

THE ROLE OF LAW, POLICY, AND PRACTICE
IN THE EROSION OF ECONOMIC POWER
IN UNDERSERVED COMMUNITIES

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ABSTRACT

The growth of businesses owned and operated within communities is a cornerstone to economic power. This Article looks at key law, policy, and practice barriers to economic growth in underserved communities. Unfortunately, the authors note, underserved minority communities are consistently denied the opportunity for economic growth and power due to the societal infrastructure in place. The Article explores pieces of societal infrastructure that have failed to provide the financial floor that these communities need to stand on to maximize economic power, prowess, and potential. Moore and White-Coleman use their positions as an African American lawyer investor and an African American lawyer entrepreneur to provide an illuminating vantage point on access to capital and business growth. The authors conclude that without examination through a variety of eyes and a change of the infrastructure in place, economic inequity will only persist—more laws will be generated, with more policy implications, and more communities will experience dissonance between law, policy, practice, and outcomes.

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INTRODUCTION

As we stand at the eclipse of the 100th anniversary of the founding of the Mound City Bar Association, we find ourselves in the shadow of some of the most turbulent civil and social times seen in recent American history: a pandemic, civil unrest, renewed racial strife, and revived racial awareness or first time, novice racial sensitivity. Amongst it all, there are economic overtones and undercurrents. This Article seeks to explore pieces of societal infrastructure that have failed to provide the financial floor that African Americans need to stand on to maximize economic power, prowess, and potential. We will examine the disparity in access to capital and business opportunity, which is a disparity wrapped in the tangled web of law, policy, and practice.

It is oftentimes unclear which is the constraining factor: law, policy, or practice. It is exceedingly clear that the effect of the disparate treatment is intricately braided into all three. Volumes have been written regarding disparity in economic opportunity for African Americans, so we have narrowed our focus here to two discrete areas for exploration: financing minority businesses and minority business growth. This focus provides the cornerstone of our organizing thesis: the erosion of economic power in underserved communities is locked up in the dearth of business growth and development in those same communities.

For this Article, “underserved” is a euphemism for predominantly African American and Latinx communities.¹ We assert here that the growth of businesses owned and operated by black and brown people in, around, or connected to the communities where they live is a cornerstone to economic power for these communities—our communities. So in this Article we look at key, law, policy, and practice barriers to that growth, barriers that both deny growth and erode that which happens to break through.

1. While this Article mentions the effect of geography on the erosion of economic power in underserved communities, i.e., the effect of redlining, it is not the main subject matter addressed. For more about the economic consequences to minorities and largely minority communities see COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* (2008); and Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 J. URB. HIST. 394 (2003).

We note that much has been written in this area over the years, from the ample writings about the challenges of the Small Business Administration's ("SBA") efforts to "support" minority businesses, to the recent rash of articles on disparity in the Payroll Protection Program ("PPP") recipients. We will draw and rely on earlier scholarly works about disparate economic opportunity rooted in the law. However, we write as an African American lawyer investor and as an African American lawyer entrepreneur. In this regard, our vantage point is as both practitioner and consumer in the equation of access to capital and business growth. We know firsthand that there is dissonance between law, policy, and practice when it comes to the capital people of color need and can access to grow and sustain their businesses. The dissonance or lack of harmony and consistency of desired outcomes between law, policy, and practice shows up in a variety of ways in the minority business growth arena.

There are good laws, developed from well-intended policy framing, that in practice fail to achieve the intended minority business growth outcomes. SBA 7(a) lending addressed in this paper is an example of such discordance between law, policy, and practice. There are good policy frames that result in law changes that when implemented drive results that are the exact opposite of what the good policy frame intended. The effect of the Volker Exemption on community banks as the result of recent changes to the Dodd-Frank Wall Street Reform and Consumer Protection Act discussed below is such an example. And there is law that dictates actions that result in ineffective policy and practice because of the lack of definitions, standards, and monitoring mechanisms, some of which is seen in the SBA 8(a) set aside program and in some of the "procurement programs" discussed in Sections III and IV. In this construct we rely on the ordinary understanding of what is law and what is supporting policy, however, we define practice as how law and policy are applied and/or implemented, including the decision-making process guiding application and implementation. Practice as used here includes the subjective decision making that exists in the application and the implementation of law and policy.

