

Forest Preserves of Cook County Disparity Study 2022



FOREST PRESERVES OF COOK COUNTY

DISPARITY STUDY

2022

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About the Study Team

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

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(except Bulk Stations and Terminals)
(NAICS Code Weight of All the Forest Preserves Spending: 9.8%)

I. EXECUTIVE SUMMARY

Colette Holt & Associates (“CHA”) was retained by the Forest Preserves of Cook County (“the Forest Preserves”) to perform a disparity study examining its Program for Minority- and Woman-Owned Business Enterprises (“M/WBEs”). In this Study, we examined the Forest Preserves’ utilization of M/WBEs from 2016 through 2020; the availability of these firms as a percentage of all firms in the agency’s geographic and industry market areas; and any disparities between the Forest Preserves’ utilization of M/WBEs and M/WBE availability. We also summarized the qualitative data about the experiences of minority- and woman-owned firms in obtaining government and private sector contracts and associated subcontracts in the Chicago area and throughout Illinois from our other disparity studies in Appendix E. Based on these findings, we evaluated the M/WBE Program for conformance with constitutional standards and national best practices for government contracting affirmative action programs.

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

A. Summary of the Legal Standards Governing Contracting Affirmative Action Program

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

As first adopted in the *Croson* decision, strict scrutiny analysis has two prongs:

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

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

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

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

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

Most federal courts, including the Seventh Circuit, have subjected preferences for WBEs to "intermediate scrutiny". Gender-based classifications must be supported by an "exceedingly persuasive justification" and be "substantially related to the objective".¹ The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to satisfy strict scrutiny. However, appellate courts have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the U.S. Department of Transportation's Disadvantaged Business Enterprise program² or held that the results would be the same under strict scrutiny.

Proof of the negative effects of economic factors on M/WBEs and the unequal treatment of such firms by actors critical to their success will meet strict scrutiny. Studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race- and gender-conscious measures to combat discrimination. These are commonly referred to as "disparity studies" because they analyze any disparities between the opportunities and experiences of minority- and woman-owned firms and their actual utilization compared to White male-owned businesses. Specific evidence of discrimination or its absence may be direct or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs. High quality studies also examine

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

2. 49 C.F.R. Part 26.

the elements of the government’s program to determine whether it is sufficiently narrowly tailored.

A complete explanation of the legal standards is provided in Appendix F to this Report.

B. Utilization, Availability, and Disparity Analyses of Forest Preserves Contracts

1. Contract Data Overview

We analyzed contract data for 2016 through 2020. The Initial Contract Data File contained 335 contracts. To conduct the analysis, we constructed all the fields necessary for our analysis where they were missing in the Forest Preserves’ contract records (*e.g.*, industry type; zip codes; six-digit North American Industry Classification System (“NAICS”) codes of prime contractors and subcontractors; and M/WBE subcontractor information, including payments, race, gender; etc.). The Final Contract Data File contained 124 prime contracts and 211 associated subcontracts, with a total value of \$33,981,921.

2. The Forest Preserves’ Industry Market

The Final Contract Data File contained 82 NAICS codes. The following six-digit NAICS codes accounted for over 99% of the agency’s spending.

**Table 1-1: Industry Percentage Distribution of Forest Preserves Contracts by Dollars
Comprising Over 1% of Agency Spend**

NAICS	NAICS Code Description	Pct Contract Dollars
561730	Landscaping Services	32.1%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.5%
237310	Highway, Street, and Bridge Construction	7.9%
238910	Site Preparation Contractors	6.2%
721211	RV (Recreational Vehicle) Parks and Campgrounds	4.8%
541330	Engineering Services	3.7%
237110	Water and Sewer Line and Related Structures Construction	3.3%
236220	Commercial and Institutional Building Construction	2.9%

NAICS	NAICS Code Description	Pct Contract Dollars
238160	Roofing Contractors	2.6%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.3%
238140	Masonry Contractors	2.3%
541620	Environmental Consulting Services	1.9%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.9%
541512	Computer Systems Design Services	1.7%
238350	Finish Carpentry Contractors	1.5%
531311	Residential Property Managers	1.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	1.1%

Source: CHA analysis of Forest Preserves data

3. The Forest Preserves’ Geographic Market

To determine the geographic market area, we applied the standard of identifying the firm locations that account for at least 75% of contract and subcontract dollar payments in the FCDF.³ Firm location was determined by zip code and aggregated into counties as the geographic unit. Contracts awarded to firms located in the State of Illinois accounted for 97.7% of the FCDF. Six counties within the Chicago metropolitan area— Cook, DuPage, Kane, Lake, McHenry, and Will— captured 93.4% of the state dollars and 91.3% of the entire FCDF. Therefore, these six counties were determined to be the geographic market for the Forest Preserves, and we limited our analysis to firms in these counties.

4. The Forest Preserves’ Utilization of M/WBEs

The next step was to determine the dollar value of the Forest Preserves’ utilization of M/WBEs as measured by payments to prime firms and subcontractors and disaggregated by race and gender.⁴

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

3. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 (“*National Disparity Study Guidelines*”), at p. 29.

4. For our analysis, the term “M/WBE” includes firms that are certified by government agencies and minority- and woman-owned firms that are not certified.

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

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
Total	5.6%	17.9%	16.5%	0.0%	40.0%	10.9%	50.8%	49.2%	100.0%

Source: CHA analysis of Forest Preserves data

5. Availability of M/WBEs in the Forest Preserves’ Markets

Using the modified “custom census” approach to estimating availability and the further assignment of race and gender using the FCDF, the Master M/W/DBE Directory and other sources, we determined the unweighted and weighted availability of M/WBEs in the Forest Preserves’ market area. For further explanation of the role of unweighted and weighted availability and how these are calculated, please see Appendix D of this Report.⁵

**Table 1-3: Aggregated Weighted M/WBE Availability for Forest Preserves
Contracts**

Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
4.5%	6.0%	2.4%	0.1%	13.0%	6.1%	19.1%	80.9%	100.0%

Source: CHA analysis of Forest Preserves data; Hoovers; CHA Master Directory

6. Concentration Analysis of the Forest Preserves’ Spending

In addition to examining the level of M/WBE and non-M/WBE contract dollar utilization, another important dimension to a disparity analysis is the level of contract dollars concentration among M/WBE and non-M/WBE firms. This approach is important because the success of a group in receiving contract dollars may be caused by an unusual amount of dollars concentrated among a few firms. If that is the case, then a race- or gender-based remedial program may still be supportable even though a few firms have been able to overcome discriminatory barriers.

This analysis yielded two important findings: 1) the three NAICS codes that provide the most contract dollars to each M/WBE group capture an identical or larger share of the overall Forest Preserves spending received by the group than the share of overall Forest Preserves spending captured by the top three

5. The USDOT “Tips for Goal Setting” urges recipients to weight their headcount of firms by dollars spent. See Tips for Goal-Setting in the Disadvantaged Business Enterprise Program, <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

NAICS codes for the agency; and 2) the three NAICS codes that provide the most contract dollars to M/WBEs are different from the three NAICS codes where Forest Preserves spend most of their contract dollars.

This means that there was relatively heavy concentration of M/WBE spending among a few NAICS codes. It also means that M/WBE spend was disproportionately concentrated in a few codes. For example, three NAICS codes captured 49.7% of all Black contract dollars; the corresponding figure for non-M/WBEs was 5.6%. These results support the inference that regardless of any statistical disparities between contract utilization and weighted availability, the experiences of M/WBEs with respect to participation in the Forest Preserves' procurement programs is sometimes significantly different from the experiences of non-M/WBEs.

7. Disparity Analysis of the Forest Preserves' Spending

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

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

$$DR = U/WA$$

Where DR is the disparity ratio; U is utilization rate; and WA is the weighted availability.

The courts have held that disparity results must be analyzed to determine whether the results are "significant". There are two distinct methods to measure a result's significance. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to, or less than, 80% of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.⁶ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone.⁷ A more in-depth discussion of statistical significance is provided in Appendix C to this Report.

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6. See U.S. Equal Employment Opportunity Commission regulation, 29 C.F.R. §1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").
 7. A chi-square test – examining if the utilization rate was different from the weighted availability – was used to determine the statistical significance of the disparity ratio.

Table 1-4 presents the disparity ratios for each demographic group. The disparity ratios for Native Americans are substantively significant. No other ratios are substantively significant. However, the disparity ratios for Hispanics, Asians, MBEs, White women, and M/WBEs are statistically significant.

Table 1-4: Disparity Ratios by Demographic Group

	Black	Hispanic	Asian	Native American	MBE	White Woman	M/WBE	Non-M/WBE
Disparity Ratio	124.1%	297.3%***	698.4%***	0.0%‡	308.8%***	177.9%*	266.3%***	60.8%‡***

Source: CHA analysis of Forest Preserves data
 *** Indicates statistical significance at the 0.001 level
 * Indicates statistical significance at the 0.05 level
 ‡ Indicates substantive significance

8. Summary

In summary, we found that M/WBEs were concentrated in a smaller subset of industries than non-M/WBEs. For some industries, only a few M/WBEs received contracts in contrast to non-M/WBEs. This suggests that although the Forest Preserves’ Program has been highly successful in creating opportunities for minority and woman firms, these benefits have not been spread evenly across all groups or industries. We find the data as a whole support the conclusion that M/WBEs have not reached parity in all aspects of the agency’s contracting activities compared to non-M/WBEs.

C. Recommendations for the Forest Preserves’ M/WBE Program

This Report presents the results of our analysis of the Forest Preserves’ geographic and product market areas; its utilization of M/WBEs as a percentage of all firms in those market areas, measured by dollars spent; the concentration of M/WBEs compared to non-M/WBEs in the agency’s spending; and the disparity ratios between each racial and ethnic group and White women compared to non-M/WBEs. We also presented the anecdotal data from our other Illinois studies, which are relevant and probative for the Forest Preserves because they share similar markets. Based on these results, we make the following recommendations for a narrowly tailored Program.

1. Use the Study to Set the Overall, Annual Aspirational MBE and WBE Goals

The federal courts require current and detailed data upon which to set race- or gender-based contracting goals. We recommend using the weighted availability estimates in this Report to set the Forest Preserves' overall, annual aspirational MBE and WBE goals. The estimated weighted M/WBE availability is 19.1%, which we believe can support an aspirational goal of 20%.

2. Use the Study to Set MBE and WBE Contract Goals

In addition to setting an overall, annual target, the agency should use the Study's detailed unweighted availability estimates as the starting point for contract specific goals. As discussed in Appendix F of this Report, the Forest Preserves' constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. This methodology involves four steps:

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

The Forest Preserves' current electronic data collection and monitoring system, B2Gnow, contains a contract goal setting module that has been designed to integrate the results of our disparity studies into the system to simplify the process and develop defensible goals. We suggest the Forest Preserves utilize this module for its contract specific goal setting.

Where there is a significant change order issued by the Forest Preserves, the contract goal should be evaluated to determine the change's impact on goal attainment. If an M/WBE's scope is reduced such that the original contract goal will not be met, the contractor should be required to make GFEs to add participation if possible. If an M/WBE's scope is increased, the M/WBE must be used for the increased amount if it is able to perform.

Written procedures spelling out the steps should be drafted.

This constitutionally mandated approach may result in goals that are higher or lower than the annual goals, including no goals where there are insufficient

subcontracting opportunities (as is often the case with supply contracts) or an insufficient number of available firms.

We urge the Forest Preserves to bid some contracts without goals that it determines have significant opportunities for M/WBE participation, especially in light of the high participation of M/WBEs during the study period. These “control contracts” can illuminate whether certified firms are used or even solicited in the absence of goals. The development of some “unremediated markets” data, as held by the courts, including the Seventh Circuit Court of Appeals, will be probative of whether the M/WBE program remains needed to level the playing field for minorities and women.

3. Increase Outreach to a Broader Range of Industries

While the Forest Preserves’ utilization of MBEs and WBEs has been outstanding in the aggregate, it is also true that the utilization of MBEs has been highly concentrated in fewer codes than that of non-M/WBEs. For example, Specialized Freight (NAICS code 484220) accounted for 19.1% of all Black contract dollars but only 1.9% of total agency spending. In total, the three codes that accounted for 49.7% of dollars to Black firms made up only 5.6% of the Forest Preserves total spend.

We suggest taking affirmative steps to target industries in which M/WBEs have not fully participated for future prime contracting and subcontracting opportunities. These could include holding special vendor fairs, enlisting the assistance of industry groups to encourage their members to submit bids for agency work, and contacting individual certified firms to ensure they are aware of specific solicitations and to answer any questions. More participation in a broader range of industries will also help to lessen the need for contract goals in industries with high M/WBE concentration, thereby reducing the burden on non-M/WBEs, a factor of the narrow tailoring standard for strict constitutional scrutiny.

4. Develop Performance Measures for Program Success

The Forest Preserves should develop quantitative performance measures for M/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. In addition to meeting the overall, annual goals, possible benchmarks might be:

- The number of bids or proposals, the industry and the dollar amount of the awards, and the goal shortfall, where the bidder was unable to meet the goals and submitted GFEs to do so.

- The number, dollar amount, and the industry code of bids or proposals rejected as non-responsive for failure to make GFEs to meet the goal.
- The number, industry, and dollar amount of M/WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors.
- Increased prime contract awards to certified firms.
- Increased “capacity” of certified firms, as measured by bonding limits, size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which M/WBEs are awarded prime contracts and subcontracts.

5. Continue to Conduct Regular Program Reviews

The Forest Preserves adopted a sunset date for the current Ordinance, and we suggest this approach be continued. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed, and if such measures are necessary, to ensure that they remain narrowly tailored.

II. CONTRACT DATA ANALYSIS FOR THE FOREST PRESERVES OF COOK COUNTY

A. Contract Data Overview

We analyzed contract data for 2016 through 2020 for the Forest Preserves. The Initial Contract Data File contained 335 contracts. In order to conduct the analysis, we constructed all the fields necessary for our analysis where they were missing in the Forest Preserves’ contract records (e.g., industry type; zip codes; six-digit North American Industry Classification System (“NAICS”) codes of prime contractors and subcontractors; and Minority- and Woman-owned Business Enterprise (“M/WBE”) subcontractor information, including payments, race, gender; etc.). Tables 2-1 through 2-2 provides data on the resulting Final Contract Data File.

Table 2-1: Final Contract Data File

Contract Type	Total Contracts	Share of Total Contracts
Prime Contracts	124	37.0%
Subcontracts	211	63.0%
TOTAL	335	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-2: Final Contract Data File Net Dollar Value

Business Type	Total Contract Dollars	Share of Total Contract Dollars
Prime Contracts	\$25,803,265	75.9%
Subcontracts	\$8,178,656	24.1%
TOTAL	\$33,981,921	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

The following sections present our analysis of the Forest Preserves’ contracts. First, we determined the geographic and product markets for the analysis. Next, we estimated the utilization of M/WBEs by the agency. Third, we used the FCDF, in

combination with other databases (as described below), to calculate M/WBE unweighted and weighted availability in the Forest Preserves' marketplace. Finally, we analyzed whether there are any disparities between the Forest Preserves' utilization of M/WBEs and M/WBE weighted availability.

B. The Forest Preserves' Geographic and Product Market

As discussed in Appendix E, the federal courts⁸ require that a government agency narrowly tailor its race- and gender-conscious contracting program elements to its geographic market area. This element of the analysis must be empirically established.⁹ The accepted approach is to analyze those detailed industries, as defined by six-digit NAICS codes,¹⁰ that make up at least 75% of the prime contract and subcontract payments for the study period.¹¹ The determination of the Forest Preserves' geographic and product market required three steps:

1. Develop the Final Contract Data File to determine the product market. These results are provided in Table 2-3.
2. Identify the geographic market.
3. Determine the product market given the geographic parameters. Table 2-4 presents these results.

1. The Forest Preserves' Final Contract Data File

The FCDF, which establishes the Forest Preserves' product market, consists of 62 NAICS codes with a total contract dollar value of \$33,981,921. Table 2-3 presents each NAICS code with its share of the total contract dollar value. The NAICS codes are presented from the code with the largest share to the smallest share.

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8. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (Richmond was specifically faulted for including minority contractors from across the country in its program based on the national evidence that supported the USDOT DBE program); see 49 C.F.R. §26.45(c); <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise> ("D. Explain How You Determined Your Local Market Area... your local market area is the area in which the substantial majority of the contractors and subcontractors with which you do business are located and the area in which you spend the substantial majority of your contracting dollars.").
 9. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (to confine data to strict geographic boundaries would ignore "economic reality").
 10. www.census.gov/eos/www/naics.
 11. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 ("*National Disparity Study Guidelines*").

Table 2-3: Industry Percentage Distribution of the Forest Preserves Contracts by Dollars

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
561730	Landscaping Services	32.1%	32.1%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.5%	41.6%
237310	Highway, Street, and Bridge Construction	7.9%	49.5%
238910	Site Preparation Contractors	6.2%	55.7%
721211	RV (Recreational Vehicle) Parks and Campgrounds	4.8%	60.5%
541330	Engineering Services	3.7%	64.2%
237110	Water and Sewer Line and Related Structures Construction	3.3%	67.5%
236220	Commercial and Institutional Building Construction	2.9%	70.4%
238160	Roofing Contractors	2.6%	73.0%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.3%	75.3%
238140	Masonry Contractors	2.3%	77.6%
541620	Environmental Consulting Services	1.9%	79.5%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.9%	81.3%
541512	Computer Systems Design Services	1.7%	83.0%
238350	Finish Carpentry Contractors	1.5%	84.5%
531311	Residential Property Managers	1.4%	85.9%
238210	Electrical Contractors and Other Wiring Installation Contractors	1.1%	87.0%
541211	Offices of Certified Public Accountants	1.0%	88.0%
443142	Electronics Stores	1.0%	89.0%
561320	Temporary Help Services	0.8%	89.8%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	0.8%	90.6%
562212	Solid Waste Landfill	0.8%	91.4%
524298	All Other Insurance Related Activities	0.7%	92.1%
541511	Custom Computer Programming Services	0.6%	92.7%
562991	Septic Tank and Related Services	0.5%	93.3%

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NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
562910	Remediation Services	0.5%	93.8%
238990	All Other Specialty Trade Contractors	0.5%	94.3%
541310	Architectural Services	0.5%	94.8%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	0.4%	95.2%
424910	Farm Supplies Merchant Wholesalers	0.4%	95.6%
541613	Marketing Consulting Services	0.4%	96.0%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	0.4%	96.4%
541611	Administrative Management and General Management Consulting Services	0.4%	96.7%
541380	Testing Laboratories	0.3%	97.0%
541320	Landscape Architectural Services	0.3%	97.3%
561611	Investigation Services	0.2%	97.5%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	0.2%	97.7%
238320	Painting and Wall Covering Contractors	0.2%	97.9%
424690	Other Chemical and Allied Products Merchant Wholesalers	0.2%	98.1%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.2%	98.3%
621999	All Other Miscellaneous Ambulatory Health Care Services	0.2%	98.5%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.2%	98.6%
424120	Stationery and Office Supplies Merchant Wholesalers	0.2%	98.8%
541370	Surveying and Mapping (except Geophysical) Services	0.1%	98.9%
811111	General Automotive Repair	0.1%	99.0%
562119	Other Waste Collection	0.1%	99.2%
541820	Public Relations Agencies	0.1%	99.3%
811211	Consumer Electronics Repair and Maintenance	0.1%	99.4%

NAICS	NAICS Code Description	Pct Contract Dollars	Cumulative Pct Contract Dollars
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.1%	99.5%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.1%	99.6%
424710	Petroleum Bulk Stations and Terminals	0.1%	99.7%
115112	Soil Preparation, Planting, and Cultivating	0.1%	99.8%
238110	Poured Concrete Foundation and Structure Contractors	0.05%	99.8%
541910	Marketing Research and Public Opinion Polling	0.03%	99.9%
213112	Support Activities for Oil and Gas Operations	0.03%	99.9%
561990	All Other Support Services	0.03%	99.9%
562998	All Other Miscellaneous Waste Management Services	0.02%	99.9%
562111	Solid Waste Collection	0.02%	100.0%
423390	Other Construction Material Merchant Wholesalers	0.02%	100.0%
238130	Framing Contractors	0.01%	100.0%
238310	Drywall and Insulation Contractors	0.01%	100.0%
444190	Other Building Material Dealers	0.01%	100.0%
TOTAL		100.0%	

Source: CHA analysis of Forest Preserves of Cook County data

2. The Forest Preserves' Geographic Market

To determine the geographic market area, we applied the standard of identifying the firm locations that account for at least 75% of contract and subcontract dollar payments in the FCDF. Firm location was determined by zip code and aggregated into counties as the geographic unit. Contracts awarded to firms located in the State of Illinois accounted for 97.7% of the FCDF. Six counties within the Chicago metropolitan area— Cook, DuPage, Kane, Lake, McHenry, and Will— captured 93.4% of the state dollars and 91.3% of the entire FCDF. Therefore, these six counties were determined to be the geographic market for the Forest Preserves, and we limited our analysis to firms in these counties.

