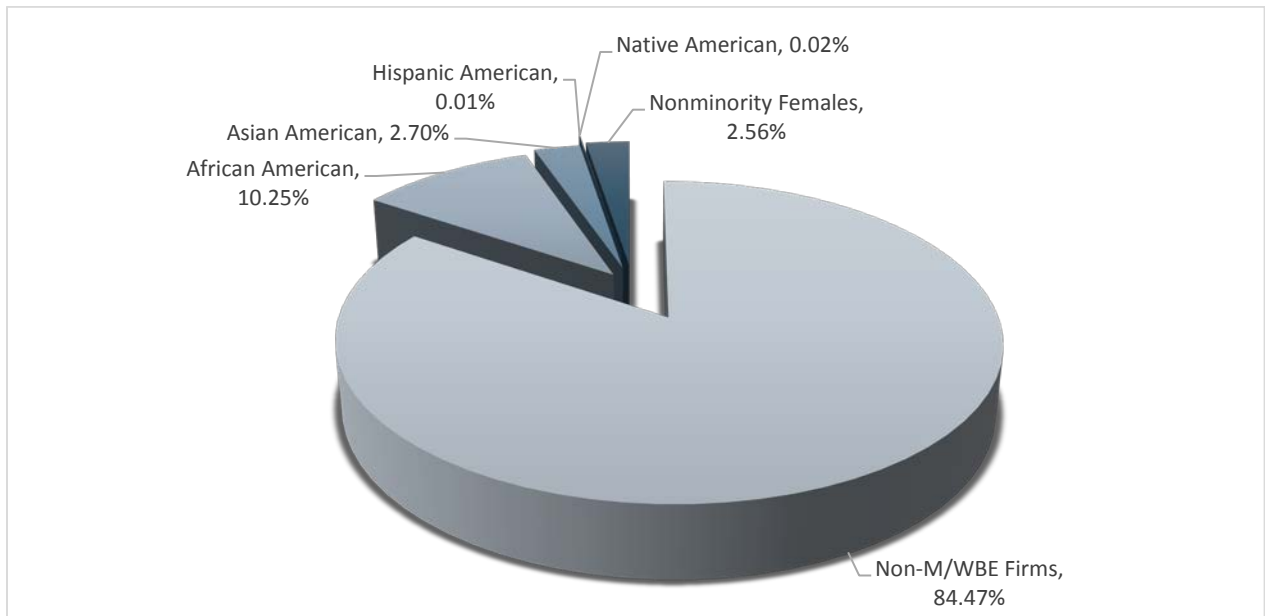
Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

Spending in Goods and Commodities totaled \$227 million during the study period. **Figure 4-6** shows the utilization of M/WBE firms was 15.53 percent or \$35.25 million in Goods and Commodities. M/WBE utilization by business ownership classification was:

- ◆ 10.25 percent for African American firms (\$23.26 million);
- ◆ 2.70 percent for Asian American firms (\$6.12 million);
- ◆ 2.56 percent for Nonminority Female firms (\$5.81 million);
- ◆ 0.02 percent for Native American firms (\$55,775); and
- ◆ 0.01 percent for Hispanic American firms (\$12,720).

The corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix D, Detailed Utilization Analyses**.

FIGURE 4-6
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,
GOODS OR COMMMODITIES



Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

4.2 UTILIZATION CONCLUSIONS

The utilization analysis shows that non-M/WBE firms are utilized at substantially higher rates than their M/WBE counterparts. Overall, 85.28 percent of the District's spending went to non-M/WBE firms, while only 14.72 percent went to M/WBE firms, with non-M/WBE utilization ranging from 68 to 98 percent by procurement category. Overall, the highest utilization rates among M/WBE classifications included Asian American firms and African American firms, accounting for 7.64 percent and 5.73 percent of dollars spent, respectively. Further analyzing the individual procurement categories, Professional Services saw the highest utilization of M/WBE firms with 31.48 percent while Construction saw the lowest utilization of M/WBE firms with 1.75 percent.

While non-M/WBE utilization is ostensibly quite high throughout the views on utilization that have been presented in this chapter, the proportion of firms willing and able to provide services to the District are a critical qualifying context in any determinations of disparity. Availability and resulting disparity ratios are presented in **Chapter 5**, which follows, to provide more definitive conclusions in this respect.

CHAPTER 5: Availability and Disparity Analysis
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

This chapter presents the results of the availability and disparity analyses of firms used in Shelby County Schools Board of Education procurements during July 1, 2011, through June 30, 2016. The specific procurement categories analyzed were Architecture & Engineering, Construction, Professional Services, Nonprofessional Services, and Goods and Supplies.

The importance of the availability and disparity analysis is that it lays the foundation to answer: *Are there disparities between the availability and utilization of M/WBEs?*

CHAPTER SECTIONS

1. Introduction
2. Methodology
3. Availability/Disparity Analysis
4. Conclusion

2. METHODOLOGY

2.1 AVAILABILITY

Estimating the availability of firms that has been adopted by the post-*Croson* case law and emphasize firms being qualified, ready, willing, and able to pursue work with an agency. Therefore, MGT staff analyzed the availability of firms using the following data sources: custom census, the Shelby County School District's (District) eSchool Mall vendor data and firms utilized during the study period by the District. Using these data sources, the availability was refined and restricted to firms located within the District's Relevant Market Area. All availability methods have strengths and weaknesses. It is true that this method can understate M/WBE availability, but the prime M/WBE availability percentages are not low in the report.

- ▶ **Prime Level Availability.** The Prime Availability Analysis was prepared using the District's eSchool Mall vendor's list and custom census Data. The Prime Availability Analysis also included firms utilized as primes in their respective business categories (Architecture & Engineering, Construction, Professional Services, and Other Services and Purchasing). There is case law where studies estimating availability based on vendor data have been upheld in federal court.¹⁴⁹

The sources of availability are not maintained by year therefore availability is not calculated by year like utilization or disparity.

2.2 DISPARITY

Disparity, in this context, is the analysis of the differences between the utilization of minority- and women-owned firms and the availability of those firms. As a result, MGT calculated disparity indices to examine whether minority- and women-owned firms received a proportional share of dollars based on the availability of minority- and women-owned firms located in the study's relevant market area, which is the District's Relevant Market Area. The detailed disparity indices by procurement category, study period, and business ownership classification are found in **Appendix G, Detailed Disparity Analyses**.

¹⁴⁹*H.B. Rowe v. North Carolina DOT*, 589 FSupp.2d 587 (ED NC 2008).

The use of disparity indices for such calculations is supported by several post-*Croson* cases, most notably *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*.¹⁵⁰ Although a variety of similar indices could be utilized, MGT’s standard for choosing a particular index methodology is that it must yield a value that is easily calculable, understandable in its interpretation, and universally comparable such that a disparity in utilization within minority- and women-owned firms can be assessed with reference to the utilization of nonminority-owned firms.

**DISPARITY INDEX
FORMULA**

Disparity Index =

$\%U_{mip_i} \div \%A_{mip_i} \times 100$

U_{mip_i} = utilization of minority- and women-owned firms_i for procurement_i

A_{mip_i} = availability of minority- and women-owned firms_i for procurement_i

Due to the mathematical properties involved in the disparity index calculations, a disparity index value of zero (0.00) indicates absolutely no utilization and, therefore, absolute disparity. A disparity index of 100 indicates that utilization is perfectly proportionate to availability, therefore indicating the absence of disparity (that is, all things being equal). Generally, firms are considered underutilized if the disparity indices are less than 100, and overutilized if the indices are above 100.

Since there is no standardized measurement to evaluate the levels of underutilization or overutilization within a procurement context, MGT’s methodology to measure disparity, if disparity is found, is based on the Equal Employment Opportunity Commission’s (EEOC) “80 percent rule.”¹⁵¹ In the employment discrimination framework, an employment disparity index below 80 indicates a “substantial disparity.” The Supreme Court has accepted the use of the “80 percent rule” in *Connecticut v. Teal (Teal)*, 457 U.S. 440 (1982).¹⁵² Therefore, firms are considered substantially underutilized (substantial disparity) if the disparity indices are 80 or less.

3. AVAILABILITY AND DISPARITY ANALYSIS

The following charts calculate the disparity index and statistical significance using the percentage of utilization and percentage of availability in the Shelby County relevant market area. The detailed estimates of availability for the relevant market area are found in **Appendix F, Detailed Availability Analyses**.

Table 5-1 shows that there is underutilization for minority firms in Architecture & Engineering. The disparity index for nonminority women is 143.46 indicating overutilization. However, M/WBE firms were underutilized.

¹⁵⁰*Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F 3d at 603.

¹⁵¹ Equal Employment Opportunity Commission, *Uniform Guidelines on Employee Selection Procedures*.

¹⁵² In *Teal* and other affirmative action cases, the terms “adverse impact,” “disparate impact,” and “discriminatory impact” are used interchangeably to characterize values of 80 and below.

TABLE 5-1
PRIME DISPARITY
ARCHITECTURE & ENGINEERING

YEAR	BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
			(%)				
Total	African American Firms	0.08%	10.89%	0.76	Underutilization	*	¥¥
	Asian American Firms	0.00%	2.42%	0.00	Underutilization	*	¥¥
	Hispanic American Firms	0.00%	0.81%	0.00	Underutilization	*	¥¥
	Native American Firms	0.00%	0.40%	0.00	Underutilization	*	¥¥
	TOTAL MINORITY FIRMS	0.08%	14.52%	0.57	Underutilization	*	¥¥
	Nonminority Women Firms	7.52%	5.24%	143.46	Overutilization		¥¥
	TOTAL M/WBE FIRMS	7.60%	19.76%	38.48	Underutilization	*	¥¥
	Non-M/WBE Firms	92.40%	80.24%	115.15	Overutilization		¥¥

Source: MGT developed the Utilization Analysis and Availability Analysis for the study.

Disparity index is the ration of the percentage of dollars to the percentage of available firms multiplied by 100.00.

The index is based on actual percentage value and not the rounded utilization and availability estimates percentage values presented. The disparity indices have been rounded.

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

The totals may not equal the sum of components due to rounding.

In the Construction procurement category minority and nonminority women were underutilized. **Table 5-2** illustrates the disparity indices for each business ownership classification. Availability for African American firms in Construction was the highest at 36.26 percent.

TABLE 5-2
PRIME DISPARITY
CONSTRUCTION

YEAR	BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
			(%)				
Total	African American Firms	0.46%	36.26%	1.28	Underutilization	*	¥¥
	Asian American Firms	0.00%	0.98%	0.09	Underutilization	*	¥¥
	Hispanic American Firms	0.08%	2.71%	3.06	Underutilization	*	¥¥
	Native American Firms	0.00%	0.43%	0.00	Underutilization	*	¥¥
	TOTAL MINORITY FIRMS	0.55%	40.39%	1.35	Underutilization	*	¥¥
	Nonminority Women Firms	1.21%	6.19%	19.50	Underutilization	*	¥¥
	TOTAL M/WBE FIRMS	1.75%	46.58%	3.76	Underutilization	*	¥¥
	Non-M/WBE Firms	98.25%	53.42%	183.91	Overutilization		¥¥

Source: MGT developed the Utilization Analysis and Availability Analysis for the study.

Disparity index is the ration of the percentage of dollars to the percentage of available firms multiplied by 100.00.

The index is based on actual percentage value and not the rounded utilization and availability estimates percentage values presented. The disparity indices have been rounded.

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

The totals may not equal the sum of components due to rounding.

Professional services minority firms were overutilized with a disparity index of 102.70 due to overutilization of Asian American firms where the index is 1125.41¹⁵³. However, M/WBEs were underutilized but not significantly. The M/WBE index falls between the 80-99 ratio where underutilization could be caused by other factors than disparate treatment as illustrated in **Table 5-3**.

TABLE 5-3
PRIME DISPARITY
PROFESSIONAL SERVICES

YEAR	BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
			(%)			*	¥¥
Total	African American Firms	10.61%	27.06%	39.19	Underutilization	*	¥¥
	Asian American Firms	20.07%	1.78%	1125.41	Overutilization		¥¥
	Hispanic American Firms	0.02%	0.92%	2.09	Underutilization	*	¥¥
	Native American Firms	0.00%	0.12%	0.00	Underutilization	*	
	TOTAL MINORITY FIRMS	30.70%	29.89%	102.70	Overutilization		
	Nonminority Women Firms	0.78%	9.10%	8.57	Underutilization	*	¥¥
	TOTAL M/WBE FIRMS	31.66%	38.99%	80.73	Underutilization		¥¥
	Non-M/WBE Firms	68.52%	61.01%	112.32	Overutilization		¥¥

Source: MGT developed the Utilization Analysis and Availability Analysis for the study.

Disparity index is the ration of the percentage of dollars to the percentage of available firms multiplied by 100.00.

The index is based on actual percentage value and not the rounded utilization and availability estimates percentage values presented. The disparity indices have been rounded.

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

The totals may not equal the sum of components due to rounding

¹⁵³ Asian American category had one firm as a high earner.

Table 5-4 illustrates the disparity indices for the Nonprofessional Services procurement category. The disparity index for minority and M/WBE firms are 28.63 and 23.94, respectively. Overall, both minority and M/WBE firms were significantly underutilized with African Americans having the greatest degree of disparity. Overall, minorities and M/WBE firms were underutilized and Asian Americans were overutilized but not at significant levels.

TABLE 5-4
PRIME DISPARITY
NONPROFESSIONAL SERVICES

YEAR	BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
			(%)				
Total	African American Firms	1.49%	41.06%	3.62	Underutilization	*	¥¥
	Asian American Firms	10.90%	1.45%	750.05	Overutilization		¥¥
	Hispanic American Firms	0.00%	0.76%	0.00	Underutilization	*	¥¥
	Native American Firms	0.02%	0.06%	34.59	Underutilization	*	
	TOTAL MINORITY FIRMS	12.41%	43.34%	28.63	Underutilization	*	¥¥
	Nonminority Women Firms	0.18%	9.22%	1.93	Underutilization	*	¥¥
	TOTAL M/WBE FIRMS	12.58%	52.56%	23.94	Underutilization	*	¥¥
	Non-M/WBE Firms	87.42%	47.44%	184.26	Overutilization		¥¥

Source: MGT developed the Utilization Analysis and Availability Analysis for the study.

Disparity index is the ration of the percentage of dollars to the percentage of available firms multiplied by 100.00.

The index is based on actual percentage value and not the rounded utilization and availability estimates percentage values presented. The disparity indices have been rounded.