We know firsthand that the dissonance can and does fall in any or all of the areas in a single transaction. And we know that without examination through a variety of eyes, the behavior will continue: more and more laws will be generated to address the disparity, with more policy implications,

and more dissonance between law, policy, practice, and outcomes, continuing the deleterious cycle of eroding economic power, just like the set of laws and policies before it.

I. THE LEGAL CONTEXT: ACCESS TO CREDIT, ACCESS TO MARKET OPPORTUNITY

As is true with most aspects of American society, there are a myriad of federal, state, and local laws promulgated, passed, and implemented to eradicate disparity in business funding and to unlock market opportunities for minority business growth. In this Article, we will look briefly at a few of these laws specifically to frame the historical backdrop for the economic erosion premise we assert: the Community Reinvestment Act of 1977 (“CRA”); the Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1071, passed by the 111th Congress (“Dodd-Frank”); the Small Business Administration § 7(a) Disadvantaged Business lending program (“SBA 7(a)”); the Small Business Administration § 8(a) Business Development program (“SBA 8(a)”); and Minority and Women’s Business Enterprises (“M/WBE”)² procurement programs. This look at the framing laws is by no means an exhaustive study of them—the literature is full of such work. The objective here is to simply set the context for a look at dissonance in law, policy, and practice and erosion of economic power.

2. A Minority Business Enterprise (“MBE”) is a certified for-profit business owned and controlled by one or more minorities. *See, e.g.*, MO. REV. STAT. § 37.020.1(3) (2018). A minority is generally defined by race or origin as individuals who are African American, Native American, Hispanic American, or Asian Pacific Americans. § 37.013.1(5). A Women’s Business Enterprise (“WBE”) is a certified for-profit business owned and controlled by one or more women. § 37.020.1(6). In this Article, both MBE and WBE are referred to as (“M/WBE”). Women and minorities are both recognized as historically disadvantaged groups which may qualify for additional certifications such as a Disadvantaged Business Enterprise from the SBA or Department of Transportation, as well as state and local certifying agencies. Small Business Act, 15 U.S.C. §§ 631–657u. *See also* Shomari Benton & David Lloyd, *You Down with MWBE? Yeah You Know Me: A Summary of the MBE, WBE, and DBE Programs in the State of Missouri*, 2 BUS., ENTREPRENEURSHIP & TAX L. REV. 1, 2 (2018).

A. The Community Reinvestment Act

The CRA was enacted by Congress in 1977,³ and it is implemented by 12 C.F.R. parts 25, 228, 345, and 195. The CRA was promulgated as a response to findings that banking and depository institutions were not lending equally or equitably in communities across the country. Rather, entire “low- and moderate-income” communities and the households and business operations within them were being denied credit or issued credit on different and significantly less favorable terms.⁴

The CRA requires that the records of insured depository institutions demonstrate that the institution is lending and, to a lesser extent, investing, in a manner that meets the credit needs of its entire community. Demonstration of this comprehensive and balanced lending and investment approach is essential to depository institutions getting “good marks” in their regulatory evaluations, including applications for mergers and acquisitions. CRA examinations are conducted by the federal agencies that are responsible for supervising depository institutions: the Board of Governors of the Federal Reserve System (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), and the Office of the Community Reinvestment Act.⁵

B. Dodd-Frank Wall Street Reform and Consumer Protection Act

Dodd-Frank sought to reform sectors of the financial system that were believed to have caused the 2008 financial crisis, or the Great Recession, including banks, mortgage lenders, and credit rating agencies. Section 1071 of Dodd-Frank was enacted for the purpose of:

3. Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901–2908.

4. See Eugene A. Ludwig, James Kamihachi & Laura Toh, *The Community Reinvestment Act: Past Successes and Future Opportunities*, CMTY. DEV. INNOVATION REV., Feb. 2009, at 86, https://www.frbsf.org/community-development/files/cra_past_successes_future_opportunities.pdf [<https://perma.cc/826Q-YF29>].