C. The Forest Preserves’ Utilization of M/WBEs in its Geographic and Product Market

Having determined the Forest Preserves’ geographic market area, the next step was to determine the dollar value of the Forest Preserves’ utilization of M/WBEs as measured by net payments to prime firms and subcontractors and disaggregated by race and gender. There were 58 NAICS codes after constraining the FCDF by the geographic market; the dollar value of the contracts in these codes is \$31,014,223. Table 2-4 presents these data. We note that the contract dollar shares in Table 2-4 are equivalent to the weight of spending in each NAICS code. These data were used to calculate weighted availability from unweighted availability, as discussed below.

Table 2-4: NAICS Code Distribution of Contract Dollars in the Constrained Product Market

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
561730	Landscaping Services	\$9,273,290	29.9%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	\$3,032,010	9.8%
237310	Highway, Street, and Bridge Construction	\$2,696,476	8.7%
238910	Site Preparation Contractors	\$2,057,050	6.6%
721211	RV (Recreational Vehicle) Parks and Campgrounds	\$1,624,991	5.2%
541330	Engineering Services	\$1,263,467	4.1%
237110	Water and Sewer Line and Related Structures Construction	\$1,126,462	3.6%
236220	Commercial and Institutional Building Construction	\$984,206	3.2%
238160	Roofing Contractors	\$874,247	2.8%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$783,788	2.5%
238140	Masonry Contractors	\$774,127	2.5%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$579,119	1.9%
541512	Computer Systems Design Services	\$570,154	1.8%
238350	Finish Carpentry Contractors	\$513,842	1.7%
531311	Residential Property Managers	\$475,516	1.5%
541620	Environmental Consulting Services	\$392,563	1.3%

NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
238210	Electrical Contractors and Other Wiring Installation Contractors	\$367,348	1.2%
541211	Offices of Certified Public Accountants	\$347,695	1.1%
443142	Electronics Stores	\$336,882	1.1%
561320	Temporary Help Services	\$278,729	0.9%
562212	Solid Waste Landfill	\$259,029	0.8%
524298	All Other Insurance Related Activities	\$253,382	0.8%
562910	Remediation Services	\$184,000	0.6%
238990	All Other Specialty Trade Contractors	\$177,350	0.6%
541310	Architectural Services	\$165,795	0.5%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	\$138,350	0.4%
424910	Farm Supplies Merchant Wholesalers	\$136,493	0.4%
541613	Marketing Consulting Services	\$126,200	0.4%
541380	Testing Laboratories	\$112,445	0.4%
541320	Landscape Architectural Services	\$87,941	0.3%
561611	Investigation Services	\$79,659	0.3%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	\$69,327	0.2%
541611	Administrative Management and General Management Consulting Services	\$67,223	0.2%
238320	Painting and Wall Covering Contractors	\$66,160	0.2%
424690	Other Chemical and Allied Products Merchant Wholesalers	\$66,010	0.2%
541511	Custom Computer Programming Services	\$61,595	0.2%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	\$57,750	0.2%
621999	All Other Miscellaneous Ambulatory Health Care Services	\$55,679	0.2%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	\$52,773	0.2%
424120	Stationery and Office Supplies Merchant Wholesalers	\$51,075	0.2%

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NAICS	NAICS Code Description	Total Contract Dollars	Pct Total Contract Dollars
541370	Surveying and Mapping (except Geophysical) Services	\$48,495	0.2%
811111	General Automotive Repair	\$47,152	0.2%
562119	Other Waste Collection	\$46,904	0.2%
541820	Public Relations Agencies	\$40,267	0.1%
811211	Consumer Electronics Repair and Maintenance	\$39,478	0.1%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	\$39,066	0.1%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	\$32,096	0.1%
115112	Soil Preparation, Planting, and Cultivating	\$22,347	0.1%
238110	Poured Concrete Foundation and Structure Contractors	\$15,600	0.1%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	\$14,850	0.05%
213112	Support Activities for Oil and Gas Operations	\$9,920	0.03%
561990	All Other Support Services	\$8,910	0.03%
562998	All Other Miscellaneous Waste Management Services	\$7,661	0.02%
562111	Solid Waste Collection	\$6,754	0.02%
423390	Other Construction Material Merchant Wholesalers	\$5,861	0.02%
238130	Framing Contractors	\$3,155	0.01%
238310	Drywall and Insulation Contractors	\$3,100	0.01%
444190	Other Building Material Dealers	\$2,410	0.01%
TOTAL		\$31,014,223	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

Tables 2-5 and 2-6 present data on the Forest Preserves' M/WBE utilization, measured in contract dollars and percentage of contract dollars.

Table 2-5: Distribution of Contract Dollars by Race and Gender (total dollars)

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
115112	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$22,347	\$22,347
213112	\$0	\$9,920	\$0	\$0	\$9,920	\$0	\$9,920	\$0	\$9,920
236220	\$156,364	\$0	\$0	\$0	\$156,364	\$296,512	\$452,876	\$531,330	\$984,206
237110	\$0	\$656,199	\$370,802	\$0	\$1,027,001	\$2,500	\$1,029,501	\$96,961	\$1,126,462
237310	\$0	\$879,965	\$0	\$0	\$879,965	\$16,161	\$896,126	\$1,800,350	\$2,696,476
238110	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$15,600	\$15,600
238130	\$0	\$3,155	\$0	\$0	\$3,155	\$0	\$3,155	\$0	\$3,155
238140	\$42,674	\$79,382	\$632,871	\$0	\$754,927	\$0	\$754,927	\$19,200	\$774,127
238160	\$299,562	\$0	\$52,607	\$0	\$352,169	\$102,125	\$454,294	\$419,953	\$874,247
238210	\$0	\$17,250	\$232,261	\$0	\$249,511	\$1,840	\$251,351	\$115,997	\$367,348
238220	\$228,000	\$4,940	\$6,276	\$0	\$239,216	\$159,535	\$398,751	\$385,037	\$783,788
238310	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$3,100	\$3,100
238320	\$58,155	\$2,100	\$0	\$0	\$60,255	\$0	\$60,255	\$5,905	\$66,160
238350	\$0	\$91,224	\$0	\$0	\$91,224	\$58,638	\$149,862	\$363,980	\$513,842
238910	\$155,662	\$1,510,660	\$0	\$0	\$1,666,322	\$0	\$1,666,322	\$390,728	\$2,057,050
238990	\$0	\$64,885	\$0	\$0	\$64,885	\$47,187	\$112,072	\$65,278	\$177,350
423120	\$0	\$117,000	\$0	\$0	\$117,000	\$21,350	\$138,350	\$0	\$138,350
423310	\$56,348	\$0	\$12,979	\$0	\$69,327	\$0	\$69,327	\$0	\$69,327
423320	\$0	\$0	\$0	\$0	\$0	\$32,096	\$32,096	\$0	\$32,096
423390	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$5,861	\$5,861

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
423610	\$0	\$0	\$0	\$0	\$0	\$14,850	\$14,850	\$0	\$14,850
423720	\$0	\$0	\$0	\$0	\$0	\$57,750	\$57,750	\$0	\$57,750
423810	\$0	\$30,452	\$0	\$0	\$30,452	\$8,614	\$39,066	\$0	\$39,066
423850	\$52,773	\$0	\$0	\$0	\$52,773	\$0	\$52,773	\$0	\$52,773
424120	\$0	\$0	\$0	\$0	\$0	\$51,075	\$51,075	\$0	\$51,075
424690	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$66,010	\$66,010
424720	\$0	\$414,951	\$2,222,053	\$0	\$2,637,005	\$240,404	\$2,877,409	\$154,602	\$3,032,010
424910	\$0	\$0	\$0	\$0	\$0	\$84,998	\$84,998	\$51,496	\$136,493
443142	\$0	\$0	\$336,882	\$0	\$336,882	\$0	\$336,882	\$0	\$336,882
444190	\$2,410	\$0	\$0	\$0	\$2,410	\$0	\$2,410	\$0	\$2,410
484220	\$329,022	\$157,287	\$18,875	\$0	\$505,184	\$31,543	\$536,727	\$42,392	\$579,119
524298	\$0	\$0	\$0	\$0	\$0	\$147,311	\$147,311	\$106,072	\$253,382
531311	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$475,516	\$475,516
541211	\$0	\$66,930	\$0	\$0	\$66,930	\$155,595	\$222,525	\$125,170	\$347,695
541310	\$0	\$0	\$0	\$0	\$0	\$99,713	\$99,713	\$66,082	\$165,795
541320	\$0	\$42,712	\$0	\$0	\$42,712	\$2,800	\$45,512	\$42,429	\$87,941
541330	\$25,466	\$16,725	\$119,771	\$0	\$161,963	\$340,554	\$502,517	\$760,950	\$1,263,467
541370	\$0	\$0	\$0	\$0	\$0	\$48,495	\$48,495	\$0	\$48,495
541380	\$0	\$0	\$99,145	\$0	\$99,145	\$0	\$99,145	\$13,300	\$112,445
541511	\$61,595	\$0	\$0	\$0	\$61,595	\$0	\$61,595	\$0	\$61,595
541512	\$0	\$0	\$570,154	\$0	\$570,154	\$0	\$570,154	\$0	\$570,154
541611	\$33,082	\$0	\$0	\$0	\$33,082	\$34,141	\$67,223	\$0	\$67,223
541613	\$0	\$0	\$30,000	\$0	\$30,000	\$96,200	\$126,200	\$0	\$126,200

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
541620	\$0	\$8,582	\$0	\$0	\$8,582	\$330,325	\$338,907	\$53,656	\$392,563
541820	\$0	\$0	\$0	\$0	\$0	\$40,267	\$40,267	\$0	\$40,267
561320	\$23,076	\$7,500	\$0	\$0	\$30,576	\$0	\$30,576	\$248,153	\$278,729
561611	\$0	\$0	\$0	\$0	\$0	\$8,774	\$8,774	\$70,886	\$79,659
561730	\$195,541	\$1,281,301	\$425,386	\$0	\$1,902,228	\$809,535	\$2,711,763	\$6,561,528	\$9,273,290
561990	\$0	\$0	\$0	\$0	\$0	\$8,910	\$8,910	\$0	\$8,910
562111	\$0	\$0	\$0	\$0	\$0	\$6,754	\$6,754	\$0	\$6,754
562119	\$0	\$0	\$0	\$0	\$0	\$5,390	\$5,390	\$41,514	\$46,904
562212	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$259,029	\$259,029
562910	\$0	\$29,800	\$0	\$0	\$29,800	\$0	\$29,800	\$154,200	\$184,000
562998	\$0	\$0	\$0	\$0	\$0	\$7,660	\$7,660	\$0	\$7,660
621999	\$4,000	\$51,679	\$0	\$0	\$55,679	\$0	\$55,679	\$0	\$55,679
721211	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,624,991	\$1,624,991
811111	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$47,152	\$47,152
811211	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$39,478	\$39,478
Total	\$1,723,730	\$5,544,598	\$5,130,062	\$0	\$12,398,390	\$3,369,601	\$15,767,991	\$15,246,231	\$31,014,223

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-6: Percentage Distribution of Contract Dollars by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
115112	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
213112	0.0%	100.0%	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
236220	15.9%	0.0%	0.0%	0.0%	15.9%	30.1%	46.0%	54.0%	100.0%
237110	0.0%	58.3%	32.9%	0.0%	91.2%	0.2%	91.4%	8.6%	100.0%
237310	0.0%	32.6%	0.0%	0.0%	32.6%	0.6%	33.2%	66.8%	100.0%
238110	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238130	0.0%	100.0%	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
238140	5.5%	10.3%	81.8%	0.0%	97.5%	0.0%	97.5%	2.5%	100.0%
238160	34.3%	0.0%	6.0%	0.0%	40.3%	11.7%	52.0%	48.0%	100.0%
238210	0.0%	4.7%	63.2%	0.0%	67.9%	0.5%	68.4%	31.6%	100.0%
238220	29.1%	0.6%	0.8%	0.0%	30.5%	20.4%	50.9%	49.1%	100.0%
238310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238320	87.9%	3.2%	0.0%	0.0%	91.1%	0.0%	91.1%	8.9%	100.0%
238350	0.0%	17.8%	0.0%	0.0%	17.8%	11.4%	29.2%	70.8%	100.0%
238910	7.6%	73.4%	0.0%	0.0%	81.0%	0.0%	81.0%	19.0%	100.0%
238990	0.0%	36.6%	0.0%	0.0%	36.6%	26.6%	63.2%	36.8%	100.0%
423120	0.0%	84.6%	0.0%	0.0%	84.6%	15.4%	100.0%	0.0%	100.0%
423310	81.3%	0.0%	18.7%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
423320	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423390	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423610	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
423720	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
423810	0.0%	78.0%	0.0%	0.0%	78.0%	22.0%	100.0%	0.0%	100.0%
423850	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
424120	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
424690	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
424720	0.0%	13.7%	73.3%	0.0%	87.0%	7.9%	94.9%	5.1%	100.0%
424910	0.0%	0.0%	0.0%	0.0%	0.0%	62.3%	62.3%	37.7%	100.0%
443142	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
444190	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
484220	56.8%	27.2%	3.3%	0.0%	87.2%	5.4%	92.7%	7.3%	100.0%
524298	0.0%	0.0%	0.0%	0.0%	0.0%	58.1%	58.1%	41.9%	100.0%
531311	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541211	0.0%	19.2%	0.0%	0.0%	19.2%	44.8%	64.0%	36.0%	100.0%
541310	0.0%	0.0%	0.0%	0.0%	0.0%	60.1%	60.1%	39.9%	100.0%
541320	0.0%	48.6%	0.0%	0.0%	48.6%	3.2%	51.8%	48.2%	100.0%
541330	2.0%	1.3%	9.5%	0.0%	12.8%	27.0%	39.8%	60.2%	100.0%
541370	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
541380	0.0%	0.0%	88.2%	0.0%	88.2%	0.0%	88.2%	11.8%	100.0%
541511	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
541512	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
541611	49.2%	0.0%	0.0%	0.0%	49.2%	50.8%	100.0%	0.0%	100.0%
541613	0.0%	0.0%	23.8%	0.0%	23.8%	76.2%	100.0%	0.0%	100.0%
541620	0.0%	2.2%	0.0%	0.0%	2.2%	84.1%	86.3%	13.7%	100.0%

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
541820	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
561320	8.3%	2.7%	0.0%	0.0%	11.0%	0.0%	11.0%	89.0%	100.0%
561611	0.0%	0.0%	0.0%	0.0%	0.0%	11.0%	11.0%	89.0%	100.0%
561730	2.1%	13.8%	4.6%	0.0%	20.5%	8.7%	29.2%	70.8%	100.0%
561990	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
562111	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
562119	0.0%	0.0%	0.0%	0.0%	0.0%	11.5%	11.5%	88.5%	100.0%
562212	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
562910	0.0%	16.2%	0.0%	0.0%	16.2%	0.0%	16.2%	83.8%	100.0%
562998	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%	100.0%
621999	7.2%	92.8%	0.0%	0.0%	100.0%	0.0%	100.0%	0.0%	100.0%
721211	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811111	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
811211	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	5.6%	17.9%	16.5%	0.0%	40.0%	10.9%	50.8%	49.2%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

D. The Availability of M/WBEs in the Forest Preserves' Geographic and Product Market

1. The Methodological Framework

Estimates of the availability of M/WBEs in the Forest Preserves' geographic and product market are a critical component of the agency's compliance with its constitutional obligations to ensure its program is narrowly tailored. As discussed in Appendix E, the courts require that the availability estimates reflect the number of "ready, willing and able" firms that can perform on specific types of work involved in the recipient's prime contracts and associated sub-contracts; general population is legally irrelevant. To examine whether M/WBEs are receiving full opportunities on the Forest Preserves' contracts, these narrowly tailored availability estimates were compared to the utilization percentage of dollars received by M/WBEs. Availability estimates are also crucial for the agency to determine its annual, aspirational MBE and WBE targets and to set narrowly tailored contract goals.

We applied the "custom census" approach, with refinements, to estimating availability, discussed in Appendix E. Using this framework, CHA utilized three databases to estimate availability:

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

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

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

We next developed a custom database from Hoovers, a Dun & Bradstreet company, for minority- and woman-owned firms and non-M/WBEs. Hoovers maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including location and detailed industry codes, and is the broadest

publicly available data source for firm information. We purchased the information from Hoovers for the firms in the NAICS codes located in the Forest Preserves' market area in order to form our custom Dun & Bradstreet/Hoovers Database. In the initial download, the data from Hoovers simply identified a firm as being minority-owned.¹² However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). We obtained this additional information from Hoovers by special request.

The Hoovers database is the most comprehensive list of minority-owned and woman-owned businesses available. It is developed from the efforts of a national firm whose business is collecting business information. Hoovers builds its database from over 250 sources, including information from government sources and various associations, and its own efforts. Hoovers conducts an audit of the preliminary database prior to the public release of the data. That audit must result in a minimum of 94% accuracy. Once published, Hoovers has an established protocol to regularly refresh its data. This protocol involves updating any third-party lists that were used and contacting a selection of firms via Hoover's own call centers.

We merged these three databases to form an accurate estimate of firms available to work on Forest Preserves contracts. For an extended explanation of how unweighted and weighted availability are calculated, please see Appendix D.

2. The Availability Data and Results

Tables 2-7 through 2-9 present data on:

1. The unweighted availability percentages by race and gender and by NAICS codes for the Forest Preserves' product market;
2. The weights used to adjust the unweighted numbers;¹³ and
3. The final estimates of the weighted averages of the individual six-digit level NAICS availability estimates in the Forest Preserves' market area.

We "weighted" the availability data for two reasons. First, the weighted availability represents the share of total possible contractors for each demographic group, weighted by the distribution of contract dollars across the NAICS codes in which the Forest Preserves spends its dollars. Weighting is necessary because the disparity ratio, discussed below, must be an "apples-to-apples" comparison. The numerator – the utilization rate – is measured in dollars *not*

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

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

the number of firms. Therefore, the denominator – availability – must be measured in dollars, not the number of firms.

Second, weighting also reflects the importance of the availability of a demographic group in a particular NAICS code, that is, how important that NAICS code is to the Forest Preserves’ contracting patterns. For example, in a hypothetical NAICS code 123456, the total available firms are 100 and 60 of these firms are M/WBEs; hence, M/WBE availability would be 60%. However, if the Forest Preserves spends only one percent of its contract dollars in this NAICS code, then this high availability would be offset by the low level of spending in that NAICS code. In contrast, if the Forest Preserves spent 25% of its contract dollars in NAICS code 123456, then the same availability would carry a greater weight.

To calculate the weighted availability for each NAICS code, we first determined the unweighted availability for each demographic group in each NAICS code (presented in Table 2-7). In the previous example, the unweighted availability for M/WBEs in NAICS code 123456 is 60%. We then multiplied the unweighted availability by the share of the Forest Preserves spending in that NAICS code presented in Table 2-8. This share is the *weight*. Using the previous example, where the Forest Preserves spending in NAICS code 123456 was one percent, the component of M/WBE weighted availability for NAICS code 123456 would be 0.006: 60% multiplied by one percent.

We performed this calculation for each NAICS code and then summed all of the individual components for each demographic group to determine the weighted availability for that group. The results of this calculation are presented in Table 2-9.