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

The totals may not equal the sum of components due to rounding

Table 5-5 illustrates the disparity indices for the Goods and Commodities procurement category. The disparity index for minority and M/WBE firms are 28.63 and 23.94, respectively. Overall, both minority and M/WBE firms were significantly underutilized with African Americans having the greatest degree of disparity. Overall, minorities and M/WBE firms were underutilized and Asian Americans were overutilized but not at significant levels.

TABLE 5-5
PRIME DISPARITY
GOODS AND COMMODITIES

YEAR	BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
			(%)			*	¥¥
Total	African American Firms	10.25%	24.32%	42.13	Underutilization	*	¥¥
	Asian American Firms	2.70%	0.67%	400.27	Overutilization		¥¥
	Hispanic American Firms	0.01%	0.34%	1.66	Underutilization	*	¥¥
	Native American Firms	0.02%	0.04%	65.68	Underutilization	*	
	TOTAL MINORITY FIRMS	12.97%	25.36%	51.14	Underutilization	*	¥¥
	Nonminority Women Firms	2.56%	7.15%	35.81	Underutilization	*	¥¥
	TOTAL M/WBE FIRMS	15.53%	32.51%	47.77	Underutilization	*	¥¥
	Non-M/WBE Firms	84.47%	67.49%	125.16	Overutilization		¥¥

Source: MGT developed the Utilization Analysis and Availability Analysis for the study.

Disparity index is the ration of the percentage of dollars to the percentage of available firms multiplied by 100.00.

The index is based on actual percentage value and not the rounded utilization and availability estimates percentage values presented. The disparity indices have been rounded.

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

The totals may not equal the sum of components due to rounding.

4. CONCLUSION

The availability and disparity analysis show that non-M/WBE firms, overall, are utilized at substantially higher rates than their M/WBE counterparts. Across all the categories, M/WBE firms were underutilized. The most egregious underutilization occurred in Construction, where the disparity index was significant at 3.76. Individually, African Americans and Hispanic Americans continuously saw substantial levels of underutilization across all categories. Asian Americans were the only minority group that saw overutilization in three of the five categories (Professional Services, Nonprofessional Services, and Goods and Commodities).

CHAPTER 6: Private Sector and Non-Goal Analyses
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

In **Chapter 2, Legal Framework**¹⁵⁴, MGT of America Consulting, LLC (MGT) detailed that the government entity enacting a minority- and women-owned business enterprise (M/WBE) program must have shown to have actively or passively perpetuated discrimination. The questions this chapter attempts to answer are:

- 1) Does Shelby County School District (District) passively engage in practices which result in disparities?
- 2) Are there disparities in utilization of M/WBE firms as prime contractors or subcontractors for commercial private sector construction projects relative to their availability?
- 3) Are there disparities for M/WBE firms in the entry into and earnings from self-employment?

The private sector analysis evaluates the presence or absence of discrimination in the private sector marketplace, and is used to determine if there is evidence to support anecdotal comments from **Chapter 7, Anecdotal Analysis**, regarding difficulties M/WBE firms have in securing work on private sector projects.

METHODOLOGY

MGT's methodology for the collection of data and the calculation of the District's market area serves as the basis for the analysis of private sector utilization of M/WBE firms and non-M/WBE firms and their availability is described in this section.

PRIVATE SECTOR ANALYSIS - RATIONALE

In *City of Richmond v. J.A. Croson (Croson)*, the Court established a "municipality has a compelling government interest in redressing not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality in some way participated in the discrimination to be remedied by the program."¹⁵⁵ This argument was reinforced by the Court of Appeals decision in *Adarand Construction, Inc. v. Rodney Slater*, concluding there was a compelling interest for a government Disadvantaged Business Enterprise (DBE) program, based primarily on evidence of private sector discrimination.¹⁵⁶ According to this argument, discriminatory practices found in the private sector marketplace may be indicative of government's passive or, in some cases, active participation in local discrimination. To remedy such discrimination, *Croson* provided government "can use its spending powers to remedy private discrimination, if it identifies discrimination with the particularity required by the Fourteenth Amendment."¹⁵⁷ Passive discrimination was examined in a disparity analysis of the utilization of M/WBE construction subcontractors by majority prime contractors on projects funded in District construction market. A comparison of public sector M/WBE utilization with private sector utilization enables an assessment of the extent to which majority

CHAPTER SECTIONS

1. Introduction
2. Collection and Management of Permits Data
3. Private Sector Disparities
4. Analysis of Race, Ethnicity, and Gender Effects on Self-Employment Rates
5. Conclusion

¹⁵⁴ Refer to **Chapter 2, Legal Framework**, Section 4.1.

¹⁵⁵ *Croson*, 488 U.S. 469, (1989) 109 US Reporter at 720-21, 744-45.

¹⁵⁶ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

¹⁵⁷ See *Richmond v. Croson*, 488 U.S. at. 492.

prime contractors have tended to hire M/WBE subcontractors only to satisfy public sector requirements. Thus, MGT will attempt to address the following questions:¹⁵⁸

- ◆ Are there disparities in utilization of M/WBE firms as prime contractors for commercial private sector construction projects relative to their availability?
- ◆ Are there disparities in utilization of M/WBE firms as subcontractors for commercial private sector construction projects relative to their availability?
- ◆ To what extent are contractors utilized on District projects also utilized on private sector construction projects?

2. COLLECTION AND MANAGEMENT OF PERMITS DATA

To conduct a proper permit analysis, the following information is necessary:

- ◆ Permit Type Text
- ◆ Permit #
- ◆ Project Description
- ◆ Scope of Work Provided
- ◆ Owner of Project
- ◆ Owner Address, City, State, ZIP Code
- ◆ Contractor Professional Name, Contact Name, Phone Number
- ◆ Subdivision Location
- ◆ Date Issued
- ◆ Dollar Value of Permit

MGT attempted to collect this data from the District but the data available did not include dollar value of the permits or scope of work provided. Without this information readily available permits cannot be broken out into only private sector permits which are classified by the type of work conducted. Further, without the value of the permits, it cannot be determined if there are disparities in utilization of M/WBE firms. As such, MGT was unable to conduct the permit analysis.

MARKET AREA METHODOLOGY

A United States county is the geographical unit of measure selected for determining market area. Counties are geographical units based on the following considerations: 1) the courts have accepted counties as a standard geographical unit of analysis in conducting equal employment opportunity and disparity analyses; 2) county boundaries are externally determined and thus free from any researcher bias resulting from any arbitrary determinations of geographical units of analysis; and 3) the U.S. Census and other federal and state data are routinely collected and reported by county.

The market area for the study was determined to be Shelby County. The private sector analysis also presents private sector disparities results based on the U.S. Census, 2012 Survey of Business Owners data for the Memphis, TN-MS-AR Metropolitan Statistical Area (MSA).

The analysis of race, ethnicity, and gender effects on self-employment rates and earnings results was based on Public Use Microdata Samples (PUMS) data derived from the 2011-2015 American Community Survey (ACS) for the Memphis, TN-MS-AR MSA marketplaces.

¹⁵⁸ Due to the limitations of the data, MGT was unable to conduct an analysis of commercial permits.

BUSINESS OWNERSHIP CLASSIFICATION AND PROCUREMENT CATEGORY

The five M/WBE classifications described—African American, Hispanic American, Asian American, Native American, and nonminority women—were used as the basis of MGT’s analysis for business ownership classification. The procurement categories are the same as the previous analyses – Architecture & Engineering, Construction, Professional Services, Nonprofessional Services, and Goods and Commodities.

3. PRIVATE SECTOR DISPARITIES

In addition to the PUMS data derived from the 2011-2015 ACS¹⁵⁹, MGT obtained and analyzed U.S. Census Bureau’s 2012 Survey of Business Owners (SBO) to measure private sector disparities. The SBO provides data on economic and demographic characteristics for businesses and business owners by geography (such as states and metropolitan areas), industries defined by North American Industry Classification System (NAICS) codes, firm receipts (firm sales),¹⁶⁰ firm employment size, and business ownership classification. The survey has been administered every five years since 1972 as part of the economic census. The most recent data, 2012 SBO, was released in 2016 and used in the study. The SBO gathers data on firms with paid employees, including workers on the payroll (employer firms) and firms without paid employees, such as sole proprietors and partners of unincorporated businesses that do not have any other employees on the payroll (non-employer firms). All firms represent a compilation of employer firms and non-employer firms.

The following presents measures of private sector disparities based on 2012 SBO data. MGT calculated private sector disparity indices to examine whether minority- and women-owned firms received a proportional share of firm sales based on the availability of minority- and women-owned firms. Disparity indices were examined for all firms and employer firms. All firms were examined since it is plausible non-employer firms can provide services at the subcontractor/subconsultant level, as well as hire independent contractors to increase capacity.

The following NAICS codes were analyzed and the results presented in the following sections for the Memphis, TN-MS-AR MSA¹⁶¹ marketplaces:

- ◆ NAICS Code 23, Construction
- ◆ NAICS Code 42, Wholesale Trade
- ◆ NAICS Code 54, Professional, Scientific, and Technical Services
- ◆ NAICS Code 56, Administrative and Support and Waste Management and Remediation Services
- ◆ NAICS Code 81, Other Services (Except Public Administration)

¹⁵⁹ Chapter 6, Section 6, Analysis of Race, Ethnicity, and Gender Effects on Self-Employment Rates and Earnings presents analysis on the effects of race and gender, along with other individual economic and demographic characters, on individuals’ participation in the private sector as self-employed business owners.

¹⁶⁰ Sales includes total shipments, receipts, revenue, or business done by the firm.

¹⁶¹ Memphis, TN-MS-AR MSA includes Fayette, Shelby, Tipton counties, TN; DeSoto, Marshall, Tate, Tunica counties, MS; and Crittenden county, AR.

MEMPHIS, TN-MS-AR MSA MARKETPLACE

Tables 6-1 through **6-5** show the measures of private sector disparities based on U.S. Census, 2012 SBO data for the population of available firms in the Memphis, TN-MS-AR MSA marketplace by race, ethnicity, and gender for construction; wholesale trade; professional, scientific, and technical services; administrative and support and waste management and remediation services; and other services (except public administration).

Based on the analysis of the U.S. Census, 2012 SBO data, overall there remains a significant gap between the market share of M/WBE firms and their share of the Memphis, TN-MS-AR MSA marketplace business population, where data were available.

NAICS CODE 23: CONSTRUCTION

Table 6-1 shows the availability, sales, and disparity results for construction (NAICS Code 23). There were a total of 12,119 construction firms (all firms¹⁶²) in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 32.21 percent were owned by minorities.

- ◆ African American firms (disparity index 8.27) were substantially underutilized, accounting for 22.23 percent of all firms and 1.84 percent of sales.
- ◆ Asian American firms (disparity index 59.94) were substantially underutilized, accounting for 0.68 percent of all firms and 0.41 percent of sales.
- ◆ Hispanic American firms (disparity index 22.45) were substantially underutilized, accounting for 7.67 percent of all firms and 1.72 percent of sales.
- ◆ Native American firms (disparity index 11.04) were substantially underutilized, accounting for 1.62 percent of all firms and 0.18 percent of sales.
- ◆ Data for nonminority women all firms were withheld; therefore, private sector disparities were not conducted.

There was a total of 1,511 construction employer firms¹⁶³ in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 4.63 percent were owned by minorities.

- ◆ African American firms (disparity index 36.64) were substantially underutilized, accounting for 2.12 percent of employer firms and 0.78 percent of sales.
- ◆ Data for Asian American employer firms were withheld; therefore, private sector disparities were not conducted.
- ◆ Hispanic American firms (disparity index 55.57) were substantially underutilized, accounting for 1.46 percent of employer firms and 0.81 percent of sales.
- ◆ Data for Native American employer firms were withheld; therefore, private sector disparities were not conducted.

¹⁶² All firms include firms with and without payroll at any time during 2012.

¹⁶³ Employer firms include firms with payroll at any time during 2012.

- ◆ Data for nonminority women employer firms were withheld; therefore, private sector disparities were not conducted.

TABLE 6-1
 PRIVATE SECTOR CENSUS DISPARITIES
 NAICS CODE 23, CONSTRUCTION
 U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
 MEMPHIS, TN-MS-AR MSA MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	12,119	\$5,100,309	1,511	\$4,564,875
African American Firms	2,694	\$93,711	32	\$35,425
Asian American Firms ¹	196	\$9,109	10	S
Hispanic American Firms	83	\$20,938	6	S
Native American Firms ²	930	\$87,863	22	\$36,935
Nonminority Women Firms ³	S	S	S	S
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	22.23%	1.84%	2.12%	0.78%
Asian American Firms ¹	1.62%	0.18%	0.66%	S
Hispanic American Firms	0.68%	0.41%	0.40%	S
Native American Firms ²	7.67%	1.72%	1.46%	0.81%
Nonminority Women Firms ³	S	S	S	S
DISPARITY INDEX				
	ALL FIRMS		EMPLOYER FIRMS	
All Firms	100.00		100.00	
African American Firms	8.27		36.64	
Asian American Firms ¹	11.04		0.00	
Hispanic American Firms	59.94		0.00	
Native American Firms ²	22.45		55.57	
Nonminority Women Firms ³	S		S	

Source: MGT conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

² Native American consists of American Indian- and Alaska Native-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

NAICS CODE 42: WHOLESALE TRADE

Table 6-2 shows the availability, sales, and disparity results for wholesale trade (NAICS Code 42). There was a total of 3,081 wholesale trade firms (all firms) in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 17.92 percent were owned by minorities.

- ◆ African American firms (disparity index of 0.16) were substantially underutilized, accounting for 13.57 percent of all firms and 0.02 percent of sales.
- ◆ Asian American firms (disparity index of 51.04) were substantially underutilized, accounting for 3.12 percent of all firms and 1.59 percent of sales.
- ◆ Hispanic American firms (disparity index of 13.12) were substantially underutilized, accounting for 1.23 percent of all firms and 0.16 percent of sales.
- ◆ Data for Native American and nonminority women category “all firms” were withheld; therefore, private sector disparities were not conducted.

There was a total of 1,586 wholesale trade employer firms in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 5.30 percent were owned by minorities.

- ◆ African American firms (disparity index 1.06) were substantially underutilized, accounting for 1.01 percent of employer firms and 0.01 percent of sales.
- ◆ Hispanic American firms (disparity index of 84.55) were underutilized, accounting for 0.19 percent of employer firms and 0.16 percent of sales.
- ◆ Data for Asian American, Native American, and nonminority women employer firms were withheld; therefore, private sector disparities were not conducted.