5. 12 U.S.C. § 2902(1).

1. [F]acilitat[ing] enforcement of fair lending laws and
2. enabl[ing] communities, governmental entities, and creditors to identify business and community development needs and opportunities for women-owned, minority-owned, and small businesses.⁶

Section 1071 mandates data reporting by financial and depository institutions and centralized collection and maintenance of the data at the newly created Consumer Financial Protection Bureau (“CFPB”).⁷ As such, § 1071 amended the Equal Credit Opportunity Act (“ECOA”),⁸ the original legislation prohibiting discrimination on the basis of race, color, religion, national origin, sex, marital status, or age in credit transactions, by delineating additional data to be collected, defining them as “mandatory data points,” and assigning enforcement to the CFPB.

The mandatory data points required by Section 1071 include:

- (1) whether the applicant is a women-owned, minority owned, and/or small business;
- (2) application/loan number;
- (3) application date;
- (4) loan/credit type;
- (5) loan/credit purpose;
- (6) credit amount/limit applied for;
- (7) credit amount/limit approved;
- (8) type of action taken;
- (9) action taken date;
- (10) census tract (principal place of business);
- (11) gross annual revenue, and
- (12) race, sex, and ethnicity of the applicant’s principal owners.⁹

C. SBA 7(a) Disadvantaged Business Lending Program

The Small Business Administration (“SBA”) is the implementing entity for the Small Business Act.¹⁰ It is common language to hear SBA programs described as “loan programs,” but the SBA is not a lending entity. As detailed on its consumer facing website, the SBA, “doesn’t lend

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376.

7. *Id.*

8. Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691–1691f.

9. 15 U.S.C. § 1691c-(2)(e)(2).

10. Small Business Act, 15 U.S.C. §§ 631–657u.

money directly to small business owners.” Instead, it sets guidelines for loans made by its partnering lenders, community development organizations, and micro-lending institutions.¹¹ The SBA partners with lenders and community development organizations to reduce the risk for financial institutions willing and able to loan to and invest in small businesses, making it easier for those businesses to get loans. The most common of its “loan programs” is the SBA 7(a) loan guarantee program.¹² SBA 7(a) loan guarantees can be used to assist businesses in securing loans for short-term and long-term working capital; refinancing current business debt; and purchasing furniture, fixtures, and supplies, among other things. Under the 7(a) loan guarantee program, the SBA will guarantee as much as 85% of the loan, leaving very little exposure “to loss of its money” for the financial institution.¹³

The broad scope of permissible uses of the SBA 7(a) guaranteed loan program is the reason for its huge popularity for small business growth. The 7(a) loan program is not, however, dedicated exclusively to M/WBEs.¹⁴

Any business meeting the SBA size designation such that it qualifies as an SBA-defined small business can seek SBA 7(a) loan support so long as the business:

- (1) Operates for profit;
- (2) Is engaged in, or proposes to do business in, the United States or its possessions;
- (3) Has reasonable invested equity;
- (4) Uses alternative financial resources, including personal assets, before seeking financial assistance;
- (5) Can demonstrate a need for a loan;
- (6) Uses the funds for a sound business

11. *Loans*, U.S. Small Bus. Admin., <https://www.sba.gov/funding-programs/loans> [https://perma.cc/E7ES-VR93].

12. *SBA 7(a) Loans for Minorities: What You Need to Know*, FUNDING CIRCLE (May 20, 2021) [https://www.fundingcircle.com/us/resources/sba-7\(a\)-loans-for-minorities/](https://www.fundingcircle.com/us/resources/sba-7(a)-loans-for-minorities/) [https://perma.cc/8TLG-554M].

13. *Types of 7(a) Loans*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans> [https://perma.cc/4HJM-KXQR].