Table 2-7: Unweighted M/WBE Availability for the Forest Preserves’ Contracts

NAICS	Black	Hispanic	Asian	Native American	MBE	White Woman	M/WBE	Non-M/WBE	Total
115112	5.8%	0.0%	0.0%	0.0%	5.8%	7.7%	13.5%	86.5%	100.0%
213112	0.0%	1.2%	0.0%	0.0%	1.2%	3.7%	4.9%	95.1%	100.0%
236220	8.3%	7.1%	3.6%	0.5%	19.5%	7.9%	27.4%	72.6%	100.0%
237110	3.5%	19.8%	8.0%	0.0%	31.2%	8.6%	39.8%	60.2%	100.0%
237310	9.0%	16.1%	6.3%	0.2%	31.6%	7.0%	38.6%	61.4%	100.0%
238110	5.0%	7.2%	0.8%	0.0%	13.0%	6.3%	19.2%	80.8%	100.0%
238130	3.4%	3.7%	0.6%	0.0%	7.7%	3.3%	11.0%	89.0%	100.0%
238140	4.0%	4.6%	0.4%	0.0%	9.0%	5.4%	14.4%	85.6%	100.0%
238160	2.4%	1.6%	0.3%	0.0%	4.3%	3.9%	8.3%	91.7%	100.0%

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NAICS	Black	Hispanic	Asian	Native American	MBE	White Woman	M/WBE	Non-M/WBE	Total
238210	3.6%	2.6%	0.8%	0.1%	7.0%	7.5%	14.5%	85.5%	100.0%
238220	2.4%	2.2%	0.6%	0.0%	5.3%	3.6%	8.9%	91.1%	100.0%
238310	11.3%	16.5%	0.8%	0.0%	28.5%	5.3%	33.8%	66.2%	100.0%
238320	3.7%	1.6%	0.3%	0.1%	5.7%	3.8%	9.6%	90.4%	100.0%
238350	16.9%	14.8%	3.4%	0.0%	35.0%	7.4%	42.4%	57.6%	100.0%
238910	10.3%	11.6%	2.1%	0.0%	24.0%	10.3%	34.3%	65.7%	100.0%
238990	2.4%	2.8%	0.5%	0.1%	5.7%	3.6%	9.3%	90.7%	100.0%
423120	0.5%	1.7%	0.8%	0.0%	3.0%	4.4%	7.3%	92.7%	100.0%
423310	1.1%	0.8%	0.8%	0.0%	2.8%	4.3%	7.0%	93.0%	100.0%
423320	1.4%	3.5%	1.6%	0.0%	6.5%	7.1%	13.6%	86.4%	100.0%
423390	5.8%	7.8%	1.9%	1.9%	17.5%	10.7%	28.2%	71.8%	100.0%
423610	2.9%	2.2%	2.0%	0.1%	7.2%	10.8%	17.9%	82.1%	100.0%
423720	2.2%	0.4%	0.4%	0.0%	2.9%	9.1%	12.0%	88.0%	100.0%
423810	0.0%	3.4%	0.4%	1.5%	5.3%	5.3%	10.7%	89.3%	100.0%
423850	3.3%	1.6%	0.7%	0.0%	5.6%	10.0%	15.5%	84.5%	100.0%
424120	4.5%	0.3%	4.2%	0.0%	8.9%	11.4%	20.3%	79.7%	100.0%
424690	1.7%	0.7%	5.0%	0.0%	7.5%	9.4%	16.8%	83.2%	100.0%
424720	1.2%	2.3%	4.3%	0.0%	7.8%	5.5%	13.3%	86.7%	100.0%
424910	0.0%	0.0%	0.7%	0.0%	0.7%	8.1%	8.8%	91.2%	100.0%
443142	0.6%	0.4%	1.1%	0.0%	2.1%	3.2%	5.4%	94.6%	100.0%
444190	1.7%	2.2%	0.5%	0.0%	4.4%	7.5%	11.9%	88.1%	100.0%
484220	10.0%	31.8%	2.6%	0.0%	44.4%	14.8%	59.3%	40.7%	100.0%
524298	4.6%	0.8%	0.0%	0.0%	5.4%	5.0%	10.4%	89.6%	100.0%
531311	4.5%	0.0%	0.2%	0.0%	4.7%	1.8%	6.5%	93.5%	100.0%
541211	2.2%	0.9%	0.4%	0.0%	3.5%	6.0%	9.6%	90.4%	100.0%
541310	3.5%	3.6%	2.6%	0.1%	9.7%	9.0%	18.8%	81.2%	100.0%
541320	1.0%	1.1%	0.6%	0.0%	2.7%	4.3%	7.1%	92.9%	100.0%
541330	4.2%	3.1%	7.2%	0.1%	14.6%	5.8%	20.4%	79.6%	100.0%
541370	3.2%	4.0%	8.0%	0.0%	15.1%	10.0%	25.1%	74.9%	100.0%
541380	1.2%	0.9%	3.3%	0.1%	5.5%	4.5%	10.1%	89.9%	100.0%

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NAICS	Black	Hispanic	Asian	Native American	MBE	White Woman	M/WBE	Non-M/WBE	Total
541511	2.5%	0.7%	5.2%	0.0%	8.4%	4.2%	12.6%	87.4%	100.0%
541512	4.6%	1.6%	6.8%	0.0%	13.0%	7.4%	20.4%	79.6%	100.0%
541611	5.0%	1.2%	1.5%	0.1%	7.9%	8.9%	16.8%	83.2%	100.0%
541613	2.5%	1.3%	0.9%	0.1%	4.7%	6.8%	11.5%	88.5%	100.0%
541620	4.2%	4.7%	3.7%	0.3%	12.9%	12.1%	25.0%	75.0%	100.0%
541820	5.4%	2.3%	0.7%	0.0%	8.3%	15.5%	23.8%	76.2%	100.0%
561320	6.7%	2.5%	2.9%	0.0%	12.1%	12.3%	24.3%	75.7%	100.0%
561611	19.8%	3.1%	0.0%	0.0%	22.8%	10.9%	33.7%	66.3%	100.0%
561730	3.1%	3.4%	0.3%	0.0%	6.8%	4.6%	11.5%	88.5%	100.0%
561990	3.0%	0.5%	0.6%	0.0%	4.1%	8.5%	12.6%	87.4%	100.0%
562111	9.0%	13.5%	1.1%	0.0%	23.6%	22.5%	46.1%	53.9%	100.0%
562119	25.0%	40.0%	0.0%	0.0%	65.0%	22.5%	87.5%	12.5%	100.0%
562212	1.6%	3.1%	0.0%	0.0%	4.7%	1.6%	6.3%	93.8%	100.0%
562910	23.0%	19.1%	2.7%	0.0%	44.8%	9.3%	54.1%	45.9%	100.0%
562998	18.2%	16.9%	1.3%	0.0%	36.4%	15.6%	51.9%	48.1%	100.0%
621999	0.9%	0.1%	0.3%	0.0%	1.3%	2.3%	3.6%	96.4%	100.0%
721211	0.0%	0.0%	0.0%	0.0%	0.0%	3.8%	3.8%	96.2%	100.0%
811111	0.2%	0.2%	0.0%	0.0%	0.5%	1.9%	2.4%	97.6%	100.0%
811211	0.5%	2.6%	1.1%	0.0%	4.2%	4.7%	8.9%	91.1%	100.0%
Total	3.3%	2.3%	1.6%	0.1%	7.4%	6.2%	13.5%	86.5%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data; Hoovers; CHA Master Directory

Table 2-8: Distribution of the Forest Preserves’ Spending by NAICS Code (the Weights)

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
115112	Soil Preparation, Planting, and Cultivating	0.1%
213112	Support Activities for Oil and Gas Operations	0.03%
236220	Commercial and Institutional Building Construction	3.2%
237110	Water and Sewer Line and Related Structures Construction	3.6%
237310	Highway, Street, and Bridge Construction	8.7%
238110	Poured Concrete Foundation and Structure Contractors	0.1%
238130	Framing Contractors	0.01%
238140	Masonry Contractors	2.5%
238160	Roofing Contractors	2.8%
238210	Electrical Contractors and Other Wiring Installation Contractors	1.2%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.5%
238310	Drywall and Insulation Contractors	0.01%
238320	Painting and Wall Covering Contractors	0.2%
238350	Finish Carpentry Contractors	1.7%
238910	Site Preparation Contractors	6.6%
238990	All Other Specialty Trade Contractors	0.6%
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers	0.4%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	0.2%
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers	0.1%
423390	Other Construction Material Merchant Wholesalers	0.02%
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers	0.05%
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers	0.2%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	0.1%
423850	Service Establishment Equipment and Supplies Merchant Wholesalers	0.2%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
424120	Stationery and Office Supplies Merchant Wholesalers	0.2%
424690	Other Chemical and Allied Products Merchant Wholesalers	0.2%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%
424910	Farm Supplies Merchant Wholesalers	0.4%
443142	Electronics Stores	1.1%
444190	Other Building Material Dealers	0.01%
484220	Specialized Freight (except Used Goods) Trucking, Local	1.9%
524298	All Other Insurance Related Activities	0.8%
531311	Residential Property Managers	1.5%
541211	Offices of Certified Public Accountants	1.1%
541310	Architectural Services	0.5%
541320	Landscape Architectural Services	0.3%
541330	Engineering Services	4.1%
541370	Surveying and Mapping (except Geophysical) Services	0.2%
541380	Testing Laboratories	0.4%
541511	Custom Computer Programming Services	0.2%
541512	Computer Systems Design Services	1.8%
541611	Administrative Management and General Management Consulting Services	0.2%
541613	Marketing Consulting Services	0.4%
541620	Environmental Consulting Services	1.3%
541820	Public Relations Agencies	0.1%
561320	Temporary Help Services	0.9%
561611	Investigation Services	0.3%
561730	Landscaping Services	29.9%
561990	All Other Support Services	0.03%
562111	Solid Waste Collection	0.02%
562119	Other Waste Collection	0.2%
562212	Solid Waste Landfill	0.8%

NAICS	NAICS Code Description	WEIGHT (Pct Share of Total Sector Dollars)
562910	Remediation Services	0.6%
562998	All Other Miscellaneous Waste Management Services	0.02%
621999	All Other Miscellaneous Ambulatory Health Care Services	0.2%
721211	RV (Recreational Vehicle) Parks and Campgrounds	5.2%
811111	General Automotive Repair	0.2%
811211	Consumer Electronics Repair and Maintenance	0.1%
TOTAL		100.0%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-9 presents the weighted availability results for each of the racial and gender categories. The aggregated availability of M/WBEs, weighted by the Forest Preserves’ spending in its geographic and industry markets, is 19.1% for the Forest Preserves’ contracts. This overall, weighted M/WBE availability result can be used by the agency to determine its overall, annual aspirational MBE and WBE goals.

Table 2-9: Aggregated Weighted Availability for Forest Preserves Contracts

Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
4.5%	6.0%	2.4%	0.1%	13.0%	6.1%	19.1%	80.9%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data; Hoovers; CHA Master Directory

E. Analysis of the Concentration of Contract Dollars Among Firms

In addition to examining the level of M/WBE and non-M/WBE contract dollar utilization, another important dimension to a disparity analysis is the level of contract dollars concentration among M/WBE and non-M/WBE firms. This approach is important because the success of a group in receiving contract dollars may be caused by an unusual amount of dollars concentrated among a few firms. If that is the case, then a race- or gender-based remedial program may still be supportable even though a few firms have been able to overcome discriminatory barriers. This section presents data to examine this issue.

Prior to presenting these data, it is important to emphasize two important findings: 1) the three NAICS codes that provide the most contract dollars to each M/

WBE group capture an identical or larger share of the overall Forest Preserves spending received by the group than the share of overall Forest Preserves spending captured by the top three NAICS codes for the agency; and 2) the three NAICS codes that provide the most contract dollars to M/WBEs are different from the three NAICS codes where Forest Preserves spend most of their contract dollars.

With respect to the first finding, Table 2-10 presents data on the share of the Forest Preserves contract dollars received by the top three NAICS codes for each demographic group. These shares are derived from the data presented in Tables 2-5 and 2-6. The three NAICS codes where the Forest Preserves spent most of its contract dollars capture 48.4% of all agency spending. For each M/WBE group, the corresponding figure for the share of spending captured by the top three codes (for each group) ranges between 43.9% (White Women) and 66.8% (Asian).

Table 2-10: Comparison of the Share of the Forest Preserves Spending Captured by the Top Three NAICS Codes for Each Demographic Group

Demographic Group	Share of All the Forest Preserves Spending in the Top Three NAICS Codes for Each Group
All	48.4%
Black	49.7%
Hispanic	66.2%
Asian	66.8%
White Women	43.9%
Non-M/WBE	65.5%

Source: CHA analysis of Forest Preserves of Cook County data

With respect to the second finding, Table 2-11 provides more detail on the data presented in Table 2-10. Table 2-11 lists the top three codes for each group and their corresponding share of the group’s total spending. The code with the largest amount of Forest Preserves spending – NAICS code 561730 (Landscaping Services) – is among the top three codes for Hispanics and White women. The code with the second largest amount of the agency’s spending – NAICS code 424720 (Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)) – is among the top three codes only for Asians. The code with the third largest amount of Forest Preserves spending – NAICS code 237310 (Highway, Street, and Bridge Construction) – is among the top three codes for Hispanics and White Women. In summary, if the important codes from the perspective of Forest Preserves were the same for all M/WBEs, we would find 12 matches (three codes; four M/WBEs groups); however, we only find five matches. Thus, we can conclude

that the NAICS codes that are important to the agency’s overall spending are different from the codes that are important to M/WBEs.

Table 2-11: The Top Three the Forest Preserves Spending NAICS Codes for Each Demographic Group

NAICS	NAICS Code Label	WEIGHT	Total of Top 3 Codes
All			
561730	Landscaping Services	29.9%	48.4%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%	
237310	Highway, Street, and Bridge Construction	8.7%	
Black			
484220	Specialized Freight (except Used Goods) Trucking, Local	19.1%	49.7%
238160	Roofing Contractors	17.4%	
238220	Plumbing, Heating, and Air-Conditioning Contractors	13.2%	
Hispanic			
238910	Site Preparation Contractors	27.2%	66.2%
561730	Landscaping Services	23.1%	
237310	Highway, Street, and Bridge Construction	15.9%	
Asian			
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	43.3%	66.8%
238140	Masonry Contractors	12.3%	
541512	Computer Systems Design Services	11.1%	
White Woman			
561730	Landscaping Services	24.0%	43.9%
541330	Engineering Services	10.1%	
541620	Environmental Consulting Services	9.8%	
Non-M/WBE			
561730	Landscaping Services	43.0%	65.5%
237310	Highway, Street, and Bridge Construction	11.8%	
721211	RV (Recreational Vehicle) Parks and Campgrounds	10.7%	

Source: CHA analysis of Forest Preserves of Cook County data

Tables 2-12 through 2-27 present more details on how the Forest Preserves spending varies across groups and within groups. These results illustrate the different levels of concentration of contract dollars among M/WBEs compared to non-M/WBEs. For each demographic group, we re-state the three NAICS codes where the group receives the largest share of the Forest Preserves' spending (first presented in Table 2-11). We next present the share of all group contract dollars and compare that share to the corresponding share received by non-M/WBEs. Finally, we examine each of the NAICS codes individually to compare the concentration of contract dollars among the three largest firms for that group to the concentration of contract dollars among the three largest non-M/WBEs.

Tables 2-12 through 2-15 present data for Black-owned firms.

- Table 2-12 presents the three NAICS codes where Black firms received the largest share of their contract dollars. While these codes captured 49.7% of all Black contract dollars, the corresponding figure for non-M/WBEs was 5.6%. In particular, while the Forest Preserves only spent 1.9% of its dollars in NAICS code 484220, 19.1% of all Black contract dollars came from this code. This disproportionality was evident in the other two leading codes for Black firms: NAICS code 238160 contributed 17.4% to all Black contract dollars but just 2.8% to all the Forest Preserves spending; NAICS code 238220 contributed 13.2% to all Black contract dollars but just 2.5% to all the Forest Preserves spending.
- Table 2-13 presents data on the firm concentration in NAICS 484220. In this code, only one Black firm and one non-M/WBE firm received contracts. One important difference was that the one Black firm received 13 contracts and the one non-M/WBE firm received just one contract.
- Table 2-14 presents data on the firm concentration in NAICS 238160. Here, fewer Black firms received contracts and the contract dollars received by Black firms were more concentrated than the contract dollars by non-M/WBE firms. The two Black firms received all of the Black dollars; the top two non-M/WBE firms received 74.0% of non-M/WBE dollars.
- Table 2-15 presents data on the firm concentration in NAICS 238220. In this code, only four contracts were let. Because only one Black firm received any contracts, the contract dollars received by Black firms were more concentrated than the contract dollars by non-M/WBE firms.

Table 2-12: Three NAICS Codes where Black Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total Black Dollars	Share of Total Non-M/WBE Dollars
484220	Specialized Freight (except Used Goods) Trucking, Local	1.9%	19.1%	0.3%
238160	Roofing Contractors	2.8%	17.4%	2.8%
238220	Plumbing, Heating, and Air-Conditioning Contractors	2.5%	13.2%	2.5%
Total 3-code Share of Total Group Dollars			49.7%	5.6%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-13: Comparison of Black and non-M/WBE Firm Concentration
NAICS Code 484220: Specialized Freight (except Used Goods) Trucking, Local**

	Black	Non-M/WBE
Number of Contracts	13	1
Number of Firms	1	1
Share of #1	100.0%	100.0%
Share of #2	0.0%	0.0%
Share of #3	0.0%	0.0%
Share of Top 3	100.0%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-14: Comparison of Black and non-M/WBE Firm Concentration
NAICS Code 238160: Roofing Contractors**

	Black	Non-M/WBE
Number of Contracts	3	10
Number of Firms	2	6
Share of #1	51.7%	47.5%
Share of #2	48.3%	26.5%
Share of #3	0.0%	8.2%
Share of Top 3	100.0%	82.2%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-15: Comparison of Black and non-M/WBE Firm Concentration
NAICS Code 238220: Plumbing, Heating, and Air-Conditioning Contractors**

	Black	Non-M/WBE
Number of Contracts	1	3
Number of Firms	1	3
Share of #1	100.0%	74.7%
Share of #2	0.0%	21.8%
Share of #3	0.0%	3.5%
Share of Top 3	100.0%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

Tables 2-16 through 2-19 present data for Hispanic-owned firms.

- Table 2-16 presents the three NAICS codes where Hispanic firms received the largest share of their contract dollars. While these codes comprised 66.3% of all Hispanic contract dollars, the corresponding figure for non-M/WBEs was 57.4%. In particular, while Forest Preserves spent 6.6% of its dollars in NAICS code 238910, 27.2% of all Hispanic contract dollars came from this code. This disproportionality was even greater in the other two leading codes for Hispanic firms: NAICS code 561730 contributed 23.1% to all Hispanic contract dollars but 29.9% of all Forest Preserves spending; NAICS code 237310 contributed 15.9% to all Hispanic contract dollars but only 8.7% to all the Forest Preserves spending.
- Table 2-17 presents data on the firm concentration in NAICS 238910. Here, the contract dollars received by Hispanic firms were more concentrated than the contract dollars by non-M/WBE firms. The top Hispanic firm received 83.9% of all Hispanic dollars; the top non-M/WBE firms received 37.7% of non-M/WBE dollars.
- Table 2-18 presents data on the firm concentration in NAICS 561730. The degree of concentration was approximately the same. The top three Hispanics accumulated 83.6% of all Hispanics contract dollars in this code; the corresponding figure for non-M/WBEs was 87.9%.
- Table 2-19 presents data on the firm concentration in NAICS 237310. In this code, the contract dollars received by Hispanic firms were slightly less concentrated than the contract dollars by non-M/WBE firms. The top three Hispanics firms received 94.6% of the Hispanic dollars; the top three non-M/WBE firms received 100% of the non-M/WBE dollars.

Table 2-16: Three NAICS Codes where Hispanic Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total Hispanic Dollars	Share of Total Non-M/WBE Dollars
238910	Site Preparation Contractors	6.6%	27.2%	2.6%
561730	Landscaping Services	29.9%	23.1%	43.0%
237310	Highway, Street, and Bridge Construction	8.7%	15.9%	11.8%
Total 3-code Share of Total Group Dollars			66.2%	57.4%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-17: Comparison of Hispanic and Non-M/WBE Firm Concentration
NAICS Code 238910: Site Preparation Contractors**

	Hispanic	Non-M/WBE
Number of Contracts	15	4
Number of Firms	6	4
Share of #1	83.9%	37.7%
Share of #2	4.7%	31.2%
Share of #3	4.5%	23.9%
Share of Top 3	93.1%	92.8%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-18: Comparison of Hispanic and Non-M/WBE Firm Concentration
NAICS Code 561730: Landscaping Services**

	Hispanic	Non-M/WBE
Number of Contracts	14	14
Number of Firms	5	7
Share of #1	34.7%	38.7%
Share of #2	31.8%	28.8%
Share of #3	17.1%	20.4%
Share of Top 3	83.6%	87.9%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-19: Comparison of Hispanic and Non-M/WBE Firm Concentration
NAICS Code 237310: Highway, Street, and Bridge Construction**

	Hispanic	Non-M/WBE
Number of Contracts	7	7
Number of Firms	5	3
Share of #1	70.0%	81.3%
Share of #2	14.2%	10.5%
Share of #3	10.4%	8.2%
Share of Top 3	94.6%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

Tables 2-20 through 2-23 present data for Asian-owned firms.

- Table 2-20 presents the three NAICS codes where Asian firms received the largest share of their contract dollars. While these codes captured 66.8% of all Asian contract dollars, the corresponding figure for non-M/WBEs was 1.1%. In particular, while the Forest Preserves only spent 9.8% of its dollars in NAICS code 424720, 43.3% of all Asian contract dollars came from this code. This disproportionality was evident in the other two leading codes for Asian firms: NAICS code 238140 contributed 12.3% to all Asian contract dollars but just 2.5% to all the Forest Preserves spending; NAICS code 541512 contributed 11.1% to all Asian contract dollars and 1.8% to all agency spending. What was also striking was how few contracts were let in these key codes for Asian contract dollars and how few firms were involved.
- Table 2-21 presents data on the firm concentration in NAICS 424720. Only one Asian firm and one non-M/WBE firms received contracts in this code.
- Table 2-22 presents data on the firm concentration in NAICS 238140. Only two Asian firm and no non-M/WBE firms received contracts in this code.
- Table 2-23 presents data on the firm concentration in NAICS 541512. In this code, only one contract was let and an Asian firm received this contract.