TABLE 6-2
 PRIVATE SECTOR CENSUS DISPARITIES
 NAICS CODE 42, WHOLESALE TRADE
 U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
 MEMPHIS, TN-MS-AR MSA MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	3,081	\$66,561,375	1,586	\$66,439,864
African American Firms	418	\$14,559	16	\$7,082
Asian American Firms ¹	S	S	S	S
Hispanic American Firms	96	\$1,058,509	65	S
Native American Firms ²	38	\$107,725	3	\$106,262
Nonminority Women Firms ³	S	S	S	S
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	13.57%	0.02%	1.01%	0.01%
Asian American Firms ¹	0.00%	S	S	S
Hispanic American Firms	3.12%	1.59%	4.10%	S
Native American Firms ²	1.23%	0.16%	0.19%	0.16%
Nonminority Women Firms ³	S	S	S	S
DISPARITY INDEX				
	ALL FIRMS		EMPLOYER FIRMS	
All Firms	100.00		100.00	
African American Firms	0.16		1.06	
Asian American Firms ¹	S		S	
Hispanic American Firms	51.04		S	
Native American Firms ²	13.12		84.55	
Nonminority Women Firms ³	S		S	

Source: MGT conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

² Native American consists of American Indian- and Alaska Native-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

NAICS CODE 54: PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES

Table 6-3 shows the availability, sales, and disparity results for professional, scientific, and technical services (NAICS Code 54). There was a total of 12,330 professional, scientific and technical services firms (all firms) in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 26.99 percent were owned by minorities.

- ◆ African American firms (disparity index of 8.80) were substantially underutilized, accounting for 22.19 percent of all firms and 1.95 percent of sales.
- ◆ Native American firms (disparity index of 15.16) were substantially underutilized, accounting for 0.49 percent of all firms and 0.08 percent of sales.
- ◆ Asian American firms (disparity index of 52.73) were substantially underutilized, accounting for 2.66 percent of all firms and 1.40 percent of sales.
- ◆ Hispanic American firms (disparity index of 15.14) were substantially underutilized, accounting for 1.65 percent of all firms and 0.25 percent of sales.
- ◆ Data for nonminority women category “all firms” were withheld; therefore, private sector disparities were not conducted.

There was a total of 1,939 professional, scientific and technical services employer firms in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 8.10 percent were owned by minorities.

- ◆ African American firms (disparity index of 14.24) were substantially underutilized, accounting for 5.26 percent of employer firms and 0.75 percent of sales.
- ◆ Asian American firms (disparity index of 45.13) were substantially underutilized, accounting for 2.63 percent of employer firms and 1.19 percent of sales.
- ◆ Hispanic American firms (disparity index of 60.12) were substantially underutilized, accounting for 0.21 percent of employer firms and 0.12 percent of sales.
- ◆ Data for Native American and nonminority women employer firms withheld; therefore, private sector disparities were not conducted.

TABLE 6-3
 PRIVATE SECTOR CENSUS DISPARITIES
 NAICS CODE 54, PROFESSIONAL, SCIENTIFIC AND TECHNICAL SERVICES
 U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
 MEMPHIS, TN-MS-AR MSA MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	12,330	\$3,327,910	1,939	\$2,947,068
African American Firms	2,736	\$65,011	102	\$22,073
Asian American Firms ¹	61	\$2,496	S	S
Hispanic American Firms	328	\$46,681	51	\$34,983
Native American Firms ²	203	\$8,293	4	\$3,655
Nonminority Women Firms ³	S	S	S	S
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	22.19%	1.95%	5.26%	0.75%
Asian American Firms ¹	0.49%	0.08%	S	S
Hispanic American Firms	2.66%	1.40%	2.63%	1.19%
Native American Firms ²	1.65%	0.25%	0.21%	0.12%
Nonminority Women Firms ³	S	S	S	S
DISPARITY INDEX				
	ALL FIRMS		EMPLOYER FIRMS	
All Firms	100.00		100.00	
African American Firms	8.80		14.24	
Asian American Firms ¹	15.16		S	
Hispanic American Firms	52.73		45.13	
Native American Firms ²	15.14		60.12	
Nonminority Women Firms ³	S		S	

Source: MGT conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

² Native American consists of American Indian- and Alaska Native-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

NAICS CODE 56: ADMINISTRATIVE AND SUPPORT AND WASTE MANAGEMENT AND REMEDIATION SERVICES

Table 6-4 shows the availability, sales, and disparity results for administrative and support and waste management and remediation services (NAICS Code 56). There was a total 13,196 administrative and support and waste management and remediation services firms (all firms) in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 65 percent were owned by minorities.

- ◆ African American firms (disparity index of 7.12) were substantially underutilized, accounting for 59.83 percent of all firms and 4.26 percent of sales.
- ◆ Asian American firms (disparity index of 44.41) were substantially underutilized, accounting for 0.81 percent of all firms and 0.36 percent of sales.
- ◆ Hispanic American firms (disparity index of 37.65) were substantially underutilized, accounting for 3.92 percent of all firms and 1.48 percent of sales.
- ◆ Native American firms (disparity index of 9.57) were substantially underutilized, accounting for 0.04 percent of all firms and 0.42 percent of sales.
- ◆ Data for nonminority women category “all firms” were withheld; therefore, private sector disparities were not conducted.

There was a total of 954 administrative and support and waste management and remediation services employer firms in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 13.10 percent were owned by minorities.

- ◆ African American firms (disparity index of 20.77) were substantially underutilized, accounting for 9.85 percent of employer firms and 2.05 percent of sales.
- ◆ Hispanic American firms (disparity index of 49.22) were substantially underutilized, accounting for 2.62 percent of employer firms and 1.29 percent of sales.
- ◆ Data for Asian American, Native American, and nonminority women employer firms withheld; therefore, private sector disparities were not conducted.

TABLE 6-4
PRIVATE SECTOR CENSUS DISPARITIES
NAICS CODE 56
ADMINISTRATIVE AND SUPPORT / WASTE MANAGEMENT AND REMEDIATION SERVICES
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
MEMPHIS, TN-MS-AR MSA MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	13,196	\$3,251,547	954	\$3,076,000
African American Firms	7,895	\$138,502	94	\$62,952
Asian American Firms ¹	58	\$1,367	4	S
Hispanic American Firms	107	\$11,709	2	S
Native American Firms ²	517	\$47,962	25	\$39,672
Nonminority Women Firms ³	S	S	S	S
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	59.83%	4.26%	9.85%	2.05%
Asian American Firms ¹	0.44%	0.04%	0.42%	S
Hispanic American Firms	0.81%	0.36%	0.21%	S
Native American Firms ²	3.92%	1.48%	2.62%	1.29%
Nonminority Women Firms ³	S	S	S	S
DISPARITY INDEX				
	ALL FIRMS		EMPLOYER FIRMS	
All Firms	100.00		100.00	
African American Firms	7.12		20.77	
Asian American Firms ¹	9.57		S	
Hispanic American Firms	44.41		S	
Native American Firms ²	37.65		49.22	
Nonminority Women Firms ³	S		S	

Source: MGT conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

² Native American consists of American Indian- and Alaska Native-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

NAICS CODE 81: OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION)

Table 6-5 shows the availability, sales, and disparity results for NAICS Code 81, other services (except public administration). There were a total 28,105 other services (except public administration) firms (all firms) in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 75.44 percent were owned by minorities.

- ◆ African American firms (disparity index of 22.32) were substantially underutilized, accounting for 69.60 percent of all firms and 15.54 percent of sales.
- ◆ Asian American firms (disparity index of 91.74) were underutilized, accounting for 3.63 percent of all firms and 3.33 percent of sales.
- ◆ Hispanic American firms (disparity index of 52.35) were substantially underutilized, accounting for 1.66 percent of all firms and 0.87 percent of sales.
- ◆ Data for Native American and nonminority women category “all firms” were withheld; therefore, private sector disparities were not conducted.

There was a total of 1,135 other services (except public administration) employer firms in the Memphis, TN-MS-AR MSA marketplace in 2012, of which 11.81 percent were owned by minorities.

- ◆ African American firms (disparity index of 35.86) were substantially underutilized, accounting for 4.76 percent of employer firms and 1.71 percent of sales.
- ◆ Asian American firms (disparity index of 30.78) were substantially underutilized, accounting for 6.78 percent of employer firms and 2.09 percent of sales.
- ◆ Hispanic American firms (disparity index of 252.88) were substantially underutilized, accounting for 0.26 percent of employer firms and 0.67 percent of sales.
- ◆ Data for Native American and nonminority women employer firms were withheld; therefore, private sector disparities were not conducted.

TABLE 6-5
 PRIVATE SECTOR CENSUS DISPARITIES
 NAICS CODE 81, OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION)
 U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
 MEMPHIS, TN-MS-AR MSA MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	28,105	\$1,449,525	1,135	\$901,535
African American Firms	19,562	\$225,206	54	\$15,383
Native American Firms ¹	152	S	S	S
Asian American Firms ²	1,021	\$48,307	77	\$18,828
Hispanic American Firms	467	\$12,608	3	\$6,026
Nonminority Women Firms ³	S	S	S	S
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	69.60%	15.54%	4.76%	1.71%
Native American Firms ¹	0.54%	S	S	S
Asian American Firms ²	3.63%	3.33%	6.78%	2.09%
Hispanic American Firms	1.66%	0.87%	0.26%	0.67%
Nonminority Women Firms ³	S	S	S	S
DISPARITY INDEX				
	ALL FIRMS		EMPLOYER FIRMS	
All Firms	100.00		100.00	
African American Firms	22.32		35.86	
Native American Firms ¹	S		S	
Asian American Firms ²	91.74		30.78	
Hispanic American Firms	52.35		252.88	
Nonminority Women Firms ³	S		S	

Source: MGT conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

² Native American consists of American Indian- and Alaska Native-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

4. ANALYSIS OF RACE, ETHNICITY, AND GENDER EFFECTS ON SELF-EMPLOYMENT RATES

The purpose of this analysis is to examine the effects of race and gender, along with other individual economic and demographic characteristics, on individuals' participation in the private sector as self-employed business operators, and on their earnings based on their participation in five procurement categories of private sector business activity in the District's Public Use Microdata Areas (PUMA)¹⁶⁴. Findings for minority business enterprises are compared to the self-employment participation and earnings record of nonminority male business owners to determine if a disparity in self-employment rates and earnings exists, and if it is attributable to differences in race, ethnicity, and gender. Adopting the methodology and variables employed by a city of Denver disparity study (see *Concrete Works v. City and County of Denver*¹⁶⁵), we use Public Use Microdata Samples (PUMS) data derived from the 2011-2015 American Community Survey (ACS), to which we apply appropriate regression statistics to draw conclusions.

To guide this investigation, three general research questions were posed. Questions and variables used to respond to each, followed by a report of findings, are reported below:

1. *Are racial, ethnic, and gender minority groups less likely than nonminority males to be self-employed?*

This analysis examined the statistical effects of the following variables on the likelihood of being self-employed in the PUMA: Race, ethnicity, and gender of business owner (African American, Asian American, Hispanic American, Native American, nonminority female, nonminority men), marital status, age, self-reported health-related disabilities, availability of capital (household property value, monthly total mortgage payments, unearned income), other characteristics (number of individuals over the age of 65 living in household, number of children under the age of 18 living in household), and level of education.

FINDING:

- ◆ In all industries, nonminority males were nearly three times as likely to be self-employed as African Americans.¹⁶⁶
- ◆ In all industries, nonminority males were over two times as likely to be self-employed as nonminority females.
- ◆ Nonminority males were over four times as likely as African Americans to be self-employed in the professional services.
- ◆ Nonminority males were nearly four times as likely as nonminority females to be self-employed in the professional services.

2. *Does racial, ethnic, and gender status have an impact on individual's self-employment earnings?*

This analysis examined the statistical effects of the following variables on income from self-employment for business owners in the PUMA: Race, ethnicity, and gender of business owner (African

¹⁶⁴ Memphis-Forest City, TN-MS-AR consist of the MSA counties identified in footnote 9 plus Benton County, MS, St. Francis County, AR.

¹⁶⁵ *Concrete Works v. City and County of Denver*, 321 F.3 950 (10th Cir. 2003).

¹⁶⁶ These "likelihood" characteristics were derived from **Table I-2** by calculating the inverse of the reported odds ratios.

American, Asian American, Hispanic American, Native American, nonminority female, nonminority men), marital status, age, self-reported health-related disabilities, availability of capital (household property value, monthly total mortgage payments, unearned income), and level of education.

FINDING:

- ◆ In the PUMA, African Americans and nonminority females reported significantly lower earnings in all business type categories.
- ◆ Overall, African Americans reported significantly lower earnings than nonminority males: 59.8 percent less.
- ◆ In the professional services, African Americans reported significantly lower earnings than nonminority males: 76.8 percent less.
- ◆ The most egregious effect on earnings elasticities was found in the other services for nonminority females. In other services, nonminority females earned 76.9 percent less than nonminority males.

3. *If minority and female-owned business enterprises (M/WBEs) and nonminority male owned firms shared similar traits and marketplace “conditions” (i.e., similar “rewards” in terms of capital and asset accrual), what would be the effect on rates of self-employment by race, ethnicity, and gender?*

Derived from a similar model employed by a city of Denver disparity study, MGT created a model that leveraged statistical findings in response to the first two questions to determine if race, gender, and ethnic effects derived from those findings would persist if nonminority male demographic and economic characteristics were combined with M/WBE self-employment data. More precisely, in contrast to Question 1, which permitted a comparison of self-employment rates based on demographic and economic characteristics reported by the 2011-2015 census for individual M/WBE categories and nonminority males, respectively, this analysis posed the question, “How would M/WBE rates change, if M/WBE’s operated in a nonminority male business world and how much of this change is attributable to race, gender, or ethnicity?”

FINDING:

- ◆ Overall, comparing self-employed nonminority males with self-employed African Americans, over 90 percent of the disparity in self-employment rates was attributable to race differences.
- ◆ Comparing self-employed nonminority males with self-employed African Americans in professional services, over 94 percent of the disparity in self-employment rates was attributable to race differences.
- ◆ Comparing self-employed nonminority males with self-employed nonminority female in other services, over 45 percent of the disparity in self-employment rates was attributable to race differences.
- ◆ Comparing self-employed nonminority males with self-employed Hispanic Americans in goods and commodities, over 24 percent of the disparity in self-employment rates was attributable to race differences.