14. *SBA 7(a) Loans for Minorities*, *supra* note 12.

purpose; and (7) Is not delinquent on any existing debt obligations to the U.S. government.¹⁵

D. SBA 8(a) Business Development Program

The 8(a) program is an initiative by the SBA to assist socially and economically challenged small business owners, which includes many M/WBEs, to win government contracts. The mission and purpose of the SBA 8(a) program is to open the doors of opportunity for business growth to “disadvantaged business enterprises.”¹⁶

The federal government’s stated goal is to award at least 5% of all federal contracting dollars to small, disadvantaged businesses each year.¹⁷ The 8(a) program is the vehicle designed to assist in reaching this goal by readying M/WBEs for government contracting. The SBA’s goal is to develop “firms that will go on to thrive in a competitive business environment,”¹⁸ and to set businesses up for continued success, even after they’re out of the program.¹⁹ To achieve this goal of providing a level playing field for small businesses owned by socially and economically disadvantaged people or entities, the government limits competition for certain contracts to businesses that participate in the 8(a) Business Development program. Disadvantaged businesses in the 8(a) program can compete for set-aside and sole-source contracts in the program; get a Business Opportunity Specialist to help navigate federal contracting; form joint ventures with established businesses through the SBA’s Mentor-Protégé Program; and receive management and technical assistance, including business training, counseling, marketing assistance, and high-level executive development. An enterprise can compete for contract awards under multiple 8(a) socioeconomic programs.

The 8(a) program was recently modified to more clearly define eligibility requirements, including threshold percentage of minority

15. *Loans and Grants*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/loans-grants/see-what-sba-offers/sba-loan-programs/general-small-business-loans-7a/7a-loan-program-eligibility>.

16. 13 C.F.R. § 124.1 (2020).

17. *8(a) Business Development Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program> [<https://perma.cc/E6PQ-ZHD7>].

18. *SBA Contracting Resources*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/sites/default/files/oed_files/Contracting_8a_Overview.pdf [<https://perma.cc/B3LS-ZBCX>].

19. *Id.*; see also, *8(a) Business Development Program*, *supra* note 17.

ownership, and broaden the eligibility framework by expanding personal wealth parameters, among other things. Effective July 15, 2020, to qualify for the 8(a) program, a small business must: not have previously participated in the 8(a) program; be at least 51% owned and controlled by U.S. citizens who are socially and economically disadvantaged; have a personal net worth of \$750,000 or less, adjusted gross income of \$350,000 or less, and \$6 million or less in assets; and demonstrate good character and potential to perform on contracts.²⁰ Certification lasts for a maximum of nine years, with a requirement for annual review by the certifying agency to maintain good standing in the program.²¹ The SBA 8(a) program offers a unique and valuable opportunity for small businesses in the U.S.

Procurement programs, all designed to increase market access and, by practice, guarantee economic opportunity for M/WBEs historically shut out, are addressed more fully later in this Article as we examine the results yielding from implementation of the laws, policies, and practices discussed herein.

This bevy of laws and implementing regulations that have emerged have been in place since the middle of the last century until now, a near seventy-year period. Yet, the problems sought to be solved still exist—the dissonance remains. We turn now to a brief look at the status of access to capital and markets.

II. ACCESS TO CAPITAL: THE RELENTLESS BARRIER TO ECONOMIC POWER

Expanding market opportunity and access to capital are both essential components to sustained business growth, so it is a chicken-and-egg dilemma as to which comes first in the sustained growth eco-cycle. Developments in the legal framework addressed both access to capital and market expansion almost simultaneously, starting with the Government Contracting Committee, established by President Dwight Eisenhower in Executive Order No. 10,479;²² to the formation of the Equal Opportunity

20. Aron C. Beezley & Sarah Sutton Osborne, *New 8(a) BD Program Requirements Effective July 15, 2020*, BRADLEY (June 22, 2020), <https://www.buildsmartbradley.com/2020/06/new-8a-bd-program-requirements-effective-july-15-2020/> [https://perma.cc/AE6Y-Q6YY].

21. 13 C.F.R. § 124.2 (2020).