Table 2-20: Three NAICS Codes where Asian Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total Asian Dollars	Share of Total Non-M/WBE Dollars
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%	43.3%	1.0%
238140	Masonry Contractors	2.5%	12.3%	0.1%
541512	Computer Systems Design Services	1.8%	11.1%	0.0%
Total 3-code Share of Total Group Dollars			66.8%	1.1%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-21: Comparison of Asian and Non-M/WBE Firm Concentration

NAICS Code 424720: Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)

	Asian	Non-M/WBE
Number of Contracts	3	1
Number of Firms	1	1
Share of #1	100.0%	100.0%
Share of #2	0.0%	0.0%
Share of #3	0.0%	0.0%
Share of Top 3	100.0%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-22: Comparison of Asian and Non-M/WBE Firm Concentration

NAICS Code 238140: Masonry Contractors

	Asian	Non-M/WBE
Number of Contracts	4	1
Number of Firms	2	1
Share of #1	92.5%	100.0%
Share of #2	7.5%	0.0%
Share of #3	0.0%	0.0%
Share of Top 3	100.0%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-23: Comparison of Asian and Non-M/WBE Firm Concentration
NAICS Code 541512: Computer Systems Design Services**

	Asian	Non-M/WBE
Number of Contracts	1	0
Number of Firms	1	0
Share of #1	100.0%	0.0%
Share of #2	0.0%	0.0%
Share of #3	0.0%	0.0%
Share of Top 3	100.0%	0.0%

Source: CHA analysis of Forest Preserves of Cook County data

Tables 2-24 through 2-27 present data for White woman-owned firms.

- Table 2-25 presents the three NAICS codes where White woman firms received the largest share of their contract dollars. Activity in NAICS code 561730 exhibit a pattern far different from what we saw for the other M/WBEs: the Forest Preserves spending in this code exceeded the codes contribution to overall White women’s contract dollars and that contribution to overall White woman contract dollars was less than the codes contribution to overall non-M/WBE contract dollars. With the other two codes, the usual patterns emerge with the share of total White woman contract dollars from these two codes exceed the corresponding figure for non-M/WBEs or the agency overall. In particular, while the Forest Preserves only spent 4.1% of its dollars in NAICS code 541330, 10.1% of all White woman contract dollars came from this code. In NAICS code 541620, the code contributed 9.8% to all White woman contract dollars and just 1.3% to all the Forest Preserves spending.
- Table 2-26 presents data on the firm concentration in NAICS 561730. Here, the contract dollars received by White woman firms were concentrated at roughly the same level as the contract dollars by non-M/WBE firms. The top three White woman firms received 81.1% of all White woman dollars; the top three non-M/WBE firms received 87.9% of non-M/WBE dollars.
- Table 2-27 presents data on the firm concentration in NAICS 541330. Here, the contract dollars received by White woman firms were more concentrated than the contract dollars by non-M/WBE firms. The top White woman firm received 81.6% of all White woman dollars; the leading non-M/WBE firms received 38.0% of non-M/WBE dollars.

- Table 2-28 presents data on the firm concentration in NAICS 541620. In this code, only one White woman firm and one non-M/WBE firms received any contracts from Forest Preserves.

Table 2-24: Three NAICS Codes where White Woman Firms Received the Most Spending

NAICS Code	NAICS Code Label	Weight	Share of Total White Woman Dollars	Share of Total Non-M/WBE Dollars
561730	Landscaping Services	29.9%	24.0%	43.0%
541330	Engineering Services	4.1%	10.1%	5.0%
541620	Environmental Consulting Services	1.3%	9.8%	0.4%
Total 3-code Share of Total Group Dollars			43.9%	48.4%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-25: Comparison of White Woman and Non-M/WBE Firm Concentration
NAICS Code 561730: Landscaping Services**

	White Woman	Non-M/WBE
Number of Contracts	21	14
Number of Firms	7	7
Share of #1	46.1%	38.7%
Share of #2	24.6%	28.8%
Share of #3	10.4%	20.4%
Share of Top 3	81.1%	87.9%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-26: Comparison of White Woman and Non-M/WBE Firm Concentration
NAICS Code 541330: Engineering Services**

	White Woman	Non-M/WBE
Number of Contracts	4	10
Number of Firms	3	6
Share of #1	81.6%	38.0%
Share of #2	10.2%	29.6%
Share of #3	8.2%	21.6%
Share of Top 3	100.0%	89.3%

Source: CHA analysis of Forest Preserves of Cook County data

**Table 2-27: Comparison of White Woman and Non-M/WBE Firm Concentration
NAICS Code 541620: Environmental Consulting Services**

	White Woman	Non-M/WBE
Number of Contracts	1	1
Number of Firms	1	1
Share of #1	100.0%	100.0%
Share of #2	0.0%	0.0%
Share of #3	0.0%	0.0%
Share of Top 3	100.0%	100.0%

Source: CHA analysis of Forest Preserves of Cook County data

The data presented in Tables 2-12 through 2-27 support the inference that regardless of any statistical disparities between contract utilization and weighted availability, the experiences of M/WBE with respect to participation in the Forest Preserves' procurement programs is sometimes significantly different from the experiences of non-M/WBEs:

- The NAICS codes where MBEs receive a large proportion of their contract dollars are different from the codes where non-MBEs receive a large portion of their contract dollars.
- In those NAICS codes where MBEs receive large portions of their contract dollars, those dollars are more concentrated among a few firms compared to non-M/WBEs in those same codes.

These results suggest that while a few M/WBEs in a few industries have been able to enjoy equal opportunities, access to Forest Preserves contracts and subcontracts is still not equally available to all firms.

F. Disparity Analysis of M/WBEs for the Forest Preserves' Contracts

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

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

$$DR = U/WA$$

Where DR is the disparity ratio; U is utilization rate; and WA is the weighted availability.

The courts have held that disparity results must be analyzed to determine whether the results are "significant". There are two distinct methods to measure a result's significance. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.¹⁴ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the

14. See U.S. Equal Employment Opportunity Commission regulation, 29 C.F.R. §1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").

probability that it resulted from random chance alone.¹⁵ A more in-depth discussion of statistical significance is provided in Appendix C.

Substantive and Statistical Significance

- ‡ Connotes these values are substantively significant. Courts have ruled the disparity ratio less or equal to 80 percent represent disparities that are substantively significant. (See Footnote 14 for more information.)
- * Connotes these values are statistically significant at the 0.05 level. (See Appendix C for more information.)
- ** Connotes these values are statistically significant at the 0.01 level. (See Appendix C for more information.)
- *** Connotes these values are statistically significant at the 0.001 level. (See Appendix C for more information.)

Table 2-28 presents the disparity ratios for each demographic group. The disparity ratios for Native Americans are substantively significant. No other ratios are substantively significant. However, the disparity ratios for Hispanics, Asians, MBEs, White women, and M/WBEs are statistically significant.

Table 2-28: Disparity Ratios by Demographic Group

	Black	Hispanic	Asian	Native American	MBE	White Woman	M/WBE	Non-M/WBE
Disparity Ratio	124.1%	297.3%***	698.4%***	0.0%‡	308.8%***	177.9%*	266.3%***	60.8%‡,***

Source: CHA analysis of Forest Preserves of Cook County data

- ‡ Indicates substantive significance
- *** statistically significant at the 0.001 level
- * statistically significant at the 0.05 level

It is standard CHA practice to explore any M/WBE disparity ratio that exceeds 100%. This is to ensure that an abnormal pattern of M/WBE concentration does not account for disparity ratios greater than 100%, thereby leading to the unwarranted conclusion that race- or gender-conscious remedies are no longer needed to redress discrimination against a particular socially disadvantaged group. It is possible that a group’s disparity ratio that is larger than 100% might be the result of the success of a few firms and not indicative of the experiences of the broad set of firms in that group. This exploration entails further examination of any NAICS codes where:

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

- The NAICS code share of overall spending is at least five percent.
- The particular M/WBE utilization in that code is at least seven percent.

Table 2-29 presents the five codes where the weight of the Forest Preserves’ spending exceeded 5.0% and the M/WBE utilization in each code also exceeded 7.0%. The weight threshold of 5.0% was selected because those seven codes captured 60.2% of all Forest Preserves spending and the next highest weights were under 4.0%.

Table 2-29: Targeted NAICS Codes for Further Exploration of M/WBE Contract Dollars

NAICS	NAICS Code Description	Weight in Each Code	Rank	M/WBE Utilization in Each Code				
				Black	Hispanic	Asian	Native American	White Woman
561730	Landscaping Services	29.9%	1	2.1%	13.8%	4.6%	0.0%	8.7%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%	2	0.0%	13.7%	73.3%	0.0%	7.9%
237310	Highway, Street, and Bridge Construction	8.7%	3	0.0%	32.6%	0.0%	0.0%	0.6%
238910	Site Preparation Contractors	6.6%	4	7.6%	73.4%	0.0%	0.0%	0.0%
721211	RV (Recreational Vehicle) Parks and Campgrounds	5.2%	5	0.0%	0.0%	0.0%	0.0%	0.0%

Source: CHA analysis of Forest Preserves of Cook County data

Given these criteria, we examined more closely the utilization of:

- Black firms in NAICS code 238910.
- Hispanic firms in NAICS codes 561730, 424720, 237310, and 238910.
- Asian firms in NAICS code 424720.
- White woman firms in NAICS codes 561730 and 424720.

Tables 2-30 through 2-41 present the results of this investigation.

Table 2-30 presents the NAICS code selected to further explore the Black disparity ratio. NAICS codes 238910 ranked fourth in terms of the overall amount of the Forest Preserves spending in each code. Of the top five NAICS codes, this was the only code where Black utilization exceeded seven percent.

Table 2-30: Targeted NAICS Codes for Further Exploration – Black

NAICS	NAICS Code Description	Weight	Overall Weight Rank	Black Utilization
238910	Site Preparation Contractors	6.6%	4	7.6%

Source: CHA analysis of Forest Preserves of Cook County data

In Table 2-31, we explore the levels of firm concentration by examining several factors:

- The NAICS code’s share of all the Forest Preserves spending with Black firms compared to the NAICS code’s share of the Forest Preserves spending received by non-M/WBEs. This illuminates how important spending in the NAICS code was to the overall revenue received by Black firms compared to that same metric for non-M/WBEs. In a world where race and gender did not affect outcomes, the share would be similar.
- The number of Black firms that received contracts compared to the number of non-M/WBEs that received contracts.
- The share of Black contract dollars in each NAICS code received by the first, second, and third largest Black firms compared to the corresponding non-M/WBEs.
- The aggregate share of Black contract dollars received by the top three Black firms and the corresponding figure for non-M/WBEs.
- The aggregate share of Black contract dollars received by Black firms outside of the top three firms along with the corresponding figure for the non-M/WBEs outside of the top three.

These five metrics evaluate whether fewer Black firms received contracts compared to non-M/WBEs and whether the Black contract dollars were more concentrated compared to the level of concentration among non-M/WBEs. If either was the case, then the high level of utilization by Black firms (and hence, the high disparity ratio) resulted from the success of a few Black firms and not from a distribution across the entire spectrum of Black firms. This would be in contrast to a wider spectrum of success among non-M/WBE firms.

Table 2-31 presents these data for Black firms and non-M/WBEs in NAICS code 238910. This code contributed 9.0% to all Black contract dollars but just 2.6% of all non-MWBE contract dollars. One Black firm received a contract from the Forest Preserves for work in this code; in contrast, four non-M/WBE firms received contracts in this code. The top three non-M/WBE firms received 92.8% of the non-M/WBE dollars. While this concentration looks similar to the 100% received by the one Black firm, it is important to note this seeming parity occurs in the context where the top two non-MWBE firms received approximately the same share, and the third leading firm is not far behind.

**Table 2-31: Comparing Black and Non-M/WBE Outcomes
NAICS Code 238910: Site Preparation Contractors
(NAICS Code Weight of All the Forest Preserves Spending: 6.6%)**

	Black	Non-M/WBE
NAICS code share of all spending	9.0%	2.6%
Number of firms	1	4
Share of group spending in NAICS code by the largest firm	100.0%	37.7%
Share of group spending in NAICS code by the second largest firm	0.0%	31.2%
Share of group spending in NAICS code by the third largest firm	0.0%	23.9%
Share of group spending in NAICS code by the three largest firms	100.0%	92.8%
Share of group spending in NAICS code by the remaining firms	0.0%	7.2%

Source: CHA analysis of Forest Preserves of Cook County data

The approach used to examine the disparity ratios for Hispanic, Asian and White woman firms.

Table 2-32 presents the four NAICS codes selected to further explore the Hispanic disparity ratio. Of the top five NAICS codes, these four codes had Hispanic utilization exceeding 13.7%.

Table 2-32: Targeted NAICS Codes for Further Exploration – Hispanic

NAICS	NAICS Code Description	Weight	Overall Weight Rank	Hispanic Utilization
561730	Landscaping Services	29.9%	1	13.8%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%	2	13.7%
237310	Highway, Street, and Bridge Construction	8.7%	3	32.6%
238910	Site Preparation Contractors	6.6%	4	73.4%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-33 presents these data for Hispanic firms and non-M/WBEs in NAICS code 561730. More non-M/WBE firms (seven) received contracts compared to Hispanic firms (five). The level of concentration among the top three firms was approximately the same: 83.6% for Hispanics compared to 87.9% for non-M/WBEs.

Table 2-33: Comparing Hispanic and Non-M/WBE Outcomes

NAICS Code 561730: Landscaping Services

(NAICS Code Weight of All the Forest Preserves Spending: 29.9%)

	Hispanic	Non-M/WBE
NAICS code share of all spending	23.1	43.0
Number of firms	5	7
Share of group spending in NAICS code by the largest firm	34.7%	38.7%
Share of group spending in NAICS code by the second largest firm	31.8%	28.8%
Share of group spending in NAICS code by the third largest firm	17.1%	20.4%
Share of group spending in NAICS code by the three largest firms	83.6%	87.9%
Share of group spending in NAICS code by the remaining firms	16.4%	12.1%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-34 presents these data for Hispanic firms and non-M/WBEs in NAICS code 424720. Only three firms received contracts: two Hispanic firms and one non-M/WBE firm.

**Table 2-34: Comparing Hispanic and Non-M/WBE Outcomes
NAICS Code 424720: Petroleum and Petroleum Products Merchant Wholesalers
(except Bulk Stations and Terminals)
(NAICS Code Weight of All the Forest Preserves Spending: 9.8%)**

	Hispanic	Non-M/WBE
NAICS code share of all spending	7.5%	1.0%
Number of firms	2	1
Share of group spending in NAICS code by the largest firm	80.6%	100.0%
Share of group spending in NAICS code by the second largest firm	19.4%	0.0%
Share of group spending in NAICS code by the third largest firm	0.0%	0.0%
Share of group spending in NAICS code by the three largest firms	100.0%	100.0%
Share of group spending in NAICS code by the remaining firms	0.0%	0.0%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-35 presents these data for Hispanic firms and non-M/WBEs in NAICS code 237310. More Hispanic firms (five) received contracts compared to non-M/WBE firms (three) The level of concentration among the top three firms were approximately the same: 94.6% for Hispanics compared to 100% for non-M/WBEs.

**Table 2-35: Comparing Hispanic and Non-M/WBE Outcomes
NAICS Code 237310: Highway, Street, and Bridge Construction
(NAICS Code Weight of All the Forest Preserves Spending: 8.7%)**

	Hispanic	Non-M/WBE
NAICS code share of all spending	15.9	11.8
Number of firms	5	3
Share of group spending in NAICS code by the largest firm	70.0%	81.3%
Share of group spending in NAICS code by the second largest firm	14.2%	10.5%
Share of group spending in NAICS code by the third largest firm	10.4%	8.2%
Share of group spending in NAICS code by the three largest firms	94.6%	100.0%
Share of group spending in NAICS code by the remaining firms	5.4%	0.0%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-36 presents these data for Hispanic firms and non-M/WBEs in NAICS code 238910. More Hispanic firms (six) received contracts compared to non-M/WBE

firms (four). The level of concentration among the top three firms was approximately the same: 93.1% for Hispanics compared to 92.8% for non-M/WBEs.

**Table 2-36: Comparing Hispanic and Non-M/WBE Outcomes
NAICS Code 238910: Site Preparation Contractors
(NAICS Code Weight of All the Forest Preserves Spending: 6.6%)**

	Hispanic	Non-M/WBE
NAICS code share of all spending	27.2	2.6
Number of firms	6	4
Share of group spending in NAICS code by the largest firm	83.9%	37.7%
Share of group spending in NAICS code by the second largest firm	4.7%	31.2%
Share of group spending in NAICS code by the third largest firm	4.5%	23.9%
Share of group spending in NAICS code by the three largest firms	93.1%	92.8%
Share of group spending in NAICS code by the remaining firms	6.9%	7.2%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-37 presents data on NAICS code 424720 in order to further explore the Asian disparity ratio. Of the top five NAICS codes, this was the only code where Asian utilization exceeded seven percent.

Table 2-37: Targeted NAICS Codes for Further Exploration – Asian

NAICS	NAICS Code Description	Weight	Overall Weight Rank	Asian Utilization
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%	2	73.3%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-38 presents these data for Asian firms and non-M/WBEs in NAICS code 424720. Both Asian and non-M/WBE groups received only one contract. However, the codes contribution to overall Asian contract dollars far exceeded the comparable number for non-M/WBEs. Forty-three percent of all Asian contract dollars came from this code; in contrast, the code contributed just 1.0% to overall non-M/WBE contract dollars.

**Table 2-38: Comparing Asian and Non-M/WBE Outcomes
NAICS Code 424720: Petroleum and Petroleum Products Merchant Wholesalers
(except Bulk Stations and Terminals)
(NAICS Code Weight of All the Forest Preserves Spending: 9.8%)**

	Asian	Non-M/WBE
NAICS code share of all spending	43.3%	1.0%
Number of firms	1	1
Share of group spending in NAICS code by the largest firm	100.0%	100.0%
Share of group spending in NAICS code by the second largest firm	0.0%	0.0%
Share of group spending in NAICS code by the third largest firm	0.0%	0.0%
Share of group spending in NAICS code by the three largest firms	100.0%	100.0%
Share of group spending in NAICS code by the remaining firms	0.0%	0.0%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-39 presents the two NAICS codes selected to further explore the White Woman disparity ratio. NAICS codes 561730, and 424720 ranked first and second respectively in terms of the overall amount of the Forest Preserves spending in each code. Of the top five NAICS codes, these two were the only codes where White woman utilization exceeded seven percent.

Table 2-39: Targeted NAICS Codes for Further Exploration - White Women

NAICS	NAICS Code Description	Weight	Overall Weight Rank	White Woman Utilization
561730	Landscaping Services	29.9%	1	8.7%
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)	9.8%	2	7.9%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-40 presents these data for White woman firms and non-M/WBE firms in NAICS code 561730. There was approximately the same level of concentration of contract dollars among White woman firms and non-M/WBE firms.

**Table 2-40: Comparing White Women and Non-M/WBE Outcomes
NAICS Code 561730: Landscaping Services
(NAICS Code Weight of All the Forest Preserves Spending: 29.9%)**

	White Woman	Non-M/WBE
NAICS code share of all spending	24.0	43.0
Number of firms	7	7
Share of group spending in NAICS code by the largest firm	46.1%	38.7%
Share of group spending in NAICS code by the second largest firm	24.6%	28.8%
Share of group spending in NAICS code by the third largest firm	10.4%	20.4%
Share of group spending in NAICS code by the three largest firms	81.1%	87.9%
Share of group spending in NAICS code by the remaining firms	18.9%	12.1%

Source: CHA analysis of Forest Preserves of Cook County data

Table 2-41 presents these data for White woman firms and non-M/WBE firms in NAICS code 424720. As with the previous code, there was approximately the same level of concentration of contract dollars among White woman firms and non-M/WBE firms. There is, however, a sharp difference in the importance of the code of each groups' overall level of contract dollars. This NAICS code contributes 7.1% to all White woman contract dollars but only 1.0% to all non-M/WBE contract dollars.

**Table 2-41: Comparing White Women and Non-M/WBE Outcomes
NAICS Code 424720: Petroleum and Petroleum Products Merchant Wholesalers
(except Bulk Stations and Terminals)
(NAICS Code Weight of All the Forest Preserves Spending: 9.8%)**

	White Woman	Non-M/WBE
NAICS code share of all spending	7.1%	1.0%
Number of firms	2	1
Share of group spending in NAICS code by the largest firm	96.7%	100.0%
Share of group spending in NAICS code by the second largest firm	3.3%	0.0%
Share of group spending in NAICS code by the third largest firm	0.0%	0.0%
Share of group spending in NAICS code by the three largest firms	100.0%	100.0%
Share of group spending in NAICS code by the remaining firms	0.0%	0.0%

Source: CHA analysis of Forest Preserves of Cook County data

In summary, while this analysis of the degree of contract dollars concentration did not paint a consistent pattern that explains the disparity ratios, it is important to note that the utilization of Asians in NAICS code 424720 (73.3%) and of Hispanics in NAICS codes 237310 and 238910 (32.6% and 73.4% respectively) are unusually high given the level of Forest Preserves spending in these three codes. These high participation rates are one explanation for the high disparity ratio for those two groups.