This chapter analyzes the relative availability of minority-owned, nonminority women-owned, and nonminority male-owned firms in five categories of private sector business activity in the District PUMA. The goal of this investigation is to separate the effects of race and gender from the effects of other economic and demographic characteristics on participation in the private sector as self-employed

business operators, and on earnings as a result of that participation. We compared these findings to the self-employment participation and earnings record of nonminority male business owners to determine if a disparity in self-employment rates and earnings exists, and if so whether it is attributable to racial or gender discrimination in the marketplace. Data for this investigation are provided by the PUMS data derived from the 2011-2015 American Community Survey, to which we apply appropriate regression statistics to draw conclusions. **Table 6-6** presents a general picture of self-employment rates by race, median earnings, and sample sizes (n's) in PUMA, calculated from the 5-percent PUMS census sample. The 5-percent PUMS census sample is utilized as it represents the most accurate sample size for larger market areas.

The next section will discuss the research basis for this examination to lay the groundwork for a description of the models and methodologies to be employed. This will be followed by a presentation of findings regarding minority status effects on self-employment rates, self-employment earnings, and attributions of these differences to discrimination, per se.

TABLE 6-6
PERCENTAGE SELF-EMPLOYED EARNINGS BY
RACIAL, ETHNIC, AND GENDER BUSINESS OWNERSHIP CLASSIFICATION

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF SELF-EMPLOYED	2015 SAMPLE CENSUS n	2015 MEDIAN EARNINGS
Non-M/WBE Firms	14.90%	128	\$57,500.00
African American Firms	4.54%	44	\$30,000.00
Hispanic American Firms	8.85%	10	\$49,000.00
Asian American Firms	13.75%	11	\$73,200.00
Native American Firms	*	*	*
Nonminority Female Firms	7.31%	43	\$40,000.00
TOTAL	9.00%	236	\$49,150.00

Source: PUMS data from 2011-2015 American Community Survey (District PUMA) and MGT, calculations using SPSS Statistics software.

SELF-EMPLOYMENT RATES AND EARNINGS AS AN ANALOG OF BUSINESS FORMATION AND MAINTENANCE

Research in economics consistently supports the finding of group differences by race and gender in rates of business formation (see *Journal of Econometrics*, Vol. 61, Issue 1, devoted entirely to the econometrics of labor market discrimination and segregation). For a disparity study, however, the fundamental question is “How much of this difference is due to factors that would appear, at least superficially, to be related to group differences other than race, ethnicity, or gender, and how much can be attributed to discrimination effects related to one’s race/ethnic/gender affiliation?” We know, for instance, that most minority groups have a lower median age than do non-Hispanic whites (ACS PUMS, 2011-2015). We also know, in general, the likelihood of being self-employed increases with age (ACS PUMS, 2011-2015). When social scientists speak of nonracial group differences, they are referring to such things as general differences in religious beliefs as these might influence group attitudes toward contraception, and, in turn, both birthrates and median age. A disparity study, therefore, seeks to examine these other important demographic and economic variables in conjunction with race and ethnicity, as they influence group rates of business formation, to determine if we can assert that discrimination against minorities is sufficiently present to warrant consideration of public sector legal remedies such as affirmative action and minority set-aside contracting.

Questions about marketplace dynamics affecting self-employment—or, more specifically, the odds of being able to form one’s own business and then to excel (i.e., generate earnings growth)—are at the heart of disparity analysis research. Whereas early disparity studies tended to focus on gross racial disparities, merely documenting these is insufficient for inferring discrimination effects per se without “partialling out” effects due to nondiscriminatory factors. Moreover, to the extent that discrimination exists, it is likely to inhibit both the formation of minority business enterprises and their profits and growth. Consequently, earlier disparity study methodology and analysis have failed to account for the effects of discrimination on minority self-employment in at least two ways: (1) a failure to account adequately for the effects of discriminatory barriers minorities face “up front” in attempting to form businesses; and (2) a failure to isolate and methodologically explain discrimination effects once minority businesses are formed.

The next section addresses these shortcomings, utilizing PUMS data derived from the 2011-2015 U.S. Census to answer research questions about the effects of discrimination on self-employment and self-employment earnings using multiple regression statistics.

RESEARCH QUESTIONS, STATISTICAL MODELS, AND METHODS

Two general research questions were posed in the initial analysis:

1. Are racial, ethnic, and gender minority groups less likely than nonminority males to be self-employed?
2. Does racial, ethnic, and gender status have an impact on individuals’ earnings?

A third question, to be addressed later—How much does racial, ethnic, and gender discrimination influence the probability of being self-employed? —draws conclusions based on findings from questions one and two.

To answer the first two questions, we employed two multivariate regression techniques, respectively: logistic regression and linear regression. To understand the appropriate application of these regression techniques, it is helpful to explore in greater detail the questions we are trying to answer. The dependent variables in questions I and II—that is, the phenomena to be explained by influences such as age, race, gender, and disability status, for example (the independent or “explanatory” variables)—are, respectively: the probability of self-employment status (a binary, categorical variable based on two possible values: 0 = not self-employed/1 = self-employed) and 2011-2015 earnings from self-employment (a continuous variable). In our analysis, the choice of regression approach was based on the scale of the dependent variable (in question I, a categorical scale with only two possible values, and in question II, a continuous scale with many possible values). Because binary logistic regression is capable of performing an analysis in which the dependent variable is categorical, it was employed for the analysis of question I.¹⁶⁷ To analyze question II, in which the dependent variable is continuous, we used simple linear regression.

¹⁶⁷ Logistical regression, or logit, models generate predicted probabilities that are almost identical to those calculated by a probit procedure, used in *Concrete Works v. City and County of Denver* case. Logit, however, has the added advantage of dealing more effectively with observations at the extremes of a distribution. For a complete explanation, see *Interpreting Probability Models* (T.F. Liao, Text 101 in the Sage University series).

THE SIMPLE LINEAR AND LOGISTIC REGRESSION MODELS

The logistic regression model can be derived with reference to the simple linear regression model expressed mathematically as:

$$Y = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \beta_4 X_4 + \beta_5 X_5 + \dots + \varepsilon$$

Where:

- Y = a continuous variable (e.g., 2011-2015 earnings from self-employment)
- β_0 = the constant, representing the value of Y when $X_i = 0$
- β_i = coefficient representing the magnitude of X_i 's effect on Y
- X_i = the independent variables, such as age, human capital (e.g., level of education), availability of capital, race/ethnicity/gender, etc.
- ε = the error term, representing the variance in Y unexplained by X_i

This equation may be summarized as:

$$E(Y) = \mu = \sum_{k=1}^K \beta_k x_k$$

in which Y is the dependent variable and μ represents the expected values of Y as a result of the effects of β , the explanatory variables. When we study a random distribution of Y using the linear model, we specify its expected values as a linear combination of K unknown parameters and the covariates or explanatory variables. When this model is applied to data in the analysis, we are able to find the statistical link between the dependent variable and the explanatory or independent variables.

Suppose we introduce a new term, η , into the linear model such that:

$$\eta = \mu = \sum_{k=1}^K \beta_k x_k$$

When the data are randomly distributed, the link between η and μ is linear, and a simple linear regression can be used. However, to answer the first question, the categorical dependent variable was binomially distributed. Therefore, the link between η and μ became $\eta = \log[\mu/(1 - \mu)]$ and logistic regression was utilized to determine the relationship between the dependent variable and the explanatory variables, calculated as a probability value (e.g., the probability of being self-employed when one is African American). The logistic regression model is expressed mathematically as:

$$\log[\mu/1(1 - \mu)] = \alpha + \beta_i X_n + \varepsilon$$

Where:

- $(\mu/1-\mu)$ = the probability of being self-employed
- α = a constant value
- β_i = coefficient corresponding to independent variables
- X_n = selected individual characteristic variables, such as age, marital status, education, race, and gender

ε = error term, representing the variance in Y unexplained by X_i

This model can now be used to determine the relationship between a single categorical variable (0 = not self-employed/1 = self-employed) and a set of characteristics hypothesized to influence the probability of finding a 0 or 1 value for the categorical variable. The result of this analysis illustrates not only the extent to which a characteristic can increase or decrease the likelihood that the categorical variable will be a 0 or a 1, but also whether the effect of the influencing characteristics is positive or negative in relation to being self-employed.

RESULTS OF THE SELF-EMPLOYMENT ANALYSIS

QUESTION ONE: ARE RACIAL, ETHNIC, AND GENDER MINORITY GROUPS LESS LIKELY THAN NONMINORITY MALES TO BE SELF-EMPLOYED?

To derive a set of variables known to predict employment status (self-employed/not self-employed), we used the 2011-2015 U.S. Census ACS 5-percent PUMS data. Logistic regression was used to calculate the probability of being self-employed, the dependent variable, with respect to socioeconomic and demographic characteristics selected for their potential to influence the likelihood of self-employment. The sample for the analysis was limited to labor force participants who met to the following criteria:

- ◆ Resident of the District's PUMA.
- ◆ Self-employed in construction, professional services, other services, architecture and engineering,¹⁶⁸ or goods and commodities.
- ◆ Employed full-time (more than 35 hours a week).
- ◆ 18 years of age or older.
- ◆ Employed in the private sector.

Next, we derived the following variables¹⁶⁹ hypothesized as predictors of employment status:

- ◆ **Race and Gender:** African American, Asian American, Hispanic American, Native American, nonminority woman, nonminority male.
- ◆ **Availability of Capital:** Homeownership, home value, mortgage rate, unearned income, residual income.
- ◆ **Marital Status.**
- ◆ **Ability to Speak English Well.**
- ◆ **Disability Status:** From individuals' reports of health-related disabilities.
- ◆ **Age and Age Squared:** Squaring the age variable acknowledges the positive, curvilinear relationship between each year of age and earnings.
- ◆ **Owner's Level of Education.**

¹⁶⁸ Due to inadequate sample size for all races in the architecture and engineering PUMS 2011-2015 data, the architecture and engineering categories were merged with the professional services category.

¹⁶⁹ The variables used in this analysis were modeled after those incorporated in the same analysis from *Concrete Works v. City and County of Denver*.

- ◆ *Number of Individuals Over the Age of 65 Living in Household.*
- ◆ *Number of Children Under the Age of 18 Living in Household.*

FINDINGS

Logistic regression analysis provided estimates of the relationship between the independent variables described above and the probability of being self-employed in the four types of business industries. In **Table 6-7**, odds ratios are presented by minority group, reporting the effect of race, ethnicity, and gender on the odds of being self-employed in 2011-2015, holding all other variables constant. Full regression results for all the variables are presented in **Appendix M, Public Use Microdata Sample (PUMS) Regression Analysis**.

TABLE 6-7
SELF-EMPLOYMENT “ODDS RATIOS” OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER
CONTROLLING FOR
SELECTED DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

BUSINESS OWNERSHIP CLASSIFICATION	ALL INDUSTRIES
African American Firms	0.350
Hispanic American Firms	0.932
Asian American Firms	0.957
Native American Firms	*
Nonminority Female Firms	0.475

Source: PUMS data from 2011-2015 American Community Survey (District PUMA) and MGT, calculations using SPSS Statistics software. Note: **Bold** indicates the estimated “odds ratio” for the group was statistically significant¹⁷⁰. The architecture and engineering business industry was excluded from this analysis because of the insufficient data.

The results reveal the following:

- ◆ In all industries, nonminority males were nearly three times as likely to be self-employed as African Americans.¹⁷¹
- ◆ In all industries, nonminority males were over two times as likely to be self-employed as nonminority females.
- ◆ Nonminority males were over four times as likely as African Americans to be self-employed in professional services.
- ◆ Nonminority males were nearly four times as likely as nonminority females in professional services.

QUESTION TWO: DOES RACIAL, ETHNIC, AND GENDER STATUS HAVE AN IMPACT ON INDIVIDUALS’ EARNINGS?

To answer this question, we compared self-employed, minority, and women entrepreneurs’ earnings to those of nonminority males in the District PUMA, when the effect of other demographic and economic characteristics was controlled or “neutralized.” That is, we were able to examine the earnings of self-

¹⁷⁰ Statistically significant is the likelihood that a relationship between two or more variables is caused by something other than random chance. MGT incorporates the statistical 95% confidence interval. This means that if the same population is sampled on numerous occasions and interval estimates are made on each occasion, the resulting intervals would bracket the true population parameter in approximately 95% of the cases.

¹⁷¹ These “likelihood” characteristics were derived from **Table 6-7** by calculating the inverse of the reported odds ratios.

employed individuals of similar education levels, ages, etc., to permit earnings comparisons by race, ethnicity, and gender.

First, we derived a set of independent variables known to predict earnings, including:

- ♦ ***Race and Gender:*** African American, Asian American, Hispanic American, Native American, nonminority woman, nonminority males.
- ♦ ***Availability of Capital:*** Homeownership, home value, mortgage rate, unearned income, residual income.
- ♦ ***Marital Status.***
- ♦ ***Ability to Speak English Well.***
- ♦ ***Disability Status:*** From individuals' reports of health-related disabilities.
- ♦ ***Age and Age Squared:*** Squaring the age variable acknowledges the positive, curvilinear relationship between each year of age and earnings.
- ♦ ***Owner's Level of Education.***

For the dependent variable, we used 2011-2015 wages from employment for self-employed individuals, as reported in the 5 percent PUMS data.

FINDINGS

Table 6-8 presents the results of the linear regression model estimating the effects of selected demographic and economic variables on self-employment earnings. Each number (i.e., coefficient) in the table represents a percent change in earnings. For example, the corresponding number for African Americans in all industries is -.598 meaning that an African American will earn 59.8 percent less than a nonminority male when the statistical effects of the other variables in the equation are "controlled for." Full regression results for all the variables are presented in **Appendix M, Public Use Microdata Sample (PUMS) Regression Analysis.**

TABLE 6-8
EARNINGS ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER
CONTROLLING FOR
SELECTED DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

BUSINESS OWNERSHIP CLASSIFICATION	ALL INDUSTRIES
African American Firms	-0.598
Hispanic American Firms	-0.395
Asian American Firms	-0.251
Native American Firms	*
Nonminority Female Firms	-0.608

Source: PUMS data from 2011-2015 American Community Survey and MGT, calculations using SPSS Statistics software. Note: **Bold** indicates the estimated “elasticities” for the group were statistically significant. The architecture and engineering business industry was excluded from this analysis because of insufficient data.

* There were insufficient census numbers available for analysis.

The results reveal the following:

- ◆ In the District’s PUMA, African Americans and nonminority females reported significantly lower earnings in all business type categories.
- ◆ Overall, African Americans reported significantly lower earnings than nonminority males: 59.8 percent less.
- ◆ In professional services, African Americans reported significantly lower earnings than nonminority males: 76.8 percent less.
- ◆ The most egregious effect on earnings elasticities was found in other services for nonminority females. In other services, nonminority females earned 76.9 percent less than nonminority males.