G. Conclusion

This Chapter provides the analysis of whether the Forest Preserves' M/WBE Program has fully remediated any discrimination in its market area. We analyzed these data to understand patterns in firm concentration and disparity ratios. Overall, we found that, compared to non-M/WBEs, minority- and woman-owned firms were concentrated in a different subset of industries. Further, in some industries, only a few M/WBEs received contracts in contrast to non-M/WBEs. This suggests that while the Forest Preserves' Program has been quite successful in creating opportunities for minority and woman firms, these benefits have not been spread evenly across all groups or subindustries. We find the data as a whole support the conclusion that minority and woman firms have not reached parity in all aspects of the Forest Preserves' contracting activities compared to non-M/WBE firms.

III. RECOMMENDATIONS FOR THE FOREST PRESERVES OF COOK COUNTY'S MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISE PROGRAM

This Report presents the results of our analysis of the Forest Preserves' geographic and product market areas; its utilization of M/WBEs as a percentage of all firms in those market areas, measured by dollars spent; the concentration of M/WBEs compared to non-M/WBEs in the agency's spending; and the disparity ratios between each racial and ethnic group and White women compared to non-M/WBEs. We also presented the anecdotal data from our other Illinois studies, which are relevant and probative for the Forest Preserves because they share similar markets. Based on these results, we make the following recommendations for a narrowly tailored Program.

A. Use the Study to Set the Overall, Annual Aspirational MBE and WBE Goals

The federal courts require current and detailed data upon which to set race- or gender-based contracting goals. We recommend using the weighted availability estimates in this Report to set the Forest Preserves' overall, annual aspirational MBE and WBE goals.

B. Use the Study to Set MBE and WBE Contract Goals

In addition to setting overall, annual targets, the Forest Preserves should use the Study's detailed unweighted availability estimates as the starting point for contract specific goals for MBE and WBE participation. As discussed in Appendix F of this Report, an agency's constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. The aspirational goal may be referenced in a solicitation that does not include contract goals so long as it is clear that

there is no requirement for any specific action by the bidder and the participation of M/WBEs is not a factor in contract award.

The narrowly tailored contract goal setting methodology involves four steps, regardless of the industry scopes of work of the project:

- Weight the estimated dollar value of the scopes of the contract by six-digit North American Industry Classification System (“NAICS”) codes, as determined during the process of creating the solicitation.
- Determine the unweighted availability of M/WBEs in those scopes, as estimated in the Disparity Study.
- Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
- Adjust the resulting percentage based on current market conditions and progress towards the annual goal.

A contract goal can be higher than the overall, annual goal; it might also be lower. What is important is that it reflect the scopes of work of the project and the availability of M/WBEs to perform those scopes, including the work projected to be performed by the prime vendor.

The Forest Preserves’ current electronic data collection and monitoring system, B2Gnow, contains a contract goal setting module that has been designed to integrate the results of our disparity studies into the system to simplify the process and develop defensible goals. We suggest the Forest Preserves utilize this module for its contract specific goal setting.

Where there is a significant change order issued by the Forest Preserves, the contract goal should be evaluated to determine the change’s impact on goal attainment. If an M/WBE’s scope is reduced such that the original contract goal will not be met, the contractor should be required to make GFEs to add participation if possible. If an M/WBE’s scope is increased, the M/WBE must be used for the increased amount if it is able to perform.

Written procedures spelling out the steps should be drafted and disseminated.

We further urge the Forest Preserves to bid some contracts without goals that it determines have significant opportunities for MBE or WBE participation. These control contracts can illuminate whether certified firms are used or even solicited in the absence of goals. This is especially important given the very high utilization of M/WBEs during the study period. The development of some “unremediated markets” data, as held by the courts including the Seventh Circuit Court of Appeals, will be probative of whether the Program remains needed to ensure the playing field remains level for minorities and women.

C. Increase Outreach to a Broader Range of Industries

While the Forest Preserves' utilization of MBEs and WBEs has been outstanding in the aggregate, it is also true that the utilization of MBEs has been highly concentrated in fewer codes than that of non-M/WBEs. For example, Specialized Freight (NAICS code 484220) accounted for 19.1% of all Black contract dollars but only 1.9% of total agency spending. In total, the three codes that accounted for 49.7% of dollars to Black firms made up only 5.6% of the Forest Preserves total spend.

We suggest taking affirmative steps to target industries in which M/WBEs have not fully participated for future prime contracting and subcontracting opportunities. These could include holding special vendor fairs, enlisting the assistance of industry groups to encourage their members to submit bids for agency work, and contacting individual certified firms to ensure they are aware of specific solicitations and to answer any questions. More participation in a broader range of industries will also help to lessen the need for contract goals in industries with high MBE concentration, thereby reducing the burden on non-M/WBEs, a factor of the narrow tailoring standard for strict constitutional scrutiny.

D. Develop Performance Measures for Program Success

The Forest Preserves should develop quantitative and qualitative performance measures for M/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. In addition to meeting the overall, annual MBE and WBE goals, possible benchmarks might be:

- The number of bids or proposals, the industry and the dollar amount of the awards and the goal shortfall, where the bidder was unable to meet the goal and submitted GFEs to do so.
- The number, dollar amount and the industry code of bids or proposals rejected as non-responsive for failure to make GFEs to meet the goal.
- The number, industry and dollar amount of MBE and WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors.
- Increased prime contract awards to certified firms.
- Increased M/WBE bonding limits, size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which minority- and woman-owned firms are awarded prime contracts and subcontracts.

E. Continue to Conduct Regular Program Reviews

The Forest Preserves adopted a sunset date for the current Program, and we suggest this approach be continued. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, the Forest Preserves must ensure that they remain narrowly tailored.

APPENDIX A:

FURTHER EXPLANATION OF THE MULTIPLE REGRESSION ANALYSIS

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

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

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

The estimation process takes this equation and transforms it into:

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

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

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

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

A coefficient was estimated for each independent variable. The broad idea is that a person's wage or earnings is dependent upon the person's race, gender, age, industry, occupation, and education. Since this report examined the Forest Preserves of Cook County, the analysis was limited to data from the counties of Cook, DuPage, Kane, Kendall, Lake, Will and McHenry. The coefficient for the new variable showed the impact of being a member of that race or gender in the metropolitan area.

APPENDIX B:

FURTHER EXPLANATION OF THE PROBIT REGRESSION ANALYSIS

Probit regression is a special type of regression analysis. Probit regression analysis is used to explore the determinants of business formation because the question of business formation is a “yes’ or “no” question: the individual does or does not form a business. Hence, the dependent variable (business formation) is a dichotomous one with a value of “one” or “zero”. This differs from the question of the impact of race and gender of wages, for instance, because wage is a continuous variable and can have any non- negative value. Since business formation is a “yes/no” issue, the fundamental issue is: how do the dependent variables (race, gender, etc.) impact the probability that a particular group forms a business? Does the race or gender of a person raise or lower the probability he or she will form a business and by what degree does this probability change? The standard regression model does not examine probabilities; it examines if the level of a variable (*e.g.*, the wage) rises or fall because of race or gender and the magnitude of this change.

The basic probit regression model looks identical to the basic standard regression model:

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

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

The estimation process takes this equation and transforms it into:

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

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

As discussed above, the dependent variable in the standard regression model is continuous and can take on many values while in the probit model, the dependent variable is dichotomous and can take on only two values: zero or one. The two models also differ in the interpretation of the independent variables’ coefficients, in the standard model, the interpretation is fairly straight-

forward: the unit change in the independent variable impacts the dependent variable by the amount of the coefficient.¹⁶ However, in the probit model, because the model is examining changes in probabilities, the initial coefficients cannot be interpreted this way. One additional computation step of the initial coefficient must be undertaken in order to yield a result that indicates how the change in the independent variable affects the probability of an event (*e.g.*, business formation) occurring. For instance, with the question of the impact of gender on business formation, if the independent variable was WOMAN (with a value of 0 if the individual was male and 1 if the individual was female) and the additional computation chance of the coefficient of WOMAN yielded a value of -0.12, we would interpret this to mean that women have a 12 percent lower probability of forming a business compared to men.

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

APPENDIX C:

SIGNIFICANCE LEVELS

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

This Report seeks to address the question of whether or not non-Whites and White women received disparate treatment in the economy relative to White males. From a statistical viewpoint, this primary question has two sub-questions:

- What is the relationship between the independent variable and the dependent variable?
- What is the probability that the relationship between the independent variable and the dependent variable is equal to zero?

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

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

To resolve the second sub-question, statistical hypothesis tests are utilized. Hypothesis testing assumes that there is no relationship between belonging to a particular demographic group and the level of economic utilization relative to White men (*e.g.*, non-Whites earn identical wages compared to White men

or non-Whites earn 0 percent less than White men). This sometimes is called the null hypothesis. We then calculate a confidence interval to find the probability that the observed relationship (*e.g.*, -35 percent) is between 0 and minus that confidence interval.¹⁷ The confidence interval will vary depending upon the level of confidence (statistical significance) we wish to have in our conclusion. When a number is statistically significant at the 0.001 level, this indicates that we can be 99.9 percent certain that the number in question (in this example, -35 percent) lies outside of the confidence interval. When a number is statistically significant at the 0.01 level, this indicates that we can be 99.0 percent certain that the number in question lies outside of the confidence interval. When a number is statistically significant at the 0.05 level, this indicates that we can be 95.0 percent certain that the number in question lies outside of the confidence interval.

17. Because 0 can only be greater than -35 percent, we only speak of “minus the confidence level”. This is a one-tailed hypothesis test. If, in another example, the observed relationship could be above or below the hypothesized value, then we would say “plus or minus the confidence level” and this would be a two-tailed test.

APPENDIX D:

UNWEIGHTED AND WEIGHTED AVAILABILITY

Central to the analysis, under strict constitutional scrutiny, of an agency's contracting activity is understanding what firms could have received contracts. Availability has two components: unweighted availability and weighted availability. Below we define these two terms; why we make the distinction; and how to convert unweighted availability into weighted availability.

Defining Unweighted and Weighted Availability

Unweighted availability measures a group's share of all firms that could receive a contract or subcontract. If 100 firms could receive a contract and 15 of these firms are minority-owned, then MBE unweighted availability is 15 percent (15/100). *Weighted availability* converts the unweighted availability through the use of a weighting factor: the share of total agency spending in a particular NAICS code. If total agency spending is \$1,000,000 and NAICS Code AAAAAA captures \$100,000 of the total spending, then the weighting factor for NAICS code AAAAAA is 10 percent ($\$100,000/\$1,000,000$).

Why Weight the Unweighted Availability

It is important to understand *why* weighted availability should be calculated. A disparity study examines the overall contracting activity of an agency by looking at the firms that *received* contracts and the firms that *could have received* contracts. A proper analysis does not allow activity in a NAICS code that is not important an agency's overall spending behavior to have a disproportionate impact on the analysis. In other words, the availability of a certain group in a specific NAICS code in which the agency spends few of its dollars should have less importance to the analysis than the availability of a certain group in another NAICS code where the agency spends a large share of its dollars.

To account for these differences, the availability in each NAICS code is weighted by the agency's spending in the code. The calculation of the weighted availability compares the firms that received contracts (utilization) and the firms that could receive contracts (availability). Utilization is a group's share of total spending by an agency; this metric is measure in dollars, *i.e.*,

MBEs received 8 percent of all dollars spent by the agency. Since utilization is measured in dollars, availability must be measured in dollars to permit an “apples-to-apples” comparison.

How to Calculate the Weighted Availability

Three steps are involved in converting unweighted availability into weighted availability:

- Determine the unweighted availability
- Determine the weights for each NAICS code
- Apply the weights to the unweighted availability to calculate weighted availability

The following is a hypothetical calculation.

Table D-1 contains data on unweighted availability measured by the number of firms:

Table D-1

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE	Total
AAAAAA	10	20	20	5	15	400	470
BBBBBB	20	15	15	4	16	410	480
CCCCCC	10	10	18	3	17	420	478
TOTAL	40	45	53	12	48	1230	1428

Unweighted availability measured as the share of firms requires us to divide the number of firms in each group by the total number of firms (the last column in Table D-1). For example, the Black share of total firms in NAICS code AAAAAA is 2.1 percent (10/470). Table D-2 presents the unweighted availability measure as a group’s share of all firms.

Table D-2

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE	Total
AAAAAA	2.1%	4.3%	4.3%	1.1%	3.2%	85.1%	100.0%

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE	Total
BBBBBB	4.2%	3.1%	3.1%	0.8%	3.3%	85.4%	100.0%
CCCCCC	2.1%	2.1%	3.8%	0.6%	3.6%	87.9%	100.0%
TOTAL	2.8%	3.2%	3.7%	0.8%	3.4%	86.1%	100.0%

Table D-3 presents data on the agency’s spending in each NAICS code:

Table D-3

NAICS	Total Dollars	Share
AAAAAA	\$1,000.00	22.2%
BBBBBB	\$1,500.00	33.3%
CCCCCC	\$2,000.00	44.4%
TOTAL	\$4,500.00	100.0%

Each NAICS code’s share of total agency spending (the last column in Table D-3) is the weight from each NAICS code that will be used in calculating the weighted availability. To calculate the overall weighted availability for each group, we first derive the every NAICS code component of a group’s overall weighted availability. This is done by multiplying the NAICS code weight by the particular group’s unweighted availability in that NAICS code. For instance, to determine NAICS code AAAAAA’s component of the overall Black weighted availability, we would multiply 22.2 percent (the NAICS code weight) by 2.1 percent (the Black unweighted availability in NAICS code AAAAAA). The resulting number is 0.005 and this number is found in Table D-4 under the cell which presents NAICS code AAAAAA’s share of the Black weighted availability. The procedure is repeated for each group in each NAICS code. The calculation is completed by adding up each NAICS component for a particular group to calculate that group’s overall weighted availability. Table D-4 presents this information:

Table D-4

NAICS	Black	Hispanic	Asian	Native American	White Women	Non-M/W/DBE
AAAAAA	0.005	0.009	0.009	0.002	0.007	0.189
BBBBBB	0.014	0.010	0.010	0.003	0.011	0.285
CCCCCC	0.009	0.009	0.017	0.003	0.016	0.391
TOTAL	0.028	0.029	0.037	0.008	0.034	0.864

To determine the overall *weighted availability*, the last row of Table D-4 is converted into a percentage (*e.g.*, for the Black weighted availability: $0.028 * 100 = 2.8$ percent). Table D-5 presents these results.

Table D-5

Black	Hispanic	Asian	Native American	White Women	Non-MWBE	Total
2.8%	2.9%	3.7%	0.8%	3.4%	86.4%	100.0%

APPENDIX E:

QUALITATIVE EVIDENCE FROM ILLINOIS DISPARITY STUDIES

In addition to the anecdotal data collected for this study and provided in the Qualitative chapter of this report, Colette Holt & Associates has conducted several studies in Illinois over the last several years that shed light on the experiences of minority- and woman-owned firms in the Chicago area and overall Illinois marketplace. We interviewed minority and woman owners and non-M/WBE representatives about barriers to the full and fair participation of all firms in the agency's market area. The total number of participants for these interviews was 819 individuals.

This summary of anecdotal reports provides an overview of the following disparity studies:¹⁸ Illinois State Toll Highway Authority ("Tollway"); State of Illinois Department of Central Management ("CMS"); Regional Transportation Authority ("RTA"); Chicago Transit Authority ("CTA"); Cook County ("Cook County"); Northeast Illinois Regional Commuter Railroad Corporation doing business as Metra ("Metra"); Metropolitan Water Reclamation District of Greater Chicago ("MWRD"); the City of Chicago Construction Contracts ("City of Chicago"); and Pace Suburban Bus ("Pace"). These studies were conducted between 2015 and 2021.

1. Discriminatory Attitudes and Negative Perceptions of Competency and Professionalism

Many minority and woman owners reported being stigmatized by their race and/or gender. Subtle and overt stereotyping and race and gender discrimination were commonplace. Respondents reported that White men often evince negative attitudes concerning their competency, skill, and professionalism.

18. Copies of these studies can be accessed at the following links: **Illinois Tollway** <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Illinois-State-Toll-Highway-Authority-Disparity-Study.pdf>; **CMS** <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-State-of-Illinois-Department-of-Central-Management-Services-Disparity-Study.pdf>; **RTA** <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-RTA-Availability-Study.pdf>; **CTA** <http://www.mwbelaw.com/wp-content/uploads/2019/12/Chicago-Transit-Authority-Disparity-Study-2019.pdf>; **Cook County** <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-Cook-County-Illinois-Disparity-Study.pdf>; **Metra** <http://www.mwbelaw.com/wp-content/uploads/2019/10/2016-Metra-Availability-Study.pdf>; **MWRD** <http://www.mwbelaw.com/wp-content/uploads/2019/10/2015-The-Metropolitan-Water-District-of-Greater-Chicago-Disparity-Study.pdf>; **City of Chicago** <http://www.mwbelaw.com/wp-content/uploads/2021/11/City-of-Chicago-Disparity-Study-for-Construction-Contracts-2021.pdf> and **Pace** <http://www.mwbelaw.com/wp-content/uploads/2021/04/2015-Pace-Chicago-Suburban-Bus-Disparity-Study.pdf>.

Biases about the capabilities of minority and women business owners impact all aspects of their attempts to obtain contracts and to ensure they are treated equally in performing contract work. The often-prevailing viewpoint is that M/WBEs and small firms in general are less qualified and less capable.

They try to put a stigma on us.... It's like a stigma that they have to use us because there's participation requirements and they make us sound like we're not good at what we do. And there are some really good MBE, WBEs out there. (Cook County, page 129)

Just this past year, a colleague of mine had a GC say, "do we want quality, or do we want diversification". The reality is, this is what is thought out there. (MWRD, page 173)

There's still the perception that if you're a minority or a woman, you can't perform.... That there's something wrong with you, you know, there's something lacking.... They stick with the good old boys. (Tollway, page 111)

There is a stigma [to being an MBE]. Quite frankly, when we go after projects, I have to remind the client we have more people in Chicago than [large engineering firm], and yet you're looking at them as though they're [name], and we are bigger than [name] in Chicago. But that's not what you're seeing. There's a ton of firms that are significantly smaller than us, who they expect us to sub to. And we have more experience, more people. And to be honest with you, I often say, "I don't have a Black engineering degree." There was no minority engineering or business degree, there wasn't any of that, right? I got the same one as everybody else. And yet somehow my experience is different. Somehow my engineering experience is less there even though I have all the same qualifications, I've worked on all the same projects. My team has worked on all the same stuff, quite frankly, our staff work for the vast majority of these larger engineering firms that we're competing against now. And they were the smartest people in the world when they worked for [name], and I of a sudden they worked for [name] firm, and they clearly are stupid. (MWRD, page 173)

The construction community is a bunch of good old boys, that are multi-generational. (MWRD, page 176)

I contacted a man in the beginning one time and asked him about doing kind of a joint deal.... And he informed me he would rather not bid a job than have to work with DBE[s]. (CMS, page 125)

[What] we learned a long time ago was the MBE or the WBE or the DBE [certifications], they can help you or hurt you. We changed our

marketing materials years ago and put that in the back end because what are we first and foremost? We are an engineering solution provider for the clients, and if this project happens to have goals, we can help you fulfill that as well, it's a win-win.... There is always this preconceived notion that [because] you are an M[BE] you can't be that competent. (RTA, page 119)

I have not been an MBE because I didn't want the stigma associated with some of the MBEs.... I do send some of my Caucasian project managers to some units. I will say and even though my company is 75% minority and women out of my 40 to 50 employees, I have to do that because there is a stigma associated.... You have to perform at a 50% higher rate, even though we don't get the good jobs, because they go to the large companies. Whether their construction or consulting, or services and goods, it's hard to compete in that environment. (MWRD, page 173)

They just give me all of these types of titles, but a lot of times, I don't really pay attention until you actually say something to me because I'm pretty much a straightforward woman. I have learned they're going to assume a lot of things about you, but you can't really get caught up with that. Because sometimes, it's a mindset. (City of Chicago, page 107)

Small, minority, women, disadvantaged businesses are perceived to not always have all the qualifications, regardless of how long they've been in business. Sometimes, even in just the way primes deal with you, they assume a certain amount of incompetence, even though they've been working with you for a while. (CMS, page 123)

The other message that I got [at an outreach meeting for Illinois Tollway projects] was that this was a sacrifice on the part of the primes, that they needed to be thanked for coming on board in that way. I found it very offensive. (RTA, page 121)

[General contractors] do not rely on our expertise. They think we're just fronts or that we don't know our businesses and they don't trust us or that we know what we're doing. In the beginning, I know people don't believe at all that I knew what I was doing. (MWRD, page 132)

They think that because you're a minority or a woman business that you don't have your act together. (Pace, page 118)

[State personnel] look down on us as some kind of beggars for percentages. (CMS, page 124)

[Large prime contractors] try one to two M's or W's, that may not be all that great, and they lump us all together as "second rate". When they may try 7-8 substandard White guy companies, and they don't think anything of it. They just keep looking for someone else. (MWRD, pages 173-174)

When we are 60, 70 people still people ask, what capacity [do you have]? We could do as good as any bigger firm in the city, but they will still ask the same question. Even the state departments will ask the same question. (CMS, page 125)

My other big burr in my saddle is always about capacity. We're just like they are. I mean if we get a big job, we can hire people just like they can. Because you want to know why? The engineers all want to go to whoever's got the big fancy job. They're technical people. They want the juicy projects.... It's not difficult to build capacity. If you can continue to win big recognizable projects. (Tollway, page 112)

Many women reported unfair treatment or sexual harassment in the business world.

Let's just be honest. I'm a woman who's in construction so that just equals bullseye.... Other contractors who come in behind you and they call you [trade] chicks. Or they tell you, what has the world come to because you're [trade] chicks.... Men come out and they complain that a woman is running the crew.... Even the men I hire, I'm giving you a paycheck, struggle with taking orders from a woman.... Someone comes to the job and they go to one of the guys [I employ] and they say, are you the lead here? (CMS, page 125)

I have on several occasions been offered jobs in exchange for sex. I've had guys order several drinks my way to try to get me drunk at a networking event. They pull me to the side because we've talked on other occasions about a specific job, and they'll say this job is coming up and they'll name one of my competitors. He's doing this and he's doing that and blah, blah, blah. A few drinks in, they want, okay, "what are you going to do" sort of thing. It's happened quite a bit. (CTA, page 59)

I was propositioned at a hotel room by my boss, the owner of the company. He was like, "Hey you're coming in, right?" When I said no, he was like, "Really? What exactly are you trying to say here?" And then he showed up half naked at my hotel room and was banging down my door to get in and come and have sex. (City of Chicago, page 110)

At least yearly, one of the first questions asked to me is “What does your husband do?”. Although benign, it implies that I certainly cannot be running a construction company. So right off the bat, they think I am unqualified. That is the assumption they are going in with. (MWRD, page 174)

There’s an issue with disrespect.... I’ve had truck drivers call me sweetie. And I said, “I appreciate that you feel that way about me, but it’s not very professional. And I would appreciate you don’t do it again.” And so, I’ve learned the confidence over the years to just not put up with it and to also train my staff not to put up with it. (City of Chicago, page 107)

They call you sweetheart. Sweetheart, honey, just inappropriate comments. (Pace, page 119)

There is an old boys’ network that is misogynistic. Let’s just be honest with it.... You’re a woman, you can’t possibly do that. That’s a ridiculous notion anymore, at least in my perspective. But I can tell you of all of the W[BE]s that I know, they have that problem working in a male-dominated situation where unless, and I hate to say it in these terms, unless you’re related or have some inside track, you’re not going to get selected unless they absolutely have to use you for something.... There’s a lot more women entering the [engineering] field. But that’s going to take a while and overcoming that prejudice [won’t be easy]. (Cook County, page 131)

I’ve gone to a lot of women’s networking events. I was a member of the [Federation of Women Contractors], a couple other networking things that are women-driven, and that’s the only place that I filled that gap, because women might have the same feelings as me, but I’ve always felt like I don’t fit in.... I’ve always worked well with men, but I find that the project management staff, all men, would be sitting there talking about sports stats. Their water cooler talk was not super interesting to me, so I didn’t fit in there. (City of Chicago, page 112)

In negotiations, people think that women aren’t savvy businesspeople and that I’ll just do this for nothing. (CMS, page 125)

You’re mansplained away. You’re just invisible. They say they want to work with you, but like you said, I think [name], that there’s hostility. There’s lack of trust. (City of Chicago, page 109)

It’s a common occurrence for people [both general contractors and agency personnel] to assume that I’m an administrative person rather

than the president.... They'll even go to the point of quizzing me about rudimentary questions about [trade]. (Pace, page 119)

My biggest problem is I can't walk in a room, or any women, I'm somebody's wife. I mean my husband has never worked for me in my whole life. He's a carpenter.... I've sat on executive boards and I've never been addressed as an [specialty trade] contractor on an executive board without oh, she's so-and-so's wife or other [specialty trade] contractor's wives, where they've sat back and said, do you know my wife? They don't want nothing to do with me. (Tollway, page 111)

Half of the buildings that I've worked for, they think that the pumper truck driver is my husband because they can't wrap their heads around that a woman owns the company or knows the technical aspects of the job and would hold the license. The other half thinks that I'm married to my field manager because those are the guys, they see the most often, it's the pumper truck driver and the field manager, so they automatically assume that they're the real owner and they're propping me up. I'm not related to any of them. (City of Chicago, page 108)

This is very cultural and definitely our line of work is hostile towards us from one way or another. I haven't had any sexual harassment so far, but I can tell you from my clients, and even my painters, I get that look. You know, that you're a lady, what are you doing in the painting business? It has been hard. But I think, like I said, it's cultural because it's not only this work that we do, but in general. Whenever we go, we get some sort of mistreatment. They don't trust us completely. They don't think that we know what we're doing. (City of Chicago, page 109)

I always feel that I have to do more than everyone else, maybe because I'm a woman. We have that thing that we always have to walk the extra mile, that 100 mile smarter than everyone else. (CTA, page 57)

2. Access to Business and Professional Networks

Minority and woman respondents reported difficulty in accessing networks and fostering relationships necessary for professional success. These barriers extended to agency staff. Respondents were unable to gain access to and communicate with key agency decisionmakers.

The support system that small White businesses have in the United States is far greater than the support system that a Puerto Rican business has, or an African-American business has.... And not just networks as in who you know. Networks to money, the ease of cash flow.... The networks and gaining access to those is really the

fundamental difference that I see [between M/WBEs and small White male-owned firms] (Cook County, page 132)

There's certainly a lot of stuff that they do that we could do as a prime, but we don't get invited. (MWRD, page 175)

[Construction] is still a relationship business. It's establishing relationship with your client and with who you're going to do business with. What I struggle with is that I can't have the same relationship with my client, who are primarily men, as men can have with them.... They're going to give projects to people that they like, people that they know, people that they have a solid relationship with. And that's a struggle that I have as a woman is that I can't establish the same relationship. It's not a good scene for me to be out in a bar until two in the morning with my male clients. (Tollway, page 110)

[The CTA should hire DBEs to] do staff augmentation that allows us to get to know some of the people without having to work through a prime that doesn't really want you to get to know who they know. (CTA, page 64)

It's eliminating you from a meeting. It's not inviting you to outings, when you could be making relationships with people. It's leaving you out of things. I cannot tell you how many times I've been told, "[name], it wasn't intentional." That's the exact point. It needs to be intentional. ... It might be a strip club, or it might be a casino. It's generally not going to get your nails done. We're all clear on that. But the whole point is, we just don't get invited to these things because number one, they decide that we wouldn't want to go. I golf. I golfed in college. I golfed in high school. Nobody, despite working 22 years in my industry knows that I golf, despite how many times I've told them that I golf. When I go and golf, they're blown away because they're like, "Holy shit, that's right down the middle of fairway." The whole point is people make assumptions about us women. You wouldn't want to go. You wouldn't feel comfortable. Or they make assumptions about the people that are on these outings. They wouldn't feel comfortable with you there. Because the reality is in a lot of these outings, these men are doing things that they shouldn't be doing. (City of Chicago, page 111)

It always goes back to relationships.... We're all in the trust business. (MWRD, page 134)

If I was going to counsel anyone on starting a business, the first thing I would tell them is to join their trade association for their particular ethnicity or female, male, whatever. I mean, you really need to have that behind you. (City of Chicago, page 112)

3. Obtaining Work on an Equal Basis

Respondents reported that institutional and discriminatory barriers continue to exist in the Chicago area marketplace. They were in almost unanimous agreement that M/W/DBE contract goals remain necessary to level the playing field and equalize opportunities. Race- and gender-neutral approaches alone are viewed as inadequate and unlikely to ensure equal opportunity.

I remember when the Tollway had no goals, and it was absolutely abysmal. There was never a minority or a female that worked on a Tollway job, ever. And we would tell them, DOT has goals. They find women and minorities to do work. It's the same type of work that the Tollway and the DOT does. And it wasn't until the Tollway started to have some goals that we started, we all started to get work on Tollway projects. (Tollway, page 113)

There's been jobs where as soon as the goal's met, then they just call up whoever they normally call... we do get more work when there is a goal involved. (Tollway, page 114)

The program has been critical for our growth [as an MBE]. I think, without the program, there's not a doubt in my head that we would be who we are today. I think the program gets you in the door. The program gives you opportunities earlier on in your career. The program opens doors for you. (City of Chicago, page 114)

If you asked me what the detriment is to minorities is we've only been doing this for some people have been doing it for two years, five years, 10 years. Just the knowledge itself takes five to 10 years to get. Capital, the access to capital takes another five or 10 years. So, that's why these companies are multi-generational. It is a situation that we want to boost up our DBE firms. We've got to start giving them projects for them, that they can get experience on, that they can start showing the bonding companies, that they have the ability to do a project. (MWRD, page 176)

The minute there's not a goal, those primes walk away, and they go back to the old boys' network. (Pace, page 121)

As a WBE, the only time that we have negotiating power before the subcontract is awarded, when our general is sending us a subcontract, is when they know that they have to use us because they wrote our name in their letter of intent paperwork that they submitted to their group. And so that gives us, if we know that, which we always try to find out, were we the one that they named, then that gives you a little bit of negotiating room with them, even on items that are outside of

their own subcontract where they're trying to get you to do something that the client requires of them. (City of Chicago, pages 114-115)

It may not be intentional, but there is still a prevalent feeling I feel in the industry, particularly engineering, that we've got to use them because we got to, if we don't use them, we're not going to get the job. (CMS, page 123)

I don't think that [a totally race- and gender-neutral program would] be good enough.... Everybody's got somebody that knows somebody that has a cousin that owns a small business that will do work. So, if you don't force it, it won't happen. (RTA, page 120)

Most of the [G]eneral C[ontractor]s out there that are non-minorities would rather this program go away. (City of Chicago, page 115)

If there isn't a program somewhere, there is no incentive for anybody to use me. And the fact that there are minority- and women- and veteran-owned options, that is the only reason I'm even going to get the experience to be able to become the prime.... In the engineering world, the larger firms are just getting larger, so it's very hard to just even have entry. (MWRD, page 134)

If there's no goal and unless you have a very specific specialty, nobody's going to call you. I mean, this is consistent for me in many states. (CTA, page 62)

In the past two years, Metra has eliminated the DBE goals on [certain entire categories of] purchases. So, we used to be subcontractor on those contracts and once they eliminated those goals there was no prime that wanted to partner with us.... The [DBE contract] goal was reduced to zero. And so, we were really disappointed and inquired why that happened and were never able to get a response. (Metra, page 124)

Where there have been goals and I've been on teams and they took away goals for whatever reason, I was denied the opportunity. Flat out. Taken off the team. (Cook County, page 133)

I lost my certification, and I was not able to do any business. I got no opportunities. (CTA, page 62)

Prime contracts were especially difficult to obtain on an equal basis.

Perception is a huge issue. There's a constant perception that if you have the certification, how could you be prime? Why should you be prime? Why are you prime, you're disadvantaged? (CTA, page 59)

If you have an MBE, WBE status it somehow implies non-prime. (Cook County, page 131)

The assumption [was] that all of these White male guys in gray suits were the primes, and the DBEs weren't at the event and were some kind of outsiders. (RTA, page 121)

The general contractors are the only ones that get to the size of graduation and they generally go out of business once they graduate. Our subcontractors don't ever get to that size because of the fact that they don't have private work to grow off of. They only have this MBE, WBE work. (Cook County, page 133)

The [DBE program] forces the primes to throw a broad net and bring in capable partners to participate. And that's how ultimately you get the exposure and with the exposure you get the credibility so that as a minority or small business you can prime yourself. (Metra, page 124)

We have graduated from the DBE program before and we reentered it. And the year that we graduated, the following year our revenues dropped by about 30 to 40%... As a DBE firm or MBE firm, it is our responsibility to look down the road and to prepare ourselves for graduation... If we had more prime relationships with the clients, we probably would have been more sustainable. (Tollway, page 114)

Don't ever start to compete against your primes, it's a different ball game. And it's interesting because [name] and [name] will fight tooth and nail on a project in the morning, and then partner with each other on the afternoon on a different project like nothing ever happened. But you got a minority firm competing against you in the morning, they will be shunned for years and will never want to do any work with you again. I've learned that personally. I have one client come to one of my teammates, I mean, one of my employees and say, "Oh, I heard you're going after this big project as a prime and we're going on the other side." He expected them to say, good luck. He said, "You just remember you work for me over here." So, I told him, "You tell the client, he remembers that he works for me over here. And he works for me over here," since we're going to play that game. But that's what's literally been told. So, once you decide that you're going to come out on your own and actually be a big boy, the prejudice, it gets significantly worse because as long as you're a small minority firm that we can keep in a box, and we can keep you where we want you to be, and you do what we say do, and you don't ask us to see the client, and we'll just give you the work, and you just be happy taking this 20%, you're fine. When you start to compete, they bring out the big guns. He'll fight the client, because the client still thinks you're little and the

clients think they too big, so you literally in this limbo area of how do I reposition the firm to get work? (MWRD, page 175)

Because you don't have that one person who has 15 years or some sort of CTA experience, they move on to somebody else, which some of the work that we do doesn't necessarily require.... We do it for all the other agencies in the city and the state or whatever, but then we're kind of bounced out of there because we don't have that CTA experience.... When they come out with smaller RFQs that seemingly would be a perfect entre for smaller businesses, there may be 500, half million-dollar contracts, million-dollar contracts, which many of the companies in here are more than capable of doing, it still goes to the largest large firm in the area. It's almost like, "We want you to come after these contracts," but then at the end of the day, do they really? (CTA, page 64)

There's the expectation that minority firms are never supposed to grow beyond a certain level that you're put in that box, you stay there comfortably and everything is good. The minute you start to spread your wings, there are issues and biases you have to be confronted with. I mean, too often, when we decided to go after a much bigger project than say, one of our goals this year, is that we want to go after a \$10 million feed project. And as we've started to assemble teams, everybody's whispering, oh, what does he think he's doing? Where does he think he's going to go with this? But the expectation is that you're not supposed to strive to do anything bigger than what has been offered to you in an MBE or DBE program. So yeah, the stigma is still very prevalent. How dare you want to grow your firm big? What are you doing? (MWRD, pages 175-176)

Many respondents indicated that M/WBEs who could access public contracts and subcontracts through M/WBE programs found it difficult to obtain private sector opportunities.

We do not get [private sector opportunities] and we've been in business quite some time. We have really good relationships with all these contractors, but we've actually even sat down with a few of them and talked about doing private work. They were in shock like, "I didn't realize you'd want to do private work." Why wouldn't I want to? (CTA, page 62)

We've got to talk about that private sector project goals and make certain that these contractors adhere to the guidelines. Otherwise, we're going to see \$65, \$80B fly through this community and we're still on food stamps. (City of Chicago, page 116)

The program is still much needed. As we all know it takes a long time to bid these jobs. Man hours which converged to dollars. And I've had two contractors while I've walked in, I've made phone calls prior to COVID try to stop by and talk about the upcoming bid. And to my surprise, both were exactly the same. They said, "[Name], we're all set on the MBE for this job." and I say, "well, I'm still a contractor. I still put a lot of time and money into this bid. I have some serious questions and I need to bid this job and I want it to be successful." "But we're all set. We're good." (City of Chicago, page 114)

It's been a very difficult task tapping into the Chicago market. Almost makes you want to just shut down and leave. I understand why a lot of businesses do at this point. (MWRD, page 176)

APPENDIX F:

LEGAL STANDARDS FOR LOCAL GOVERNMENT CONTRACTING EQUITY PROGRAMS

1. Summary of Constitutional Equal Protection Standards

To be effective, enforceable, and legally defensible, a race-based affirmative action program for public sector contracts, regardless of funding source, must meet the judicial test of constitutional “strict scrutiny”.¹⁹ Strict scrutiny constitutes the highest level of judicial review.²⁰ The strict scrutiny analysis is comprised of two prongs or elements:

1. The government must establish its “compelling interest” in remediating race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.
2. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.²¹

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

1. Quantitative evidence of the underutilization of minority- or woman-owned firms by the agency and/or throughout the agency’s geographic and industry market area as compared to their availability in the market area.
2. Qualitative evidence of race- or gender-based barriers to the full and fair participation of minority- and woman-owned firms in the market area or in seeking contracts with the agency.^{22,23} Anecdotal data can consist of

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

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

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

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

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

1. The necessity of relief;²⁴
2. The efficacy of race-neutral remedies at overcoming identified discrimination;²⁵
3. The flexibility and duration of the relief, including the availability of waiver provisions;²⁶
4. The relationship of numerical goals to the relevant labor market;²⁷ and
5. The impact of the relief on the rights of third parties.²⁸

In *Adarand Constructors, Inc. v. Peña*,²⁹ the United States Supreme Court extended the analysis of strict scrutiny to race-based federal enactments such as the United States Department of Transportation (“USDOT”) federal Disadvantaged Business Enterprise (“DBE”) program for federally assisted transportation contracts.³⁰ Just as in the local government context, the national legislature must have a compelling governmental interest for the use of race-conscious programs adopted by state and local governments, and the remedies adopted must be narrowly tailored to that evidence.³¹

Most federal courts, including the Seventh Circuit,³² have subjected preferences for Woman-Owned Business Enterprises (“WBEs”) to “intermediate scrutiny”.³³ Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.³⁴ The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to satisfy strict scrutiny. However, appellate courts have

22. *Id.* at 509.

23. CHA has included the qualitative or anecdotal evidence collected for our Chicago area and Illinois studies as Appendix E.

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

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

26. *Id.*

27. *Id.*

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

29. *Adarand III*, 515 U.S. 200 (1995).

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

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

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

applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program³⁵ or held that the results would be the same under strict scrutiny.³⁶

Classifications not based upon a suspect class (race, ethnicity, religion, national origin or gender) are subject to the lesser standard of review referred to as “rational basis scrutiny”.³⁷ The courts have held there are no equal protection implications under the Fourteenth Amendment of the United States Constitution for groups not subject to systemic discrimination.³⁸ In contrast to both strict scrutiny and intermediate scrutiny, rational basis means the governmental action or statutory classification must be “rationally related” to a “legitimate” government interest.³⁹ Thus, preferences for persons with disabilities or veteran status may be enacted with vastly less evidence than that required for race- or gender-based measures to combat historic discrimination.⁴⁰

Unlike most legal challenges, the defendant bears the initial burden of producing “strong evidence” in support of its race-conscious program.⁴¹ As held by the Seventh Circuit,⁴² the plaintiff must then proffer evidence to rebut the government’s case, and bears the ultimate burden of production and persuasion that the affirmative action program is unconstitutional.⁴³ “[W]hen the proponent of an affirmative action plan produces sufficient evidence to support an inference of discrimination, the plaintiff must rebut that inference in order to prevail.”⁴⁴

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33. See, e.g., *Associated Utility Contractors of Maryland v. Mayor of Baltimore*, 83 F. Supp. 2d 613, 620 (D. Md. 2000) (“*Baltimore I*”); *Scott*, 199 F.3d at 206, 215, *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997) (“*Engineering Contractors II*”); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (“*Concrete Works II*”); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990, 1009-1011 (3rd Cir. 1993) (“*Philadelphia II*”); *Coral Construction Co. v. King County, Washington*, 941 F.2d 910, 930-931 (9th Cir. 1991).
 34. Cf. *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).
 35. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 720 (7th Cir. 2007), cert. denied, ___ U.S. ___, June 26, 2017 (“*Northern Contracting III*”).
 36. *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).
 37. See generally, *Coral Construction*, 941 F. 2d at 910; *Equality Foundation v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997).
 38. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
 39. *Heller v. Doe*, 509 U.S. 312, 320 (1993).
 40. The standard applicable to status based on sexual orientation or gender identity has not yet been clarified by the courts.
 41. *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).
 42. See generally *Dunnnett Bay Construction Company v. Borggren*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).
 43. *Scott*, 199 F.3d at 219; *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), 532 U.S. 941, cert. granted then dismissed as improvidently granted, 534 U.S. 103 (2001) (“*Adarand VII*”).
 44. *Engineering Contractors II*, 122 F.3d at 916.