DISPARITIES IN RATES OF SELF-EMPLOYMENT: HOW MUCH CAN BE ATTRIBUTED TO DISCRIMINATION?

Results of the analyses of self-employment rates and 2011-2015 self-employment earnings revealed general disparities between minority and nonminority self-employed individuals whose businesses were located in the District’s PUMA. For question III, we analyzed how much of these disparities are attributable to discrimination, and how much of the disparities are attributable to race-, ethnicity-, and gender-neutral factors.

Table 6-9 presents the results of these analyses. Column A reports observed employment rates for each racial, ethnic, and gender group, calculated directly from the PUMS 2011-2015 data. To obtain values in columns B and C, we calculated two predicted self-employment rates using the following equation:

$$Pr ob(y = 1) = \sum_{k=1}^K (e^{\beta_k x_k} / 1 + e^{\beta_k x_k})$$

Where:

- Pr ob(y = 1) = represents the probability of being self-employed
- β_k = coefficient corresponding to the independent variables used in the logistic regression analysis of self-employment probabilities
- x_k = the mean values of these same variables

The first of these predicted self-employment rate calculations (in column B) presents nonminority male self-employment rates as they would be if their characteristics (i.e., x_k , or mean values for the independent variables) were applied to minority market structures (represented for each race by their β_k or odds coefficient values). The second self-employment rate calculation (in column C) presents minority self-employment rates as they would be if minorities were rewarded in a similar manner as

nonminority males in the nonminority male market structure: that is, by multiplying the minority means (i.e., characteristics) by the estimated nonminority coefficients for both race and the other independent variables.

TABLE 6-9
OBSERVED AND PREDICTED SELF-EMPLOYMENT RATES
DISTRICT PUMA

BUSINESS OWNERSHIP CLASSIFICATION	OBSERVED SELF-EMPLOYMENT RATES (A)	Non- M/WBE CHARACTERISTICS AND OWN MARKET STRUCTURE (B)	OWN CHARACTERISTICS AND NON-M/WBE MARKET STRUCTURE (C)	DISPARITY RATIO (COLUMN A DIVIDED BY COLUMN C) (D)	PORTION OF DIFFERENCE DUE TO DISCRIMINATION (E)
Overall					
Non-M/WBE Firms	0.14901048	0.14901048	0.14901048	1.000	
African American Firms	0.04536082	0.06793710	0.13906063	0.32619459	0.90400500
Hispanic American Firms	0.08849558	0.15991701	0.16438573	0.53834099	n/d
Asian American Firms	0.13750000	0.16619245	0.24678544	0.55716414	n/d
Native American Firms	0.00000000	0.00000000	0.00621408	0.00000000	*
Nonminority Female Firms	0.07312925	0.09006221	0.15216364	0.48059611	n/d
Construction					
Non-M/WBE Firms	0.30208333	0.30208333	0.30208333	1.000	
African American Firms	0.17857143	0.60133932	0.33927913	0.52632600	n/d
Hispanic American Firms	0.06666667	0.22414572	0.57547181	0.11584697	n/d
Asian American Firms	0.00000000	0.00000000	0.21990696	0.00000000	*
Native American Firms	0.00000000	0.00000000	0.21990696	0.00000000	*
Nonminority Female Firms	0.00000000	0.00000000	0.21990696	0.00000000	*
Professional Services					
Non-M/WBE Firms	0.21875000	0.21875000	0.21875000	1.000	
African American Firms	0.04741379	0.13998626	0.20900780	0.22685179	0.94313985
Hispanic American Firms	0.12500000	0.22804924	0.57946536	0.21571609	n/d
Asian American Firms	0.15789474	0.27586820	0.57805063	0.27315036	n/d
Native American Firms	0.00000000	0.00000000	0.00387821	0.00000000	*
Nonminority Female Firms	0.06296296	0.14322162	0.24782219	0.25406507	n/d
Other Services					
Non-M/WBE Firms	0.08659218	0.08659218	0.08659218	1.00000000	
African American Firms	0.05454545	0.04551696	0.09404534	0.57999107	n/d
Hispanic American Firms	0.09433962	0.13871880	0.08907940	1.05905089	n/d
Asian American Firms	0.12820513	0.23248324	0.14547609	0.88127970	n/d
Native American Firms	0.00000000	0.00000000	0.00317487	0.00000000	*
Nonminority Female Firms	0.06763285	0.05354197	0.07618385	0.88775836	0.45101808
Goods & Commodities					
Non-M/WBE Firms	0.13469388	0.13469388	0.13469388	1.000	
African American Firms	0.00465116	0.00943625	0.21128955	0.02201322	n/d
Hispanic American Firms	0.09090909	0.21743824	0.10183968	0.89266869	0.24964347
Asian American Firms	0.14285714	0.25071180	0.09720856	1.46959434	n/d
Native American Firms	0.00000000	0.00000000	0.00033426	0.00000000	*
Nonminority Female Firms	0.11764706	0.16065009	0.14966657	0.78606102	n/d

Source: PUMS data from 2011-2015 American Community Survey and MGT, calculations using SPSS and Microsoft Excel.

n/d: No discrimination was found.

* There were insufficient census numbers available for analysis.

Using these calculations, we were able to determine a percentage of the disparities in self-employment between minorities and nonminority males attributable to discrimination by dividing the observed self-employment rate for a particular minority group (column A) by the predicted self-employment rate as it

would be if minority groups faced the same market structure as nonminority males (column C). Next, we calculated the difference between the predicted self-employment rate as it would be if minority groups faced the same market structure as nonminority males and the observed self-employment rate for that minority group, and divided this value by the difference between the observed self-employment rate for nonminority males and the self-employment rate for a particular minority group. In the absence of discrimination, this number is zero, which means disparities in self-employment rates between minority groups and nonminority males can be attributed to differences in group characteristics not associated with discrimination. Conversely, as this value approaches 1.0, we are able to attribute disparities increasingly to discrimination in the marketplace.

FINDINGS

Examining the results reported in **Table 6-9**, we found the following:

- ◆ Overall, comparing self-employed nonminority males with self-employed African Americans, over 90 percent of the disparity in self-employment rates was attributable to race differences.
- ◆ Comparing self-employed nonminority males with self-employed African Americans in professional services, over 94 percent of the disparity in self-employment rates was attributable to race differences.
- ◆ Comparing self-employed nonminority males with self-employed nonminority females in other services, over 45 percent of the disparity in self-employment rates was attributable to race differences.
- ◆ Comparing self-employed nonminority males with self-employed Hispanic Americans in goods and commodities, over 24 percent of the disparity in self-employment rates was attributable to race differences.

5. CONCLUSION

Based on the analysis of the U.S. Census, 2012 SBO data, there remains a significant gap between the utilization of M/WBE firms based on the Memphis, TN-MS-AR MSA marketplace business population, where data were available.

In general, findings from the PUMS 2011-2015 data indicate minorities were significantly less likely than nonminority males to be self-employed and, if they were self-employed, they earned significantly less in 2011-2015 than did self-employed nonminority males. When self-employment rates were stratified by race and by business type, trends varied within individual race-by-type cells, but disparities persisted, in general, for all minorities and nonminority females. When group self-employment rates were submitted to MGT's disparity-due-to-minority-status analysis, findings supported the conclusion that disparities for these groups (of adequate sample size to permit interpretation) were likely the result of differences in the marketplace due to race, gender, and ethnicity.¹⁷²

Although MGT was unable to conduct an analysis of commercial permits, the SBO and PUMS analysis show that capacity alone is not a sufficient explanation for these differences, especially at the subcontractor level in the construction business category, where capacity is a lesser consideration and availability far

¹⁷² **Appendix M** reports self-employment rates and earnings in greater detail by race, ethnicity, and gender and business category.

exceeds the record of utilization, especially in the private sector. This chapter presented statistical evidence that disparities associated with race and gender persist after controls for capacity and business experience are considered. To the extent which M/WBE subcontractor utilization is minimal in the private sector, credence may be given to the proposition established in *Croson*, in which government could be a passive participant in private sector discrimination if it did not require contractors who apply for public sector construction projects to solicit and negotiate with M/WBE subcontractors in good faith efforts.

CHAPTER 7: Anecdotal Analysis
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

The blueprint for collecting and analyzing anecdotal evidence for this study was provided by the U.S. Supreme Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989) (*Croson*). In that case, the court held that race-conscious programs must be supported by strong documentation of discrimination, including evidentiary findings that go beyond the demographics of a community. This chapter examines the qualitative evidence of disparate treatment of M/WBE firms by the Shelby County School District (District), the District's prime contractors, and in the private sector. In addition, we sought to answer: *Is there qualitative/anecdotal evidence of disparate treatment of M/WBE subcontractors by prime contractors?* The anecdotal analysis in this report is a widely-accepted research methodology that is based on data collected through In-Depth Interviews, Survey of Vendor responses, and Public Meetings. The collection and analysis of anecdotal data helps explain and provides context for the quantitative data analyses found in **Chapters 4 and 5**. In conjunction with the quantitative data, MGT could also draw inferences from these data as to the prevalence of obstacles perceived as limiting the participation of M/WBEs and other firms in the District's procurement transactions.

Unlike conclusions derived from other types of analysis in this report, the conclusions derived from anecdotal analysis do not rely solely on quantitative data. Rather, the analysis in this chapter utilizes qualitative data to describe the context of the examined social, political, and economic environment in which all businesses and other relevant entities applicable to the study operate. Collective responses from the In-Depth Interviews and Public Meetings provided in this chapter are not altered for context, but are edited for grammar. Otherwise, responses were unfiltered or unedited. However, readers should be cautioned that anecdotal comments in this chapter detail the perceptions and opinions of individuals, and the evidentiary weight of these opinions depends on how much they are corroborated by statements of others and the quantitative data in the report.

The anecdotal data in this report consist of 483 business owners or representatives who provided their anecdotal perceptions, views, and opinions of their experiences working with the District or on District projects as subcontractors.

2. METHODOLOGY

Anecdotal information can bolster the quantitative analyses of contract expenditures to explain whether minority business creation, growth, and retention are negatively affected by discrimination. In *Croson*, the court held that anecdotal accounts of discrimination could help establish a compelling interest for a local government to institute a race-conscious remedy. Moreover, such information can provide a local entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to M/WBE participation in contract opportunities. Further discussion of anecdotal testimony is contained in **Chapter 2, Legal Framework**.

CHAPTER SECTIONS

1. Introduction
2. Methodology
3. Demographics
4. Reported Barriers to Doing Business with the District
5. Disparate Treatment
6. Suggested Remedies from Anecdotal Participants
7. Conclusion

MGT's experience conducting disparity studies has shown that utilizing multiple methods of anecdotal data collection provides more comprehensive information than methodologies using a single-pronged approach. For this reason, MGT used a combination of Surveys, Public Meetings, and In-Depth interviews to collect anecdotal information and to identify issues that were common to businesses in the market area between July 1, 2011, and June 30, 2016.

COMMUNITY OUTREACH

Anecdotal data collection began with development of a Community Outreach Plan to inform the community about the disparity study and the anecdotal data collection activities that would take place as part of the study. MGT worked with the District staff to identify communication methods such as press releases, email blasts to business owners, and assistance from area trade associations and business organizations¹⁷³ to include in the Plan. The outreach activities engaged were:

- ◆ MGT created a disparity study website specifically for the District that provided the broader community of the study's objectives, tasks, frequently asked questions, and most importantly how business owners could participate in the anecdotal data collection.
- ◆ Three email blasts were distributed to 1) announce the disparity study, 2) announce the Public meetings, and 3) encourage business owners to participate in the Survey of Vendors or In-Depth Interviews if they were contacted.
- ◆ Ran a radio advertisement on the District's FM88.5 to announce the Public Meetings.

To identify the target audience for the anecdotal activities, MGT developed a Master Vendor Database. In addition, the database was used to ensure that its anecdotal analysis was based on data from a broad range of firms in the marketplace. The Master Vendor Database incorporated data sets from the District's vendor, contract, and registration lists; membership lists provided by area trade associations and business organizations; and lists provided by recognized minority and small business certification and registry agencies. The data sources were merged and duplicates removed to create a single database.

SAMPLING

MGT's sampling methodology for the In-Depth Interviews and Survey of Vendors was to randomly select firms from the District's Master Vendor Database. Each sample pulled was cross referenced with previous extractions to ensure that firms did not participate in more than one anecdotal activity. Electronic notices of the Public Meetings were sent to vendors listed in the District's directory as well as area trade associations and business organizations, who were asked to share the information with their members. Since the Public Meetings were open to the public, firms that attended the Public Meetings may have also been randomly selected for other anecdotal activities.

SURVEY OF VENDORS

The Survey of Vendors asked respondents to provide information on business ownership, demographics, and structure; work bid or performed as prime contractors with the District; work bid or performed as subcontractors to District prime contractors; whether the respondent firm bid or performed work in the private sector; and any perceived barriers to doing business with the District that the respondents

¹⁷³ The area trade associations and business organizations are referred to as Stakeholders for purposes of this report.

believed they had experienced during the study period. The survey questionnaire was developed by MGT and administered via telephone during the months of July and August 2017.

Disparity study survey analyses are commonly plagued by sample size limitations, especially where the size of the minority business population is insufficient to permit a valid and representative sample. This problem is compounded when analyses are stratified further by business type. Insufficient sample size can pose problems for the statistical confidence of the results. MGT attempted to collect data in proportion to the distribution of M/WBEs and non-M/WBEs in the relevant market area. In this study, the number of Native American-owned businesses responding to the survey were extremely low. Although MGT's goal is to report data that can satisfy the 95 percent confidence level, this does not mean that data should not be reported because of slightly reduced confidence intervals, especially when extreme due diligence has been exercised in attempting to meet the 95 percent standard. For this reason, our conclusions from the responses received do not reflect a statistical finding for Native American firms in the anecdotal findings. The Survey of Vendors questionnaire is included in this report as **Appendix H – Survey of Vendors Instrument**. Complete survey results are included as **Appendix I – Survey of Vendors Results**.

PUBLIC MEETINGS

All area firms that have done business with the District or have attempted to do business with the District or its prime contractors were invited to attend one of three Public Meetings. During the meetings, MGT provided information to the business community about the study's objectives, tasks, and the roles business owners have in the study. Attendees were encouraged to provide anecdotal comments on their experiences which were recorded by MGT interviewers.

Meetings were held at the Frances E Coe Auditorium, 160 S. Hollywood St., Memphis, on November 15 & 16, 2016.