A plaintiff “cannot meet its burden of proof through conjecture and unsupported criticism of [the government’s] evidence.”⁴⁵ To successfully rebut the government’s evidence, a plaintiff must introduce “credible, particularized evidence” that rebuts the government’s showing of a strong basis in evidence.⁴⁶ For example, in the challenge to the Minnesota and Nebraska DBE programs, “plaintiffs presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to, and participation in, federally assisted highway contracts. Therefore, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.”⁴⁷ When the statistical information is sufficient to support the inference of discrimination, the plaintiff must prove that the statistics are flawed.⁴⁸ A plaintiff cannot rest upon general criticisms of studies or other related evidence; it must meet its burden that the government’s proof is inadequate to meet strict scrutiny, rendering the legislation or government program illegal.⁴⁹

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

2. Elements of Strict Scrutiny

In its decision in *City of Richmond v. J.A. Croson Co.*, the United States Supreme Court established the constitutional contours of permissible race-based public contracting programs. Reversing long established Equal Protection jurispru-

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45. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 989 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (10th Cir. 2003) (“*Concrete Works IV*”).
 46. *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233 (4th Cir. 2010); *Midwest Fence Corp. v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (“*Midwest Fence I*”), *affirmed*, 840 F.3d 932 (7th Cir. 2016) (“*Midwest Fence II*”).
 47. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).
 48. *Coral Construction*, 941 F. 2d at 921; *Engineering Contractors II*, 122 F.3d at 916.
 49. *Adarand VII*, 228 F.3d at 1166; *Engineering Contractors II*, 122 F.3d at 916; *Concrete Works II*, 36 F.3d at 1513, 1522-1523; *Webster v. Fulton County, Georgia*, 51 F.Supp.2d 1354, 1364 (N.D. Ga. 1999), *aff’d per curiam*, 218 F. 3d 1267 (11th Cir. 2000); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-278 (1986).

dence,⁵⁰ the Court, for the first time, extended the highest level of judicial examination from measures designed to limit the rights and opportunities of minorities to legislation that inures to the benefit of these victims of historic, invidious discrimination. Strict scrutiny requires that a government entity prove both its “compelling governmental interest” in remediating identified discrimination based upon “strong evidence”⁵¹ and that the measures adopted to remedy that discrimination are “narrowly tailored” to that evidence. However benign the government’s motive, race is always so suspect a classification that its use must pass the highest constitutional test of “strict scrutiny”. Many programs fail to meet the “compelling governmental interest” requirement, the “narrow tailoring” requirement, or both.

The Court struck down the City of Richmond’s Minority Business Enterprise Plan (“Plan”) because it failed to satisfy the strict scrutiny analysis applied to “race-based” government programs. The City’s “set-aside” Plan required prime contractors awarded City construction contracts to subcontract at least 30% of the project to Minority-Owned Business Enterprises (“MBEs”).⁵² A business located anywhere in the nation was eligible to participate so long as it was at least 51% owned and controlled by minority citizens or lawfully-admitted permanent residents.

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

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

[A] state or local subdivision ... has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.... [Richmond] can use its spending powers to

50. U.S. Const. Amend. XIV, §1.

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

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

remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment ... [I]f the City could show that it had essentially become a “passive participant” in a system of racial exclusion ... [it] could take affirmative steps to dismantle such a system.⁵³

Strict scrutiny of race-based remedies is required to determine whether racial classifications are in fact motivated by notions of racial inferiority or blatant racial politics. This highest level of judicial review “smokes out” illegitimate uses of race by ensuring that the legislative body is pursuing an important enough goal to warrant use of a highly suspect tool.⁵⁴ It also ensures that the means chosen “fit” this compelling goal so closely that there is little or no likelihood that the motive for the classification was illegitimate racial prejudice or stereotype. The Court made clear that strict scrutiny is designed to expose racial stigma; racial classifications are said to create racial hostility if they are based on notions of racial inferiority.

Richmond’s evidence was found to be lacking in every respect.⁵⁵ The City could not rely upon the disparity between its utilization of MBE prime contractors and Richmond’s minority population because not all minority persons would be qualified to perform construction projects; general population representation is irrelevant. No data were presented about the availability of MBEs in either the relevant market area or their utilization as subcontractors on City projects.

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

53. 488 U.S. at 491-92.

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

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

In the case at hand, the City has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in City construction projects. The City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the City has demonstrated “a strong basis in evidence for its conclusion that remedial action was necessary.”⁵⁶

This analysis was applied only to Blacks. The Court emphasized that there was “absolutely no evidence” of discrimination against other minorities. “The random inclusion of racial groups that, as a practical matter, may have never suffered from discrimination in the construction industry in Richmond, suggests that perhaps the City’s purpose was not in fact to remedy past discrimination.”⁵⁷

Having found that Richmond had not presented evidence in support of its compelling interest in remediating discrimination—the first prong of strict scrutiny—the Court made two observations about the narrowness of the remedy—the second prong of strict scrutiny. First, Richmond had not considered race-neutral means to increase MBE participation. Second, the 30% quota had no basis in evidence, and was applied regardless of whether the individual MBE had suffered discrimination.⁵⁸ The Court noted that the City “does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁵⁹

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

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s

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

57. *Id.*

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

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

prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the City could act to dismantle the closed business system by taking appropriate measures against those who discriminate based on race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion... Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.⁶⁰

While much has been written about *Croson*, it is worth stressing what evidence was, and was not, before the Court. First, Richmond presented *no* evidence regarding the availability of MBEs to perform as prime contractors or subcontractors and *no* evidence of the utilization of minority-owned subcontractors on City contracts.⁶¹ Nor did Richmond attempt to link the remedy it imposed to any evidence specific to the program; it used the general population of the City rather than any measure of business availability.

Some commentators have taken this dearth of any particularized proof and argued that only the most particularized proof can suffice in all cases. They leap from the Court's rejection of Richmond's reliance on only the percentage of Blacks in the City's population to a requirement that only firms that bid or have the "capacity" or "willingness" to bid on a particular contract at a particular time can be considered in determining whether discrimination against Black businesses infects the local economy.⁶²

This argument has been rejected explicitly by some courts. In denying the plaintiff's summary judgment motion to enjoin the City of New York's Minority- and Woman-Owned Business Enterprise ("M/WBE") construction ordinance, the court stated:

[I]t is important to remember what the *Croson* plurality opinion did and did not decide. The Richmond program, which the *Croson* Court struck down, was insufficient because it was based on a comparison of the minority population in its entirety in Richmond, Virginia (50%) with the number of contracts awarded to minority businesses (0.67%). There were no statistics presented regarding the number of minority-owned contractors in the Richmond area, *Croson*, 488 U.S. at 499, and

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

61. *Id.* at 502.

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

the Supreme Court was concerned with the gross generality of the statistics used in justifying the Richmond program. There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.⁶³

Further, Richmond made no attempt to narrowly tailor a goal for the procurement at issue that reflected the reality of the project. Arbitrary quotas, and the unyielding application of those quotas, did not support the stated objective of ensuring equal access to City contracting opportunities. The *Croson* Court said nothing about the constitutionality of flexible goals based upon the availability of MBEs to perform the scopes of the contract in the government's local market area. In contrast, the USDOT DBE program avoids these pitfalls. The federal DBE program "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."⁶⁴

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

Establishing a "Strong Basis in Evidence" for the Forest Preserves of Cook County's Program for Minority- and Woman-Owned Businesses

The case law on the DBE program should guide the Forest Preserves of Cook County's ("Forest Preserves") program. Whether the program is called an M/WBE program or a DBE program or any other moniker, the same strict scrutiny test applies, regardless of the industries included. As discussed, 49 C.F.R. Part 26 has been upheld by every court, and local programs for M/WBEs will be judged against this legal framework.⁶⁵ As previously noted, programs for veterans, persons with disabilities, preferences based on geographic location or truly race- and gender-neutral small business efforts are not subject to strict scrutiny but rather the lower level of scrutiny called "rational basis". Therefore, no evidence comparable to that in a disparity study is needed to enact such initiatives.

It is well established that disparities between an agency's utilization of M/WBEs and their availability in the relevant marketplace provide a sufficient

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

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

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

basis for the consideration of race- or gender-conscious remedies. Proof of the disparate impacts of economic factors on M/WBEs and the disparate treatment of such firms by actors critical to their success is relevant and probative under the strict scrutiny standard. Discrimination must be shown using sound statistics and econometric models to examine the effects of systems or markets on different groups, as well as by evidence of personal experiences with discriminatory conduct, policies or systems.⁶⁶ Specific evidence of discrimination or its absence may be direct or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs.⁶⁷

Croson's admonition that “mere societal” discrimination is not enough to meet strict scrutiny is met where the government presents evidence of discrimination in the industry targeted by the program. “If such evidence is presented, it is immaterial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry... The genesis of the identified discrimination is irrelevant.” There is no requirement to “show the existence of specific discriminatory policies and that those policies were more than a reflection of societal discrimination.”⁶⁸

The Forest Preserves need not prove that it is itself guilty of discrimination to meet its burden. In upholding Denver’s M/WBE construction program, the court stated that Denver can show its compelling interest by “evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination...[by] linking its spending practices to the private discrimination.”⁶⁹ Denver further linked its award of public dollars to discriminatory conduct through the testimony of M/WBEs that identified general contractors who used them on City projects with M/WBE goals but refused to use them on private projects without goals.

The following are the evidentiary elements courts will examine in determining the constitutional validity of the Forest Preserves’ race- and gender-conscious program and the steps in performing a disparity study necessary to meet those elements.

Define the Forest Preserves’ Market Area

The first step is to determine the relevant geographic market area in which the Forest Preserves operates. *Croson* states that a state or local government may

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

67. *Id.*

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

69. *Id.* at 977.

only remedy discrimination within its own contracting market area. The City of Richmond was specifically faulted for including minority contractors from across the country in its program, based on national data considered by Congress.⁷⁰ The Forest Preserves must therefore empirically establish the geographic and product dimensions of its contracting and procurement market area to ensure that the program meets strict scrutiny. This is a fact driven inquiry; it may or may not be the case that the market area is the government's jurisdictional boundaries.⁷¹ This study employs long established economic principles to empirically establish the Forest Preserves' geographic and product market area to ensure that any program based on the study satisfies strict scrutiny.

A commonly accepted definition of geographic market area for disparity studies is the locations that account for at least 75% of the agency's contract and subcontract dollar payments.⁷² Similarly, the accepted approach is to analyze those detailed industries that make up at least 75% of the prime contract and associated subcontract payments for the study period.⁷³ This produces the utilization results within the geographic market area.⁷⁴

Determine the Forest Preserves' Utilization of M/WBEs

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

- Develop the initial contract data files. This involves first gathering the Forest Preserves' records of its payments to prime contractors, and if available, associated subcontractors.
- Develop the final contract data file. Whatever data are missing (often race and gender ownership, North American Industry Classification System ("NAICS") or other industry codes, work descriptions or other important information not collected by the agency) must be reconstructed by the consultant. Using surveys is unlikely to yield sufficient data. It is also important to research whether a firm that has an address outside the

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

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

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

73. *Id.* at 50-51.

74. For this Report, we found the Forest Preserves' market area to be Cook, Dupage, Kane, Lake, McHenry and Will counties. Please see Chapter IV for additional details.

market area has a location in the geographic market area (contract records often have far flung addresses for payments). All necessary data for at least 80% of the contract dollars in the final contract data files should be collected to ensure a comprehensive file that mirrors the Forest Preserves' contracting and procurement activities.

Determine the Availability of M/WBEs in the Forest Preserves' Market Area

Next, the study must estimate the availability of minorities and women in the Forest Preserves' relevant geographic market area to participate in the Forest Preserves' contracts as prime contractors and associated subcontractors. Based on the product and geographic utilization data, the study should calculate unweighted and weighted M/WBE availability estimates of ready, willing and able firms in the Forest Preserves' market. These results will be a narrowly tailored, dollar-weighted average of all the underlying industry availability numbers; larger weights will be applied to industries with relatively more spending and lower weights applied to industries with relatively less spending. The availability figures should be sub-divided by race, ethnicity, and gender.

The availability analysis involves the following steps:

1. The development of the Merged Business Availability List. Three data sets are used to develop the Merged Business Availability List:
 - The firms in the M/WBE Master Directory. This methodology includes both certified firms and non-certified firms owned by minorities or women.⁷⁵ The Master Directory consists of all available government and private D/M/WBE directories, limited to firms within the Forest Preserves' geographic and product market.
 - The firms contained in the Forest Preserves' contract data file. This will require the elimination of any duplications because a firm might have received more than one contract for work in a given NAICS code during the study period.
 - Firms extracted from the Dun & Bradstreet MarketPlace/Hoovers database, using the relevant geographic and product market definitions.
2. The estimation of unweighted availability. The Merged Business Availability List will be the available universe of relevant firms for the study. This process will significantly improve the identification of minority-owned and woman-owned businesses in the business

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

population. Race and sex must be assigned to any firm not already classified.⁷⁶ This will produce estimates of woman and minority business availability in the Forest Preserves' markets for each NAICS code in the product market; for woman and minority business availability for all NAICS codes combined; and for the broad industry categories of goods, services and construction. The detailed results should also be the basis for contract specific goal setting methodology.

3. The estimation of weighted availability. Using the weights from the utilization analysis, the unweighted availability should be adjusted for the share of the Forest Preserves' spending in each NAICS code. The unweighted availability determination will be weighted by the share of dollars the Forest Preserves actually spends in each NAICS code, derived from the utilization analysis. These resulting weighted availability estimates will be used in the calculation of disparity indices.

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

This methodology for estimating availability is usually referred to as the "custom census" approach with refinements. This approach is favored for several reasons. As recognized by the courts and the *National Disparity Study Guidelines*,⁷⁷ this methodology in general is superior to the other methods for at least four reasons.

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

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

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

- Second, by examining a comprehensive group of firms, it “casts a broader net” beyond those known to the agency. As held by the federal court of appeals in finding the Illinois Department of Transportation’s program to be constitutional, the “remedial nature of [DBE programs] militates in favor of a method of DBE availability calculation that casts a broader net” than merely using bidders lists or other agency or government directories.⁷⁸ A broad methodology is also recommended by the Federal DBE Program, which has been upheld by every court.⁷⁹ A custom census is less likely to be tainted by the effects of past and present discrimination than other methods, such as bidders lists, because it seeks out firms in the agency’s market areas that have not been able to access its opportunities.
- Third, this approach is less impacted by variables affected by discrimination. Factors such as firm age, size, qualifications, and experience are all elements of business success where discrimination would be manifested. Several courts have held that the results of discrimination – which impact factors affecting capacity – should not be the benchmark for a program designed to ameliorate the effects of discrimination. They have acknowledged that minority and woman firms may be smaller, newer, and otherwise less competitive than non-M/WBEs because of the very discrimination sought to be remedied by race-conscious contracting programs. Racial and gender differences in these “capacity” factors are the *outcomes* of discrimination and it is therefore inappropriate as a matter of economics and statistics to use them as “control” variables in a disparity study.⁸⁰
- Fourth, it has been upheld by every court that has reviewed it, including in the failed challenge to the Illinois Department of Transportation’s DBE program⁸¹ and most recently in the successful defense of the Illinois State Toll Highway’s DBE program.⁸²

Other methodologies relying only on vendor or bidder lists may overstate or understate availability as a proportion of the Forest Preserves’ actual markets because they reflect only the results of the agency’s own activities, not an accurate portrayal of marketplace behavior. Other methods of whittling down

78. *Northern Contracting III*, 473 F.3d at 723.

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

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

81. *Northern Contracting III*, 473 F.3d at 715.

82. *Midwest Fence II*, 840 F.3d at 932; *see also Northern Contracting III*, 473 F.3d at 715 (CHA served as testifying experts for the Tollway).

availability by using assumptions based on surveys with limited response rates or guesses about firms' capacities easily lead to findings that woman and minority businesses no longer face discrimination. Firms that fail to respond to a survey are called "unavailable" even if the firm is actually working on agency contracts.

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

This test has been rejected by the courts when directly addressed by the plaintiff and the agency. As recognized by the courts and the *National Disparity Study Guidelines*, these capacity factors are not race- and gender-neutral variables. Discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors. In a perfectly discriminatory system, M/WBEs would have no "capacity" because they would have been prevented from developing any "capacity". That certainly would not mean that there was no discrimination or that the government must sit by helplessly and continue to award tax dollars within the "market failure" of discrimination and without recognition of systematic, institutional race- and gender-based barriers. It is these types of "capacity" variables where barriers to full and fair opportunities to compete will be manifested. Capacity limitations on availability would import the current effects of past discrimination into the model, because if M/WBEs are newer or smaller because of discrimination, then controlling for those variables will mask the phenomenon of discrimination that is being studied. In short, identifiable indicators of capacity are themselves impacted and reflect discrimination. The courts have agreed. Based on expert testimony, judges understand that factors such as size and experience reflect outcomes influenced by race and gender: "M/WBE construction firms are generally smaller and less experienced *because of discrimination.*"⁸³ Significantly, *Croson* does not "require disparity studies that measure whether construction firms are able to perform a *particular contract.*"⁸⁴

To rebut this framework, a plaintiff must proffer its own study showing that the disparities disappear when whatever variables it believes are important are held constant and that controlling for firm specialization explained the disparities.⁸⁵ "Since the state defendants offered evidence to do so, the burden

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

84. *Id.*

then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. Speculative criticism about potential problems will not carry that burden.”⁸⁶ “To successfully rebut the [Illinois] Tollway’s evidence of discrimination, [plaintiff] Midwest {Fence] must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *See Concrete Works IV*, 321 F.3d at 959 (citation omitted). Again, the Court finds that Midwest has failed to make this showing.”⁸⁷

There are also practical reasons to not circumscribe availability through “capacity” limitations. First, there is no agreement concerning what variables are relevant or how those variables are to be measured for the purpose of examining whether race and gender barriers impede the success of minority and woman entrepreneurs. [“Plaintiff’s’ expert] and Midwest Fence have not explained how to account for relative capacity.”⁸⁸ For example, a newly formed firm might be the result of a merger of much older entities or have been formed by highly experienced owners; it is unclear how such variations would shed light on the issues in a disparity study. Second, since the amount of necessary capacity will vary from contract to contract, there is no way to establish universal standards that would satisfy the capacity limitation. Third, firms’ capacities are highly elastic. Businesses can add staff, rent equipment, hire subcontractors or take other steps to be able to perform a particular scope on a particular contract. Whatever a firm’s capacity might have been at the time of the study, it may well have changed by the time the agency seeks to issue a specific future solicitation. Fourth, there are no reliable data sources for the type of information usually posited as important by those who seek to reduce availability estimates using capacity factors. While a researcher might have information about firms that are certified as M/WBEs or that are prequalified by an agency (which usually applies only to construction firms), there is no database for that information for non-certified firms, especially White male-owned firms that usually function as subcontractors. Any adjustment to the numerator (M/WBEs) must also be made to the denominator (all firms), since a researcher cannot assume that all White male-owned firms have adequate capacity but that M/WBEs do not.

Capacity variables, such as the length of time the owner has been in business, the receipts of the firms, the number of employees and other information,

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

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

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

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

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

Examine Disparities between the Forest Preserves' Utilization of M/WBEs and M/WBE Availability

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

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise... In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.⁸⁹

This is known as the "disparity ratio" or "disparity index" which is a critical element of the statistical evidence. A disparity ratio measures the participation of a group in the government's contracting opportunities by dividing that group's utilization by the availability of that group and multiplying that result by 100. Courts have looked to disparity indices in determining whether strict scrutiny is satisfied.⁹⁰ An index less than 100% indicates that a given group is being utilized less than would be expected based on its availability.

The courts have held that disparity results must be analyzed to determine whether the results are "significant". There are two distinct methods to measure the significance of a result. First, a "large" or "substantively significant" disparity is commonly defined by courts as utilization that is equal to or less

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

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

than 80% of the availability measure. This is based on the Equal Employment Opportunity Commission’s “eighty percent rule” that a ratio less than 80% presents a *prima facie* case of discrimination by supporting the inference that the result may be caused by the disparate impacts of discrimination.⁹¹ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone.⁹² A more in-depth discussion of statistical significance is provided in Appendix C.

In addition to creating the disparity ratio, correct measures of availability are necessary to determine whether discriminatory barriers depress the formation of firms by minorities and women, and the success of such firms in doing business in both the private and public sectors, known as an “economy-wide” disparity analysis.⁹³

The Forest Preserves need not prove that the statistical inferences of discrimination are “correct”. In upholding Denver’s M/WBE Program, the Tenth Circuit Court of Appeals noted that strong evidence supporting Denver’s determination that remedial action was necessary need not have been based upon “irrefutable or definitive” proof of discrimination. Statistical evidence creating inferences of discriminatory motivations was sufficient and, therefore, evidence of market area discrimination was properly used to meet strict scrutiny. To rebut this type of evidence, the plaintiff must prove by a preponderance of the evidence that such proof does not support those inferences.⁹⁴

Nor must the Forest Preserves demonstrate that the “ordinances will *change* discriminatory practices and policies” in the local market area; such a test would be “illogical” because firms could defeat the remedial efforts simply by refusing to cease discriminating.⁹⁵

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

91. 29 C.F.R. §1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”); see *Engineering Contractors II*, 122 F3d at 914.

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

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

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

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

Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination.... Denver was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. To impose such a burden on a municipality would be tantamount to requiring proof of discrimination and would eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence.⁹⁶

Similarly, statistical evidence by its nature cannot identify the individuals responsible for the discrimination; there is no need to do so to meet strict scrutiny, as opposed to an individual or class action lawsuit.⁹⁷

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

The courts have repeatedly held that analysis of disparities in the rates at which M/WBEs in the government's markets form businesses compared to similar non-M/WBEs, their earnings from such businesses, and their access to capital markets are highly relevant to the determination of whether the market functions properly for all firms regardless of the race or gender of their ownership. These analyses contributed to the successful defense of the Illinois Tollway's DBE program⁹⁸. As similarly explained by the Tenth Circuit, this type of evidence

demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair

96. *Id.* at 971.

97. *Id.* at 973.