STAKEHOLDER ENGAGEMENT

MGT contacted the associations and organizations listed below to 1) inform them of the study, 2) request their assistance to distribute the community meetings notices and anecdotal data collection reminders to their members or constituents, and 3) participate in stakeholder interviews. In addition, MGT requested copies of membership or vendor lists from these organizations to create a nonduplicative database that was used to update gaps in the District's Master Vendor Databases. Organization and associations contacted were:

- ◆ Arkansas Department of Economic Development-Small and Minority Business Unit
- ◆ Arkansas Highway Transportation Department
- ◆ Arlington TN Chamber of Commerce
- ◆ Associated Builders and Contractors, Inc.
- ◆ Associated General Contractors of Mississippi
- ◆ Associated General Contractors of Tennessee (W TN Branch)
- ◆ Bartlett Area Chamber of Commerce
- ◆ Black Business Association
- ◆ Business Contracting Consortium
- ◆ Byhalia Area Chamber of Commerce
- ◆ Rock Region Metro
- ◆ City of Little Rock Small Business Development Office-Small Business Incubator Service System
- ◆ Clarksdale/Coahoma County Chamber of Commerce
- ◆ Coahoma Industrial Authority

- ♦ Collierville Chamber of Commerce
- ♦ Covington Tipton County Chamber of Commerce
- ♦ Desoto County Economic Development Council
- ♦ Fayette County Chamber of Commerce
- ♦ Germantown Area Chamber of Commerce
- ♦ Greater Memphis Area Pest Control Association
- ♦ Greater Memphis Chamber of Commerce
- ♦ Hernando Main Street Chamber of Commerce
- ♦ Holly Springs Chamber of Commerce
- ♦ Horn Lake Chamber of Commerce
- ♦ Lakeland Area Chamber of Commerce
- ♦ Marion Chamber of Commerce
- ♦ Mechanical Contractors Association of Memphis
- ♦ Memphis Advertising Federation (Amer. Ad Federation)
- ♦ Memphis Area Minority Contractors Association
- ♦ Memphis Bioworks Foundation
- ♦ Memphis-Shelby County Airport Authority
- ♦ MidSouth Independent Electrical Contractors
- ♦ MidSouth Minority Business Council Continuum
- ♦ Millington Area Chamber of Commerce
- ♦ Minority PUL Alliance
- ♦ Mississippi Department of Transportation
- ♦ Mississippi Development Authority-Minority and Small Business Development
- ♦ Mississippi Economic Council - The State Chamber of Commerce
- ♦ National Association of Minority Contractors
- ♦ National Association of Women Business Owners
- ♦ National Electrical Contractors Association (Memphis Chapter)
- ♦ National Hispanic Professional Organization
- ♦ North Mississippi Industrial Development Association
- ♦ Olive Branch Chamber of Commerce
- ♦ Sheet Metal Contractors Association of Memphis
- ♦ SHRM Memphis
- ♦ South Tipton County Chamber of Commerce
- ♦ Southaven Chamber of Commerce
- ♦ Tate County Chamber of Commerce
- ♦ Tate County Economic Development Foundation
- ♦ Tennessee Association of Roofing Contractors
- ♦ Tennessee Department of Transportation
- ♦ TN Governor's Office of Diversity Business (state directory)
- ♦ Tri State Minority Supplier Development Council
- ♦ Tunica County Chamber of Commerce
- ♦ West Memphis Chamber of Commerce
- ♦ Whitehaven Economic Redevelopment Corporation

IN-DEPTH BUSINESS INTERVIEWS

The In-depth Business Interviews were one-on-one interviews with business owners to gather information regarding the firm’s primary line of business, ethnicity and education/training background of the owner, business history, size and gross revenues during selected calendar and/or fiscal years, and information about the firms’ experiences in attempting to do and conducting business with the District (both directly as a prime and/or as a subcontractor). The In-depth interviews—which were structured settings where an interviewer or facilitator used an interview guide to solicit input from participants—provided more latitude for additional information gathering on issues that are unique to the respondents’ experiences. As discussed in more detail in the Demographics section below, interviews were conducted with M/WBEs and non-M/WBEs. The In-depth Interview Guide (**Appendix L**) included questions designed to establish a profile for each business. Additionally, MGT asked questions related to experiences with the M/WBE program, and instances of disparate treatment and/or discrimination experienced or perceived by the firm while attempting to do or conducting business with the District. The interviewer made no attempt to prompt or guide responses from the participants, although follow-up questions were asked to obtain further clarification or information as necessary and appropriate.

3. DEMOGRAPHICS

The demographic characteristics of participants in the collection of anecdotal information are described in the sections below.

SURVEY OF VENDORS DEMOGRAPHICS

Survey of Vendors firm owners and representatives were surveyed to solicit information about their firms and their experiences doing business or attempting to do business with the District, the District prime contractors, and in the private sector during the study period. MGT collected surveys from 384 firms.

RACE, ETHNICITY AND GENDER

Table 7-1 provides the race, ethnicity, and gender of the respondents who participated in the survey. Participants that indicated “Other” as their racial or ethnic classification were asked to provide more details on their response. Responses indicated that the owner identifies with multiple racial or ethnic groups.

TABLE 7-1
SHELBY COUNTY SCHOOLS
SURVEY OF VENDORS DEMOGRAPHICS
NUMBER OF RESPONDENTS

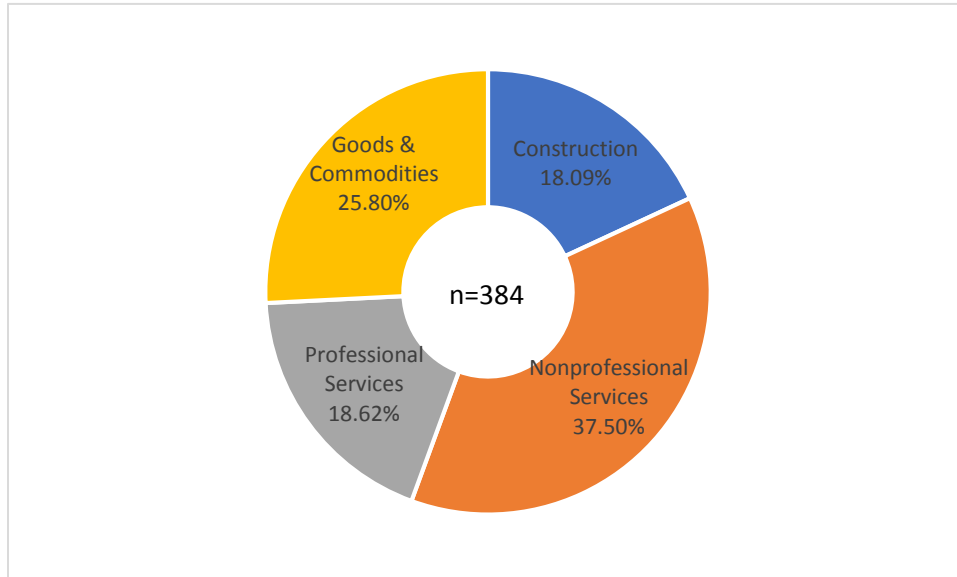
Race/Ethnicity/Gender	Count	Percentage
African American	140	36.46%
Asian or Pacific Islander	12	3.13%
Hispanic American	4	1.04%
Native American/ American Indian	3	0.78%
Nonminority Women	73	19.01%
Other/Don't Know	22	5.73%
Non-M/WBE	130	33.85%
TOTAL	384	100.00%

Source: Responses from Survey of Vendors, 2017.

INDUSTRY

The respondents were asked to identify their primary type of business as Architecture & Engineering, Construction, Professional Services, Nonprofessional Services, or Goods and Commodities. The distribution of the respondents is provided in **Exhibit 7-1**. The procurement category definitions are discussed in **Chapter 4, Market Area and Utilization Analyses**.

EXHIBIT 7-1
SHELBY COUNTY SCHOOLS
SURVEY OF VENDORS DEMOGRAPHICS
BUSINESS INDUSTRY



Source: Responses from Survey of Vendors, 2017.

CAPACITY

The survey asked question to address the capacity of firms, such as number of employees and gross revenue. The data from the responses are also used to conduct a regression analysis that addresses any barriers but for race and gender. A detailed explanation can be found in **Appendix J, Survey of Vendor Regression Analysis**.

Table 7-2 shows that 61 percent of the firms surveyed (236 respondents) have 0-10 employees excluding the owner, which may have implications for the type and size of projects firms are willing to pursue. M/WBE firms account for 45 percent or 175 respondents with 10 or fewer employees.

TABLE 7-2
SHELBY COUNTY SCHOOLS
SURVEY OF VENDORS DEMOGRAPHICS
NUMBER OF EMPLOYEES

Business Ownership Classification	0 - 10 employees	11 - 20 employees	21 - 30 employees	31 - 40 employees	41+ employees	Don't know
African American	119	7	4	0	7	2
Asian American	9	1	0	1	2	0
Hispanic American	3	1	0	0	0	0
Native American	0	1	1	0	1	0
Nonminority Female	44	15	2	6	8	0
Other/Don't Know	1	1	0	1	3	0
Non-M/WBE	60	27	14	10	32	1
Total	236	53	21	18	53	3

Source: Responses from Survey of Vendors, 2017.

Table 7-3 illustrates the responses from primes when asked to indicate the range that best approximates their gross revenue during the study period.

TABLE 7-3
SHELBY COUNTY SCHOOLS
SURVEY OF VENDORS DEMOGRAPHICS
GROSS REVENUE-PRIME

	Business Ownership							Total
	Asian American	African American	Hispanic American	Native American	Nonminority Female	Non-M/WBE	Don't Know	
Up to \$50,000	1	48	2	0	11	9	0	71
	7.7%	34.3%	50.0%	0.0%	14.7%	6.3%	0.0%	18.5%
\$50,001 to \$100,000	0	31	0	0	3	7	0	41
	0.0%	22.1%	0.0%	0.0%	4.0%	4.9%	0.0%	10.7%
\$100,001 to \$300,000	3	20	0	0	7	11	0	41
	23.1%	14.3%	0.0%	0.0%	9.3%	7.7%	0.0%	10.7%
\$300,001 to \$500,000	2	6	1	1	8	7	0	25
	15.4%	4.3%	25.0%	33.3%	10.7%	4.9%	0.0%	6.5%
\$5,000,001 to \$10 million	1	3	0	0	4	7	0	15
	7.7%	2.1%	0.0%	0.0%	5.3%	4.9%	0.0%	3.9%
\$500,001 to \$1 million	2	10	0	0	11	17	0	40
	15.4%	7.1%	0.0%	0.0%	14.7%	11.9%	0.0%	10.4%
\$1,000,001 to \$3 million	2	8	0	1	13	19	0	43
	15.4%	5.7%	0.0%	33.3%	17.3%	13.3%	0.0%	11.2%

	Business Ownership							
	Asian American	African American	Hispanic American	Native American	Nonminority Female	Non-M/WBE	Don't Know	Total
\$3,000,001 to \$5 million	0	2	0	1	5	22	1	31
	0.0%	1.4%	0.0%	33.3%	6.7%	15.4%	16.7%	8.1%
Over \$10 million	2	2	0	0	5	28	2	39
	15.4%	1.4%	0.0%	0.0%	6.7%	19.6%	33.3%	10.2%
Don't know	0	10	1	0	8	16	3	38
	0.0%	7.1%	25.0%	0.0%	10.7%	11.2%	50.0%	9.9%

Source: Responses from survey conducted by Innovative Strategies, 2017.

The Survey of Vendors also included questions regarding access to capital. Survey respondents were asked if they applied for a commercial loan between July 1, 2011, and June 30, 2016, and whether their loan was approved or denied. If their loan was denied, a follow up question asked what they believed was the basis of their denial. Of the 49 (12.8% of the total) respondents who applied for a commercial loan, 55.10 percent were M/WBEs. The approval rate for M/WBEs was 48.64 percent. The highest loan amount approved for most of the M/WBE firms was between \$50,000 and \$100,000.

More in-depth and detailed analyses of the Survey of Vendor results are provided in [Appendix I, Survey of Vendors Results](#).

PUBLIC MEETINGS DEMOGRAPHICS

The community meetings totaled 48 attendees from varying industries, including construction, office supplies, mechanical, information technology, financial services, and state or local governmental representatives. Official testimonies were received and recorded from 19 attendees. The racial and ethnic compositions of the attendees included African American, Nonminority Males, Nonminority Women, and Asian American firms

IN-DEPTH FIRM INTERVIEW DEMOGRAPHICS

The Firm Interviews were conducted during the months of June through August 2017. To obtain interviewees, a random sample of firms from the District's Master Vendor Database that were not previously selected for the Survey of Vendors were contacted for interviews. Interviews of 51 firms were conducted at the firm's office, at a location designated by the firm's owner, or via telephone. Architecture & Engineering firms represented 2 percent, Construction firms represented 29 percent, Professional Services firms represented 37 percent, Nonprofessional Services firms represented 14 percent, and Goods and Commodities firms represented 14 percent of firms interviewed.

4. REPORTED BARRIERS TO DOING BUSINESS WITH THE DISTRICT

MGT documented participant responses concerning barriers faced in the District's procurement process, including factors that frequently prevented businesses from winning or being awarded contracts. This

section summarizes trends identified by MGT from the Survey of Vendors, public meetings, and interviews.

SURVEY OF VENDORS RESULTS

Among the M/WBE firms who responded to survey questions about barriers to doing business, the biggest concern for prime contractors was competing with larger firms (71 or 47% of M/WBEs). Similarly, M/WBE subcontractors stated their biggest barrier working with primes on District projects is competing with large companies (31 or 36% of M/WBEs). Additional key barriers for M/WBE firms included:

Among Primes:

- ◆ Slow payment – 28%
- ◆ Short or limited time given to prepare bid package or quote – 26%
- ◆ Selection process/evaluation criteria – 26%

Among Subcontractors:

- ◆ Short or limited time given to prepare bid package or quote – 20%
- ◆ Financing – 15%

ANECDOTAL RESPONSES

Participants in the Interviews and Public Meetings provided statements about perceived barriers to doing business or attempting to do business with the District directly or with District primes. The participants' responses included the following:

- ◆ A representative from an African American-owned construction firm stated that it's difficult to get bond if your credit is not good or no cash in the bank. This prevents us from doing business with the school system. The VA Hospital waives the bond, which allows small contractors to build capacity to be able to afford a bond.
- ◆ An African American owner of a professional consulting firm stated that their biggest barrier is a lack of knowledge of their contracting policies and procedures. They continued to say that they don't know if there is a class to learn about the procurement processes.
- ◆ An African American nonprofessional services business owner indicated that some of the contracts are so large that you must find someone to partner with.
- ◆ The owner of a Nonminority-owned construction firm stated he had a contract and the payment was over three months old which was discouraging. He further explained that the District doesn't understand the impact that slow payments have on a small business.

5. DISPARATE TREATMENT AND DISCRIMINATION

Participants in the Survey of Vendors, In-Depth Interviews, and Public Meetings were asked if they experienced discriminatory or disparate behavior by the District, its primes, or in the private sector during the study period. While no firm reported specific evidence of discrimination, multiple respondents stated

that they had experienced disparate treatment in the private marketplace due to their status as M/WBE firms. In addition, **Table 7-4** illustrates the responses of M/WBE subcontractors survey respondents when asked whether they experienced other forms of disparate treatment while doing business with primes.

TABLE 7-4
SHELBY COUNTY SCHOOLS
DISPARATE TREATMENT

	African American	Asian American	Hispanic American	Native American	Nonminority Female
Harassment	2.90%	0.00%	0.00%	0.00%	1.30%
Unequal or unfair treatment	6.40%	0.00%	0.00%	0.00%	1.30%
Bid shopping or bid manipulation	7.10%	7.70%	0.00%	0.00%	6.70%
Double standards in performance	7.90%	7.70%	0.00%	0.00%	2.70%
Denial of opportunity to bid	6.40%	7.70%	0.00%	0.00%	4.00%
Unfair denial of contract award	5.70%	0.00%	0.00%	0.00%	2.70%
Unfair termination	1.40%	0.00%	0.00%	0.00%	2.70%
Unequal price quotes from suppliers	4.30%	7.70%	0.00%	0.00%	3.50%

Source: Responses from Survey of Vendors, 2017.

SURVEY OF VENDORS RESULTS

Survey respondents were asked a series of questions regarding whether they had experienced discrimination by the District, the District primes, or in the private sector due to their M/WBE status. The first question was “Have you or your company experienced discriminatory behavior when attempting to do work”. **Table 7-5** illustrates the response to this question for each respondent, prime and subcontractors.

TABLE 7-5
SHELBY COUNTY SCHOOLS
DISCRIMINATION

	By the District	By Primes	In the Private Sector
M/WBE (Prime)	8.08%		
Non- M/WBE (Prime)	3.35%		
M/WBE (Subcontractor)		2.55%	
Non-D/W/MBE (Subcontractor)		0.00%	
All M/WBE Firms			13.61%
All Non-D/W/MBE Firms			4.02%

Source: Responses from Survey of Vendors, 2017.

6. SUGGESTED REMEDIES FROM ANECDOTAL PARTICIPANTS

While collecting anecdotal data, participants provided their ideas and recommendations for improving the procurement process and increasing M/WBE participation. A few recurring ideas and/or suggested remedies provided by participants are:

- ◆ Conduct regular outreach and relationship building sessions to encourage M/WBE firms to compete for contract opportunities.
- ◆ Track the number of contracts by District department, and race and gender of contractor.
- ◆ Expand the M/WBE goals to include department directors and hold them accountable for accomplishing them.
- ◆ Follow-up after the bid is awarded to ensure M/WBEs are utilized on the contract and gets paid in a timely fashion.
- ◆ Provide opportunities to M/WBEs to build capacity.
- ◆ Publish M/WBE performance reports.
- ◆ Post ALL open bids, RFPs, and RFQs in a central location such as the District’s website.

7. STAKEHOLDER INTERVIEWS

Input from area trade associations and business organizations (referenced as stakeholders) provided a broader insight to experiences and barriers for minority and women businesses in the marketplace. Business development, capacity building, educational workshops, and advocacy are just a few of the services these stakeholders offer to their construction, professional services, architecture, engineering, and suppliers members. During their interview, stakeholders provided an overview of their perspectives on the District’s procurement processes, and their members accounts of their experiences doing business or attempting to business with the District, its primes and in the private sector.

The questions posed to the stakeholders were asked to respond to included, but not limited to:

1) *Does your organization have a working relationship with the District?*

Several stakeholders stated that they had a relationship with the former Memphis City Schools administration. Memphis City Schools would provide stakeholders with blueprints, bid packages, bidder’s list to provide to its members which is currently not offered by Shelby County Schools. Since the merger of Memphis City Schools and Shelby County Schools stakeholders have met with District leaders, i.e. superintendent, Director of Purchasing to discuss ways to increase M/WBE utilization. Most did not have formal working relationships with the District but are optimistic that a working relationship will develop.

2) *Is your organization familiar with the District’s procurement policies?*

- a. A couple of the stakeholders indicated that they are familiar with the District’s procurement processes. Stakeholders’ perceptions were that the District hires the same firms over and over because of long term relationship and for ease of the contracting process.

- 3) Are you aware of any barriers minority- and women-owned firms face with doing business or trying to do business with prime firms working on District contracts?**
- a. Several of the stakeholders agreed that not having relationships with the District or primes is a barrier for M/WBEs. In addition, financing for bonding and insurance, lack of knowledge about procurement opportunities are barriers not only for District contracts but in the private sector market place.
- 4) Are there suggested recommendations to improve the Schools' procurement processes?**
- a. Dedicate staff resources that will work to increase outreach, and technical assistance to M/WBE firms on District contracts.
 - b. Host a forum with stakeholders to explain the procurement processes so they can be shared with their members.
 - c. Increase transparency of procurement opportunities by posting bids, RFPs, etc. on the District's website, and notify M/WBE firms.

Create and publish a procurement forecast of future District contracts or purchases.

8. CONCLUSIONS

This chapter provides qualitative and anecdotal evidence of disparate treatment of M/WBE subcontractors by prime contractors that is consistent with the statistical evidence found elsewhere in this study. Using multi-facet qualitative data collection methods proved to be successful in gathering perceptions, experiences, and opinions from the business community, particularly M/WBE firms. Findings include, but are not limited to, barriers M/WBEs face such as subcontractors not being solicited on projects without goals and competing with larger firms. Although there is no clear evidence of disparate treatment by the District directly, the anecdotal evidence of disparate treatment in the private sector is consistent with the Private Sector Analysis contained in **Chapter 6, Private Sector and Non-Goal Analysis**. Utilization of M/WBE firms in the private sector was significantly less than utilization by the District¹⁷⁴. The findings in the chapter answers our research question: *Is there qualitative/anecdotal evidence of disparate treatment of M/WBE subcontractors by prime contractors?* M/WBE subcontractors would face obstacles to obtaining work with the District's prime contractors in the absence of remedial efforts.

¹⁷⁴ **Chapter 6, Section 3, Private Sector Utilization Analysis, Commercial Construction Permits** presents analysis of utilization of M/WBE and non-M/WBE firms in private sector commercial construction market.

CHAPTER 8: Findings and Recommendations
BUSINESS MARKET AVAILABILITY AND DISPARITY
STUDY

Shelby County Schools Board of Education



I. INTRODUCTION

The Shelby County Board of Education contracted MGT of America Consulting, LLC (MGT) to conduct a **Business Market Availability and Disparity Study** to determine if there is a disparity between the number of viable minority- and woman-owned businesses that are ready, willing, and able to perform Architectural & Engineering, Construction, Professional Services, Nonprofessional Services, and Goods and Commodities contracts, as well as the numbers of these same business types who are actually participating in these types of contracts with the Shelby County School District (District).

Within the context of studying the District's procurement practices, the study must be conducted in a manner consistent with disparity study best practices, controlling local legal precedents, and constitutional law to properly advise the District about the legal basis for potential remedies, if necessary. MGT's methodology included a review of the disparity study's legal framework; a policy and procedures review; analyses of utilization, availability, and statistical disparity; anecdotal research; private sector analyses; and findings, commendations, and recommendations.

In this chapter, MGT provides findings for the District on minority- and women-owned business enterprise (M/WBE) utilization and availability. This study consisted of fact-finding to analyze District procurement trends and practices between July 1, 2011, and June 30, 2016; evaluating the impact of race- and gender-neutral remedial efforts; and evaluating options for future program development.

The results of this study and conclusions drawn are presented in detail in **Chapters 3** through **7** of this report. This chapter will summarize the evidence on the central research question: *is there factual predicate evidence to support a race- and gender-conscious M/WBE program for the District?* MGT found sufficient evidence of disparity and recommends the District establish a race- and gender-based procurement program to address identified disparities.

2. FINDINGS

FINDING A: M/WBE PRIME UTILIZATION

M/WBE utilization overall varied in the procurement categories. African American and Nonminority Women firms were utilized in all procurement categories while the remaining minority-owned firms were utilized as primes in all categories except Architecture & Engineering. The dollar value of M/WBE prime contractor utilization on District projects over the study period within the relevant market was as follows and is detailed in **Table 8-1**.

- ◆ MBE primes were paid \$3,970 in Architecture & Engineering contracts, 0.08 percent of Architecture & Engineering prime contract dollars; WBE primes were paid \$360,109 in Architecture & Engineering contracts, 7.52 percent of Architecture & Engineering prime contract dollars. There was disparity for all M/WBE groups.

CHAPTER SECTIONS

1. Introduction
2. Findings
3. Commendations and Recommendations
4. Selected M/WBE and SLBE Practices
5. Conclusion

- MBE primes were paid \$638,101 in Construction contracts, 0.55 percent of Construction prime contract dollars; WBEs were paid \$1.4 million on Construction prime contracts, 1.21 percent of Construction prime contract dollars. There was disparity for all M/WBE groups.
- MBE primes were paid \$33.3 million in Professional Services contracts, 30.70 percent of Professional Services prime contract dollars; WBE primes were paid \$847,161 in Professional Services contracts, 0.78 percent of Professional Services prime contract dollars. There was disparity for M/WBE groups except for Asian American firms.
- MBE primes were paid \$26.6 million in Nonprofessional Services contracts, 12.41 percent of Nonprofessional Services prime contract dollars; WBE primes were paid \$382,895 in Nonprofessional Services contracts, 0.18 percent of Nonprofessional Services prime contract dollars. There was disparity for M/WBE groups except for Asian American firms.
- MBE primes were paid \$29.4 million in Goods and Commodities contracts, 12.97 percent of Goods and Commodities prime contract dollars; WBE primes were paid \$5.8 million in Goods and Commodities contracts, 2.56 percent of Goods and Commodities prime contract dollars. There was disparity for M/WBE groups except for Asian American firms.

TABLE 8-1
 UTILIZATION OF FIRMS ANALYSIS, PRIME LEVEL
 DISTRIBUTION OF DOLLARS BY BUSINESS OWNERSHIP CLASSIFICATION

BUSINESS OWNERSHIP CLASSIFICATION	ALL	A&E	CONSTRUCTION	PROFESSIONAL SERVICES	NONPROFESSIONAL SERVICES	GOODS OR COMMODITIES
African American	\$ 38,510,725	\$ 3,970	\$ 540,256	\$ 11,522,023	\$ 3,187,948	\$ 23,256,528
Asian American	\$ 51,308,930	\$ 0	\$ 970	\$ 21,805,950	\$ 23,383,345	\$ 6,118,664
Hispanic American	\$ 130,556	\$ 0	\$ 96,875	\$ 20,961	\$ 0	\$ 12,720
Native American	\$ 102,661	\$ 0	\$ 0	\$ 0	\$ 46,885	\$ 55,776
TOTAL MINORITY FIRMS	\$ 90,052,871	\$ 3,970	\$ 638,101	\$ 33,348,934	\$ 26,618,179	\$ 29,443,687
Nonminority Female Firms	\$ 8,807,957	\$360,109	\$ 1,408,469	\$ 847,161	\$ 382,895	\$ 5,809,322
TOTAL M/WBE FIRMS	\$ 98,860,828	\$364,079	\$ 2,046,570	\$ 34,196,095	\$ 27,001,074	\$ 35,253,009
TOTAL NON-M/WBE FIRMS	\$ 572,861,498	\$ 4,424,689	\$ 114,675,081	\$ 74,443,568	\$ 187,569,552	\$ 191,748,607
TOTAL	\$ 671,722,326	\$ 4,788,768	\$ 116,721,651	\$ 108,639,664	\$ 214,570,626	\$ 227,001,617
BUSINESS OWNERSHIP CLASSIFICATION	ALL	A&E	CONSTRUCTION	PROFESSIONAL SERVICES	STANDARDIZED SERVICES	GOODS OR COMMODITIES
African American	5.73%	0.08%	0.46%	10.61%	1.49%	10.25%
Asian American	7.64%	0.00%	0.00%	20.07%	10.90%	2.70%
Hispanic American	0.02%	0.00%	0.08%	0.02%	0.00%	0.01%
Native American	0.02%	0.00%	0.00%	0.00%	0.02%	0.02%
TOTAL MINORITY FIRMS	13.41%	0.08%	0.55%	30.70%	12.41%	12.97%
Nonminority Female Firms	1.31%	7.52%	1.21%	0.78%	0.18%	2.56%
TOTAL M/WBE FIRMS	14.72%	7.60%	1.75%	31.48%	12.58%	15.53%
TOTAL NON-M/WBE FIRMS	85.28%	92.40%	98.25%	68.52%	87.42%	84.47%

Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

FINDING B: PRIME M/WBE UTILIZATION BY STUDY PERIOD

Table 8-2 illustrates total spending by fiscal year by business ownership classification. The largest aggregate spending with MBEs was in fiscal year 2016 where MBEs received payments on prime contracts totaling \$20.192 million, 13.51 percent of total prime contract dollars; WBEs were paid \$2.72 million on total prime contracts in fiscal year 2012, 1.93 percent of total prime contract dollars.