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

competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.... The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.⁹⁹

Business discrimination studies and lending formation studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. “Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it similarly demonstrates that *existing* M/WBEs are precluded from competing for public contracts.”¹⁰⁰ Despite the contentions of plaintiffs that possibly dozens of factors might influence the ability of any individual to succeed in business, the courts have rejected such impossible tests and held that business formation studies are not flawed because they cannot control for subjective descriptions such as “quality of education”, “culture” and “religion”.¹⁰¹

For example, in unanimously upholding the Federal DBE Program for federally assisted transportation-related-contracts, the courts agree that disparities between the earnings of minority-owned firms and similarly situated non-minority-owned firms and the disparities in commercial loan denial rates between Black business owners compared to similarly situated non-minority business owners are strong evidence of the continuing effects of discrimination.¹⁰² The Eighth Circuit Court of Appeals took a “hard look” at the evidence Congress considered, and concluded that the legislature had

spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, [the plaintiffs] presented evidence that the data were susceptible to multiple interpretations, but they

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

100. *Id.*

101. *Concrete Works IV*, 321 F3d at 980.

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

failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground.¹⁰³

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

A study should further explore anecdotal evidence of experiences with discrimination in contracting opportunities because it is relevant to the question of whether observed statistical disparities are due to discrimination and not to some other non-discriminatory cause or causes. As observed by the Supreme Court, anecdotal evidence can be persuasive because it “brought the cold [statistics] convincingly to life.”¹⁰⁴ Testimony about discrimination practiced by prime contractors, bonding companies, suppliers, and lenders has been found relevant regarding barriers both to minority firms’ business formation and to their success on governmental projects.¹⁰⁵ While anecdotal evidence is insufficient standing alone, “[p]ersonal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence. Moreover, anecdotal evidence of a [government’s] institutional practices that exacerbate discriminatory market conditions are [sic] often particularly probative.”¹⁰⁶ “[W]e do not set out a categorical rule that every case must rise or fall entirely on the sufficiency of the numbers. To the contrary, anecdotal evidence might make the pivotal difference in some cases; indeed, in an exceptional case, we do not rule out the possibility that evidence not reinforced by statistical evidence, as such, will be enough.”¹⁰⁷

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

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

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

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

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

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

incident told from the witness' perspective and including the witness' perceptions."¹⁰⁸ Likewise, the Tenth Circuit held that "Denver was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to either refute the incidents described by Denver's witnesses or to relate their own perceptions on discrimination in the Denver construction industry."¹⁰⁹

3. Narrowly Tailoring a Minority- and Woman-Owned Business Enterprise Program for the Forest Preserves

Even if the Forest Preserves has a strong basis in evidence to believe that race-based measures are needed to remedy identified discrimination, the program must still be narrowly tailored to that evidence. In striking down the City of Chicago's earlier M/WBE construction program, the court held that "remedies must be more akin to a laser beam than a baseball bat."¹¹⁰ In contrast, as discussed above, programs that closely mirror those of the Federal DBE Program¹¹¹ have been upheld using that framework.¹¹² The courts have repeatedly examined the following factors in determining whether race-based remedies are narrowly tailored to achieve their purpose:

- The necessity of relief;¹¹³
- The efficacy of race- and gender-neutral remedies at overcoming identified discrimination;¹¹⁴
- The relationship of numerical benchmarks for government spending to the availability of minority- and woman-owned firms and to subcontracting goal setting procedures;¹¹⁵
- The flexibility of the program requirements, including the provision for good faith efforts to meet goals and contract specific goal setting procedures;¹¹⁶
- The relationship of numerical goals to the relevant market;¹¹⁷

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

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

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

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

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

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

114. *Paradise* at 171.

115. *Id.*

116. *Id.*

- The impact of the relief on third parties;¹¹⁸ and
- The overinclusiveness of racial classifications.¹¹⁹

Consider Race- and Gender-Neutral Remedies

Race- and gender-neutral approaches are necessary components of a defensible and effective M/WBE program,¹²⁰ and the failure to seriously consider such remedies has proven fatal to several programs.¹²¹ Difficulty in accessing procurement opportunities, restrictive bid specifications, excessive experience requirements, and overly burdensome insurance and/or bonding requirements, for example, might be addressed by the Forest Preserves without resorting to the use of race or gender in its decision-making. Effective remedies include unbundling of contracts into smaller units that facilitate small business participation; providing technical support; and developing programs to address issues of financing, bonding, and insurance important to all small and emerging businesses.¹²² Further, governments have a duty to ferret out and punish discrimination against minorities and women by their contractors, staff, lenders, bonding companies or others.¹²³

The requirement that the agency must meet the maximum feasible portion of the goal through race-neutral measures, as well as estimate that portion of the goal that it predicts will be met through such measures, has been central to the holdings that the DBE program rule meets narrow tailoring.¹²⁴ The highly disfavored remedy of race-based decision making should be used only as a last resort.

117. *Id.*

118. *Croson* at 506.

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

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

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

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

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

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

However, strict scrutiny does not require that every race-neutral approach must be implemented and then proven ineffective before race-conscious remedies may be utilized.¹²⁵ While an entity must give good faith consideration to race-neutral alternatives, “strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative might be ... [S]ome degree of practicality is subsumed in the exhaustion requirement.”¹²⁶ Actual results matter, too. “Like [the Illinois Department of Transportation], the [Illinois] Tollway uses race- and gender-neutral measures. ... Those measures have not produced substantial DBE participation, however, so the Tollway also sets DBE participation goals.”¹²⁷

Set Targeted M/WBE Goals

Numerical goals or benchmarks for M/WBE participation must be substantially related to their availability in the relevant market.¹²⁸ For example, the DBE program rule requires that the overall goal must be based upon demonstrable evidence of the number of DBEs ready, willing, and able to participate on the recipient’s federally assisted contracts.¹²⁹ “Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*.”¹³⁰

It is settled case law that goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets; goals must be contract specific. In holding the City of Chicago’s former construction program to be insufficiently narrowly tailored, the court found that the MBE and WBE goals were “formulistic” percentages not related to the availability of firms.¹³¹ Contract goals must be based upon availability of M/WBEs to perform the anticipated scopes of the contract, location, progress towards meeting annual goals, and other factors.¹³² Not only is transparent, detailed contract goal setting legally mandated,¹³³ but this approach also reduces the need to conduct good faith efforts reviews, as well as the temptation to create

125. *Grutter*, 529 U.S. at 339.

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

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

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

129. 49 C.F.R. §26.45 (b).

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

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

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

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

“front” companies and sham participation to meet unreasonable contract goals. While this is more labor intensive than defaulting to the annual, overall goals, narrow tailoring requires contract goal setting.

Ensure Flexibility of Goals and Requirements

It is imperative that remedies not operate as fixed quotas.¹³⁴ An M/WBE program must provide for contract awards to firms who fail to meet the contract goals but make good faith efforts to do so. In *Croson*, the Court refers approvingly to the contract-by-contract waivers used in the USDOT’s DBE program,¹³⁵ a feature that has been central to the holding that the DBE program meets the narrow tailoring requirement. If the standards for evaluating whether a bidder who fails to meet the contract goal has made good faith efforts to so

seems vague, that is likely because it was meant to be flexible.... A more rigid standard could easily be too arbitrary and hinder prime contractors’ ability to adjust their approaches to the circumstances of particular projects. Midwest Fence’s real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. Midwest Fence contends this creates a de facto system of quotas because contractors believe they must meet the DBE goal in their bids or lose the contract. But Appendix A to the [DBE program] regulations cautions against this very approach.... Flexibility and the availability of waivers affect whether a program is narrowly tailored. The regulations caution against quotas; provide examples of good faith efforts prime contractors can make and states can consider; and instruct a bidder to use “good business judgment” to decide whether a price difference between a DBE and a non-DBE subcontractor is reasonable or excessive in a given case. For purposes of contract awards, this is enough to “give fair notice of conduct that is forbidden or required,” [citation omitted].¹³⁶

Chicago’s program failed narrow tailoring by imposing a “rigid numerical quota” on prime bidders’ utilization of MBEs and WBEs.¹³⁷ By contrast, the

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

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

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

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

constitutionally sound Illinois Tollway’s program provides for detailed waiver provisions, including rights of appeal of adverse determinations that the bidder made a good faith effort to meet a contract goal.¹³⁸

Review Program Eligibility Over-Inclusiveness and Under-Inclusiveness

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

The groups to include must be based upon evidence demonstrating disparities caused by discrimination.¹³⁹ The “random inclusion” of ethnic or racial groups that may never have experienced discrimination in the entity’s market area may indicate impermissible “racial politics”.¹⁴⁰ In striking down Cook County, Illinois’ construction program, the Seventh Circuit remarked that a “state or local government that has discriminated just against Blacks may not by way of remedy discriminate in favor of Blacks and Asian-Americans and women.”¹⁴¹ However, at least one court has held some quantum of evidence of discrimination for each group is sufficient; *Croson* does not require that each group included in the ordinance suffer equally from discrimination.¹⁴² Therefore, remedies should be limited to those firms owned by the relevant minority groups, as established by the evidence, that have suffered actual harm in the market area.¹⁴³

The over-inclusiveness concern is mitigated by the requirement that the firm’s owner(s) must be disadvantaged.¹⁴⁴ The Federal DBE Program’s rebuttable presumptions of social and economic disadvantage, including the requirement

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

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

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

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

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

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

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

that the disadvantaged owner’s personal net worth not exceed a certain ceiling and that the firm meet the Small Business Administration’s size definitions for its industry, have been central to the courts’ holdings that it is narrowly tailored.¹⁴⁵ “[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively [socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor.”¹⁴⁶ In contrast, Chicago’s program was held to fail strict scrutiny because “[t]he ‘graduation’ revenue amount is very high, \$27,500,000, and very few have graduated. There is no net worth threshold. A third generation Japanese-American from a wealthy family, and with a graduate degree from MIT, qualifies (and an Iraqi immigrant does not).”¹⁴⁷

Evaluate the Burden on Third Parties

Failure to make “neutral” changes to contracting and procurement policies and procedures that disadvantage M/WBEs and other small businesses may result in a finding that the program unduly burdens non-M/WBEs.¹⁴⁸ The trial court in the City of Chicago case noted that “there was little testimony about the effectiveness of race-neutral programs.”¹⁴⁹ However, “innocent” parties can be made to share some of the burden of the remedy for eradicating racial discrimination.¹⁵⁰

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

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

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

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

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

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

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

Court finds the Tollway Program's burden on non-DBE subcontractors to be permissible.¹⁵¹

Burdens must be proven and cannot constitute mere speculation by a plaintiff.¹⁵² “Implementation of the race-conscious contracting goals for which [the federal authorizing legislation] provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although the result places a very real burden on non-DBE firms, this fact alone does not invalidate [the statute]. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities.”¹⁵³

Narrow tailoring does permit certified firms acting as prime contractors to count their self-performance towards meeting contract goals if the study finds discriminatory barriers to prime contract opportunities. There is no requirement that a program be limited only to the subcontracting portions of contracts. Part 26 provides this remedy for discrimination against DBEs seeking prime contractor work,¹⁵⁴ and it does not limit the application of the program to only subcontracts.¹⁵⁵ The trial court in upholding the Illinois DOT’s DBE program explicitly recognized that barriers to subcontracting opportunities also affect the ability of DBEs to compete for prime work on a fair basis.

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

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

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

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

154. 49 C.F.R. §26.53(g) (“In determining whether a DBE bidder/offeror for a prime contract has met the contractor goal, count the work the DBE has committed to perform with its own forces as well as the work that it has committed to be performed by DBE subcontractors and suppliers.”).

155. 49 C.F.R. §26.45(a)(1).

competitive industry with tight profit margins, considerable hazards, and strict bonding and insurance requirements.¹⁵⁶

Examine the Duration and Review of the M/WBE Program

Race-based programs must have durational limits. A race-based remedy must “not last longer than the discriminatory effects it is designed to eliminate.”¹⁵⁷ The unlimited duration and lack of review were factors in the court’s holding that the earlier iteration of the City of Chicago’s M/WBE construction program was no longer narrowly tailored; Chicago’s program was based on 14-year-old information which, while it supported the program adopted in 1990, no longer was sufficient standing alone to justify the City’s efforts in 2004.^{158,159} How old is too old is not definitively answered¹⁶⁰; however, governments would be wise to analyze data at least once every five or six years.¹⁶¹

In contrast, the Federal DBE Program’s periodic review by Congress has been repeatedly held to provide adequate durational limits.^{162,163} Similarly, “two facts [were] particularly compelling in establishing that [North Carolina’s M/WBE program] was narrowly tailored: the statute’s provisions (1) setting a specific expiration date and (2) requiring a new disparity study every five years.”¹⁶⁴

4. Cases from the Seventh Circuit Court of Appeals

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

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

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

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

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

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

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

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

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

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

Builders Association of Greater Chicago v. City of Chicago

Plaintiff brought suit in 1996 to challenge the constitutionality of the City of Chicago's construction M/WBE Program. In defending the action, the City relied upon the types and quality of evidence discussed above in establishing its strong basis in evidence for its M/WBE program designed to remedy discrimination against minority- and woman-owned construction firms.¹⁶⁵ However, the program as implemented in 2003 when the case was tried, had not been reviewed since its inception in 1990. The court therefore found it was no longer sufficiently narrowly tailored to meet strict constitutional scrutiny. The court stayed the final order enjoining the implementation of the Program for six months, to permit the City to review the ruling and adopt a new program.¹⁶⁶

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

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

The court held that the playing field for minorities and women in the Chicago area construction industry in 2003 was still not level. The City presented a great amount of statistical evidence. Despite the plaintiff's attacks about over-aggregation and disaggregation of data and which firms were included in the analyses, "a reasonably clear picture of the Chicago construction industry emerged... While the size of the disparities was disputed, it is evident that minority firms, even after adjustment for size, earn less and work less, and have less sales compared to other businesses". That there was perhaps over-

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

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

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

Further, while it is somewhat unclear whether disparities for Asians and Hispanics result from discrimination or the language and cultural barriers common to immigrants, there were two areas “where societal explanations do not suffice”. The first is the market failure of prime contractors to solicit M/WBEs for non-goals work. Chicago’s evidence was consistent with that presented of the effects of the discontinuance or absence of race-conscious programs throughout the country and in Illinois. Not only did the plaintiff fail to present credible alternative explanations for this universal phenomenon but also this result “follows as a matter of economics... [P]rime contractors, without any discriminatory intent or bias, are still likely to seek out the subcontractors with whom they have had a long and successful relationship... [T]he vestiges of past discrimination linger on to skew the marketplace and adversely impact M/WBEs disproportionately as more recent entrants to the industry... [T]he City has a compelling interest in preventing its tax dollars from perpetuating a market so flawed by past discrimination that it restricts existing M/WBEs from unfettered competition in that market.”¹⁶⁷

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

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

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

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

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

Northern Contracting, Inc. v. Illinois Department of Transportation

In this challenge to the constitutionality of the DBE program, the Seventh Circuit Court of Appeals affirmed the district court's trial verdict that the Illinois Department of Transportation's application of Part 26 was narrowly tailored.¹⁶⁸ Like every other circuit that has considered the issue, the court held that IDOT had a compelling interest in remedying discrimination in the market area for federally funded highway contracts, and its DBE Plan was narrowly tailored to that interest and in conformance with the regulations.

To determine whether IDOT met its constitutional and regulatory burdens, the court reviewed the evidence of discrimination against minority and woman construction firms in the Illinois area. IDOT had commissioned an Availability Study to meet Part 26 requirements. The IDOT Study included a custom census of the availability of DBEs in IDOT's market area similar to that employed in this Report, weighted by the location of IDOT's contractors and the types of goods and services IDOT procures. The Study determined that DBEs comprised 22.77% of IDOT's available firms.¹⁶⁹ It next examined the possible impact of discrimination on the formation of firms. As required by "step 2" of Part 26,

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

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

IDOT considered whether to adjust the step 1 base figure to account for the “continuing effects of past discrimination” (often called the “but for” discrimination factor).¹⁷⁰ The Availability Study analyzed Census Bureau data to determine whether and to what extent there are disparities between the rates at which DBEs form businesses relative to similarly situated non-minority men, and the relative earnings of those businesses. Controlling for numerous variables such as the owner’s age, education, and the like, the Study found that in a race- and gender-neutral market area the availability of DBEs would be approximately 20.8% higher, for an estimate of DBE availability “but for” discrimination of 27.51%.

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

- An Availability Study conducted for Metra, the Chicago-area commuter rail agency;
- Expert reports relied upon in *BAGC v. Chicago*;
- Expert reports and anecdotal testimony presented to the Chicago City Council in support of the City’s revised 2004 M/WBE Program ordinance;
- Anecdotal evidence gathered at IDOT’s public hearings on the DBE program;
- Data on DBE involvement in construction projects in markets without DBE goals;¹⁷¹ and
- IDOT’s “zero goals” experiment. This was designed to test the results of “race-neutral” contracting policies, that is, the utilization of DBEs on contracts without goals. IDOT issued some solicitations for which there was significant DBE availability to perform the scopes of work without a DBE goal. In contrast to contracts with goals, DBEs received approximately 1.5% of the total value of these “zero goals” contracts.

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

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

170. 49 C.F.R. §26.45(d)(3).

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

anecdotal evidence of discrimination in the relevant marketplaces, indicates that IDOT's 2005 DBE goal represents a "plausible lower-bound estimate" of DBE participation in the absence of discrimination Plaintiff presented no persuasive evidence contravening the conclusions of IDOT's studies, or explaining the disparate usage of DBEs on goals and non-goals contracts. ... IDOT's proffered evidence of discrimination against DBEs was not limited to alleged discrimination by prime contractors in the award of subcontracts. IDOT also presented evidence that discrimination in the bonding, insurance, and financing markets erected barriers to DBE formation and prosperity. Such discrimination inhibits the ability of DBEs to bid on prime contracts, thus allowing the discrimination to indirectly seep into the award of prime contracts, which are otherwise awarded on a race- and gender-neutral basis. This indirect discrimination is sufficient to establish a compelling governmental interest in a DBE program. ... Having established the existence of such discrimination, a governmental entity has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.¹⁷²

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

Most recently and saliently for the City of Chicago's local M/WBE construction program, the challenge to Part 26, IDOT's implementation of those regulations and its DBE program for state funded contracts, and to the Illinois Tollway's¹⁷³ separate DBE program was rejected.¹⁷⁴

Plaintiff Midwest Fence is a White male-owned fencing and guardrail specialty contractor owned and controlled by White males that typically bids on projects as a subcontractor. From 2006-2010, Midwest generated average gross sales of approximately \$18M per year. It alleged that the DBE programs failed to meet the requirement that they be based on strong evidence of discrimination, and that the remedies were neither narrowly tailored on their face nor as applied. In sum, plaintiff's argument was that the agencies lacked proof of discrimination, and it bore an undue burden under the programs as a specialty

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

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

174. *Midwest Fence I*, 2015 WL 1396376.

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

The district court granted summary judgment in favor of all defendants on all claims. It found that the USDOT DBE Program serves a compelling government interest in remedying a history of discrimination in highway construction contracting. The court observed that Midwest Fence's challenge to the Tollway's program¹⁷⁵ mirrored the challenge to the IDOT's program and held that the Tollway, like IDOT, established a strong basis in evidence for its remedial program, finding that both programs imposed minimal burdens on non-DBEs, employed numerous race-neutral measures, and ensured significant and ongoing flexibility and adaptability to local conditions.¹⁷⁶

The Seventh Circuit Court of Appeals affirmed the district court's grant of summary judgment. It reiterated its decision in *Northern Contracting III* that the USDOT DBE Program is facially constitutional. "We agree with the district court and with the Eighth, Ninth, and Tenth Circuits that the federal DBE program is narrowly tailored on its face, so it survives strict scrutiny."¹⁷⁷

The bases for holding the Tollway's program were constitutional are especially instructive for the City of Chicago. Before adopting the Program, the Tollway set aspirational goals on a number of small contracts. These attempts failed: in 2004, the Tollway did not award a single prime contract or subcontract to a DBE. Additionally, in adopting its program, the Tollway considered anecdotal evidence provided in *Northern Contracting* consisting of the testimony of several DBE owners regarding barriers they faced.¹⁷⁸

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

Further, its

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

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

176. *Midwest Fence II*, 840 F. 3d at 932.

177. *Midwest Fence II*, 840 F. 3d at 945.

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

DBE subcontractors to be permissible... The Tollway's race-neutral measures are consistent with those suggested under the Federal Regulations. *See*, 49 U.S.C. §26.51. The Court finds that the availability of these programs, which mirror IDOT's, demonstrates 'serious, good faith consideration of workable race-neutral alternatives.' [citations omitted] In terms of flexibility, the Tollway Program, like the Federal Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so... Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the Federal Regulations, the Court finds the Tollway Program sufficiently flexible. Midwest's final challenge to the Tollway Program is that its goal-setting process is "secretive and impossible to scrutinize." [reference omitted] However, the Tollway has plainly laid out the two goal-setting procedures it has employed since the program's enactment ... The Tollway Defendants have provided a strong basis in evidence for their DBE Program. Midwest, by contrast, has not come forward with any concrete, affirmative evidence to shake this foundation.¹⁷⁹

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