TABLE 8-2
 UTILIZATION OF FIRMS ANALYSIS, PRIME LEVEL
 DISTRIBUTION OF DOLLARS BY BUSINESS OWNERSHIP CLASSIFICATION BY FISCAL YEAR
 ALL PROCUREMENT CATEGORIES COMBINED

BUSINESS OWNERSHIP CLASSIFICATION	2012	2013	2014	2015	2016	TOTAL
	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)
African American	\$7,441,284.28	\$5,368,097.12	\$4,921,639.48	\$7,131,701.50	\$13,648,002.83	\$38,510,725.21
Asian American	\$11,989,998.15	\$14,776,518.46	\$10,430,113.81	\$7,576,879.31	\$6,535,420.13	\$51,308,929.86
Hispanic American	\$6,621.51	\$16,779.15	\$3,510.00	\$94,085.00	\$9,560.00	\$130,555.66
Native American	\$0.00	\$0.00	\$8,890.60	\$93,770.00	\$0.00	\$102,660.60
TOTAL MINORITY FIRMS	\$19,437,903.94	\$20,161,394.73	\$15,364,153.89	\$14,896,435.81	\$20,192,982.96	\$90,052,871.33
Nonminority Female Firms	\$2,726,158.17	\$2,630,722.16	\$906,137.70	\$810,647.20	\$1,734,291.49	\$8,807,956.72
TOTAL M/WBE FIRMS	\$22,164,062.11	\$22,792,116.89	\$16,270,291.59	\$15,707,083.01	\$21,927,274.45	\$98,860,828.05
TOTAL NON-M/WBE FIRMS	\$119,258,579.74	\$118,902,907.10	\$104,813,935.55	\$102,318,814.60	\$127,567,260.82	\$572,861,497.81
TOTAL FIRMS	\$141,422,641.85	\$141,695,023.99	\$121,084,227.14	\$118,025,897.61	\$149,494,535.27	\$671,722,325.86
BUSINESS OWNERSHIP CLASSIFICATION	2012	2013	2014	2015	2016	TOTAL
	(%)	(%)	(%)	(%)	(%)	(%)
African American	5.26%	3.79%	4.06%	6.04%	9.13%	5.73%
Asian American	8.48%	10.43%	8.61%	6.42%	4.37%	7.64%
Hispanic American	0.00%	0.01%	0.00%	0.08%	0.01%	0.02%
Native American	0.00%	0.00%	0.01%	0.08%	0.00%	0.02%
TOTAL MINORITY FIRMS	13.74%	14.23%	12.69%	12.62%	13.51%	13.41%
Nonminority Female Firms	1.93%	1.86%	0.75%	0.69%	1.16%	1.31%
TOTAL M/WBE FIRMS	15.67%	16.09%	13.44%	13.31%	14.67%	14.72%
TOTAL NON-M/WBE FIRMS	84.33%	83.91%	86.56%	86.69%	85.33%	85.28%
TOTAL FIRMS	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: MGT developed a Master Utilization Database based on dollars expended by the District between July 1, 2011, and June 30, 2016.

FINDING C: REGRESSION ANALYSIS

In a statistical analysis of survey data in the District area that controlled for the effects of certain variables (such as, company capacity, owner level of education, and experience), all M/WBE-owned firms earned less revenue in 2016 than did their non-M/WBE counterparts (only African Americans and Native Americans were statistically significant), supporting the conclusion that M/WBE status is negatively related to earnings when compared with earnings for non-M/WBEs.

FINDING D: DISPARITIES IN SURVEY OF BUSINESS OWNERS DATA

In 10 disparity ratios for five procurement categories, for both the state of Tennessee and the Memphis MSA, only four instances of over-utilization were found for M/WBE groups.

FINDING E: DISPARITIES IN SELF-EMPLOYMENT AND REVENUE EARNINGS

Econometric analysis using data from the 2011-2015 American Community Survey data for the Memphis Public Use Microdata Area found statistically significant disparities for entry into self-employment for African Americans and Nonminority Women. There were also statistically significant disparities in earnings from self-employment for African Americans and Nonminority Women.

FINDING F: ANECDOTAL COMMENTS

Among the M/WBEs who responded to questions about barriers to doing business with the District, the biggest concern for prime contractors and subcontractors was competing with large firms (47% of M/WBE primes and 36% of M/WBE subcontractors). Other issues noted by M/WBE respondents included:

Primes:

- Slow payment – 28 percent.
- Short or limited time given to prepare bid package or quote – 26%
- Selection process/evaluation criteria – 26%.

Subcontractors:

- Short or limited time given to prepare bid package or quote – 20%
- Financing – 15%.

With respect to disparate treatment, M/WBE respondents in the survey reported:

- Discriminatory experiences in dealing with prime contractor – 2.55 percent.
- Discriminatory experiences in the private sector – 13.61 percent.

3. COMMENDATIONS AND RECOMMENDATIONS

The following commendations and recommendations are based on multiple findings and do not necessarily tie to one finding. These recommendations also reflect in part that a school district is involved. School districts, while they have large construction programs, do not have the same mission of business development as cities, counties, and states. The District should be commended for their pursuance of a disparity study to determine if there is evidence to support a M/WBE program.

RECOMMENDATION A: SUBCONTRACTOR PROJECT GOALS

In response to the primary research question, this study provides evidence to support a District M/WBE program. This conclusion is based primarily on statistical disparities in current M/WBE utilization; evidence of discrimination in business formation and revenue earned from self-employment; and anecdotal evidence of disparate treatment. The District should tailor its M/WBE participation policy to remedy each of these specific disparities. The core theme should be that prime contractors should document their outreach efforts and the reasons why they may have rejected qualified M/WBEs and M/WBEs who were the low-bidding or most qualified subcontractors.

RECOMMENDATION B: DATA MANAGEMENT

The District should create methods of tracking subcontractor utilization for M/WBE and non-M/WBE firms. In particular, the District should:

- Require the reporting of subcontractor utilization.
- Validate subcontractor utilization using compliance reporting.
- Produce comprehensive reports on MBE utilization.

- ♦ Maintain a list of certified M/WBE firms using other governmental and certification organizations in the Memphis area.

RECOMMENDATION C: SLBE PROGRAM

The District should consider adding a Small Local Business Enterprise (SLBE) program, including SLBE project goals and SLBE set-asides. SLBE programs have the advantage that they are generally not subject to constitutional challenge. Combining SLBE programs and M/WBE programs has become common across agencies that maintain M/WBE programs. Further ideas on SLBE programs are discussed in **Section 4** below.

RECOMMENDATION D: NARROWLY TAILORED M/WBE PROGRAM

Developments in court cases involving federal disadvantaged business enterprise (DBE) programs provide important insight into the design of local M/WBE programs. Federal courts have consistently found DBE regulations in 49 CFR 26 to be narrowly tailored.¹⁷⁵ The federal DBE program has the features shown in **Table 8-4** that contribute to this characterization as a narrowly tailored remedial procurement preference program. The District should adopt these features in any new M/WBE program.

TABLE 8-4
NARROWLY TAILORED M/WBE PROGRAM FEATURES

	NARROWLY TAILORED GOAL-SETTING FEATURES	DBE Regulations
1.	The District should not use M/WBE quotas.	49 CFR 26(43)(a)
2.	The District should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
3.	The District should meet the maximum amount of M/WBE goals through race-neutral means.	49 CFR 26(51)(a)

Source: Suggested features in a proposed narrowly tailored M/WBE program based on USDOT 49 CFR 26.

RECOMMENDATION E: ASPIRATIONAL M/WBE GOALS

The District should be commended for its aspirational goals and the revisions of its aspirational goals. The District should consider establishing annual aspirational MBE and WBE goals by business category. Proposed goals are listed in **Table 8-5**. The proposed goals are based on a weighted average of M/WBE utilization and availability. These aspirational goals should not be applied rigidly to every individual District project. Instead, MBE and WBE goals should vary from project to project. Aspirational goals should be based on relative MBE and WBE availability. The primary means for achieving these aspirational goals should be an SBE program, outreach, and adjustments in District procurement policy in addition to M/WBE project goals.

¹⁷⁵ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Gross Seed. v. State of Nebraska*, 345 F.3d 968 (8th Cir. 2003); cert denied, 158 L.Ed. 2d 729 (2004).

TABLE 8-5
PROPOSED MBE AND WBE GOALS

Procurement Category	M/WBE Goals
Architecture and Engineering	13.68%
Construction	24.17%
Professional Services	35.24%
Nonprofessional Services	32.57%
Goods or Commodities	24.02%

RECOMMENDATION F: OUTREACH

The District should utilize available resources such as industry-specific trade associations and business organization to inform its members about procurement opportunities with the District. Occasionally, the District should host “How to Do Business” workshops for interested firms. It will be equally important to educate District staff of any new M/WBE or SLBE programs established by the District for discretionary spending.

RECOMMENDATION G: STAFFING

To increase its efforts on M/WBE inclusion, the District should consider adding three staff to assist with outreach, reporting, and monitoring. The District needs staff to manage and implement study recommendations and provide oversight and management of the program that results from the study.

RECOMMENDATION H: CERTIFICATION

The District should use existing certification agencies to identify certified minority and women business enterprises in the Memphis area. Agencies to consider:

- ◆ City of Memphis
- ◆ Departments of Transportation for Arkansas, Mississippi, and Tennessee
- ◆ Tennessee Governor’s Office of Diversity Business Enterprise
- ◆ Tri-state Minority Supplier’s Development Council

This list can be expanded per the District’s requirements.

4. SELECTED M/WBE AND SLBE PRACTICES

As MGT reviews procurement policies and remedial programs of federal, state, and local government M/W/SBE programs, we are able to identify policies that promote local small business development. This research affords us the opportunity to create an extensive library of practices that agencies use to include minority, women, small, and disadvantaged businesses in their procurement process. Contained herein is a menu of policies that have worked in some localities, but may not have been effective in others. Some policies have been discontinued for budgetary reasons. In many instances, it is difficult to determine whether a particular policy is directly responsible for the success of a program. Such assistance may include direct subsidies to businesses, funds for management and technical assistance to small and new entrepreneurs, mentor-protégé programs, and bonding assistance, as well as collaboration with and support for organizations that provide management and technical assistance to businesses.

A substantial number of these agencies also have procurement preference programs for small business. Some M/W/SBE programs are nominal and some seem to have substantial resources devoted to M/W/SBE program design and implementation. In general, the demand by some courts and some legislation for race-neutral business development policies has increased the resources devoted to race-neutral M/WBE programs.

GOOD FAITH EFFORTS

Portsmouth Public Schools, Virginia. The Portsmouth Public Schools require bidders to meet a combination of good faith efforts that equal a numerical value established by the program. Each good faith effort option is assigned a value weighted by the greatest result of possible success of the effort.

SMALL BUSINESS PRIME CONTRACTING PROGRAMS

The City and County of Denver has a defined selection pool of Small Business Enterprises (SBE) and specific projects for Emerging Business Enterprises (EBE). The EBE certification program seeks to assist businesses in obtaining work on construction and professional services contracts. The City will offer projects restricted for bidding only for EBEs, and provide free technical assistance to enable emerging business enterprises to gain the knowledge, experience, and resources needed to participate in the competitive process for contracts.

For Construction Services, the applicant business enterprise and affiliates cannot exceed \$3,000,000 based on annual receipts averaged over three preceding consecutive fiscal years and will be based on 100 percent of the applicable size standards established by the Small Business Administration (SBA) classification system.

For Professional Services, the applicant business enterprise and affiliates cannot exceed \$1,000,000 based on annual receipts averaged over three preceding consecutive fiscal years and will be based on 50 percent of the applicable size standards established by the Small Business Administration (SBA) classification system.

The City of Charlotte, North Carolina has a comprehensive SBE program including SBE set asides and business assistance. In addition, the City of Charlotte sets department goals for SBE utilization, sets SBE goals on formal and informal contracts, and makes SBE utilization part of department performance review utilization numbers. The City has a waiver provision for bidders, but has rejected bids for bidder noncompliance with the SBE program. Charlotte achieved 28.9 percent M/WBE subcontractor utilization in Construction and 33.1 percent M/WBE subcontractor utilization in Architecture and Engineering through small business subcontracting goals.

BIDDER ROTATION

Some political jurisdictions use bidder rotation schemes to limit habitual purchases from majority firms and to ensure that SBEs have an opportunity to bid along with majority firms. A number of agencies, including the City of Indianapolis, Indiana; Fairfax County, Virginia; and Miami-Dade County, Florida, use bid rotation to encourage M/W/SBE utilization, particularly in Architecture and Engineering. Some examples of bidder rotation from these agencies include:

Miami-Dade County, Florida. Miami-Dade County has used small purchase orders for the Community Business Enterprise program and rotated on that basis. In addition, Miami-Dade County has utilized an Equitable Distribution Program, whereby a pool of qualified Architecture and Engineering professionals are

rotated awards of county miscellaneous Architecture and Engineering services as prime contractors and subcontractors.

SMALL BUSINESS SET-ASIDES

Miami-Dade County Public Schools. The Miami-Dade Schools SBE policy includes a sheltered market component. The policy provides that certain contracts can be placed in a sheltered market by the Office of Economic Opportunity and Miami-Dade Schools goal setting committee if: (1) there are at least three SBE/MBEs that are capable and available, (2) there is under-utilization in that business category, and (3) the extent to which the District's SBE prime contractor goals are being achieved. A contract can be removed from the sheltered market program if a responsive and responsible bid is not received or the bid received is deemed to be too high in price.

North Carolina Department of Transportation (NCDOT). In the NCDOT program, small contractors are defined as firms with less than \$1.5 million in revenue. There is a small contractor goal of \$2 million for each of the 14 NCDOT divisions. The current cap on project size for small contractors is \$500,000. For contracts less than \$500,000, NCDOT can solicit three informal bids from small business enterprises. North Carolina law permits the waiving of bonds and licensing requirements for these small contracts let to SBEs. From FY04 through FY08, M/WBEs won \$29.4 million (20.3 percent) in prime contracts under the North Carolina program.

Oregon Department of Transportation (ODOT). Under its Small Business Initiative, ODOT started a pilot program targeting small firms in Region I. The program was extended statewide in September 2007. The program initially set aside contracts of less than \$75,000 for competition amongst small firms and targeted Architecture and Engineering firms. Set asides for Architecture and Engineering and related services were extended to projects of up to \$150,000. Set-asides for Construction are limited to projects valued at \$100,000 or less. The program covers Project Specific contracts and On-Call Contracts.

The City of Tampa, Florida. The City allows for a 5 percent bid preference of the lowest bidder but cannot exceed \$20,000 for Small Local Business Enterprise.

OUTREACH

Most agencies have extensive outreach, including match-making with procurement officials, workshops and seminars, featuring SBEs in agency newsletters, and providing procurement forecasts.

MANAGEMENT AND TECHNICAL ASSISTANCE

A number of agencies hire an outside management and technical assistance providers to offer tech services related to business development and performance. Such a contract can be structured to include providing incentives to produce results, such as the number of M/W/SBEs being registered as qualified vendors with a city, the number of M/W/SBEs graduating from subcontract work to prime contracting, and rewarding firms that utilize M/W/SBEs in their private sector business activities.

Los Angeles Unified School District Small Business Boot Camp. The eight-week program trains contractors in bonding, prequalification, bidding, scheduling, public contract law, safety plans, labor compliance, and financing.

5. CONCLUSION

This study provides factual predicate evidence for the establishment of a District M/WBE program. This evidence is based on quantitative and qualitative data from public and private sources. Any program efforts must be narrowly tailored to rectify the issues identified in this report.