22. Exec. Order No. 10,479, 18 Fed. Reg. 4899 (Aug. 13, 1953).

Committee by President Kennedy in the 1960s;²³ to the SBA 7(a) and 8(a) amendments in the 1970s; and continuing through the Dodd-Frank legislation in the early 2000s.

However, businesses need money to grow, so we look first at access to capital, primarily credit. The most widely used tool for M/WBE growth capital in the SBA toolkit is the 7(a) loan guarantee program. The SBA reports an astounding 33% of its 7(a) loan guarantees back loans for MBEs. The SBA further reports historically high loan amounts were awarded to WBEs in 2019–2020.²⁴ This lending support provided by SBA 7(a) backing is astounding given that the U.S. Census Bureau reports that in 2018, MBEs and WBEs comprised 18.3% and 19.9% of U.S. businesses, respectively.²⁵ Clearly, SBA 7(a) is doing its job—in fact, it is working overtime to drive access to credit for M/WBE businesses. With 33% of the guarantees going to MBEs, this group is significantly over-subscribed in the 7(a) program. How is it then that we continue to have minority and women business owners reporting that the lack of access to capital is their primary barrier to growth?²⁶ What is the source of this dissonance?

Common reasons, offered by Drs. Robert Fairlie and Alicia Robb in their definitive 2007 study “Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital. Limitations faced by MBE,” include: (1) the need for capital by M/WBEs is exponentially higher than the availability of capital, (2) the

23. See *Remarks at the First Meeting of the President's Committee on Equal Employment Opportunity*, JOHN F. KENNEDY PRESIDENTIAL LIBR. AND MUSEUM (Apr. 11, 1961), <https://www.jfklibrary.org/asset-viewer/archives/JFKWHA/1961/JFKWHA-021-004/JFKWHA-021-004> [https://perma.cc/H2CW-S4CH].

24. See *SBA 7(a) Loans for Minorities*, *supra* note 12; *SBA Achieves Historic Small Business Lending for Fiscal Year 2020*, U.S. SMALL BUS. ADMIN. (Oct. 28, 2020), <https://www.sba.gov/article/2020/oct/28/sba-achieves-historic-small-business-lending-fiscal-year-2020> [https://perma.cc/LW89-G5FV].

25. See Press Release, U.S. Census Bureau, *Annual Business Survey Release Provides Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses* (Jan. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/annual-business-survey.html> [https://perma.cc/NKS7-GZQ5].

26. See *Access to Capital is Still a Challenge for Minority Business Enterprises*, U.S. DEP'T. COM. MINORITY BUS. DEV. AGENCY (2020), <https://archive.mbda.gov/news/blog/2010/07/access-capital-still-challenge-minority-business-enterprises.html> [https://perma.cc/E33C-H7DB].

disparity in loan amounts receive keeps M/WBEs under-capitalized, and (3) M/WBEs need access to equity in addition to credit.²⁷

These reasons are further validated by additional current studies highlighting similar factors. For example, Dodd-Frank is identified as an accelerating force in the demise of smaller community banks, credit unions, and minority depository institutions, by increasing their regulatory burden, thereby reducing the number of financial institutions that lend in the part of the market where many of the M/WBE businesses exist, the low- and moderate-income sphere.²⁸ More specifically, the Dodd-Frank's Volcker Rule, contained within Section 619 of Dodd-Frank and named after former Federal Reserve Chair Paul Volcker, generally prohibits banking entities from proprietary trading, acquiring or retaining ownership interest in, or having certain relationships with hedge or private equity funds, thereby further reducing the opportunity for access by M/WBEs access to equity capital.²⁹

Disparity in loan terms continues to haunt M/WBEs seventy years after Eisenhower's Contract Committee and fifty years after the promulgation of the SBA and CRA law and rules. In their 2017 article "Are Minority-Owned Businesses Underserved by Financial Markets? Evidence from the Private-Equity Industry," authors Bates, Bradford, and Jackson answer their question in the affirmative.³⁰ Relying on data collected in the Survey of Small Business Finance ("SSBF") report,³¹ the findings of disparity are chronicled by the authors: (1) on average white owned small businesses seeking loans get 73% more than M/WBE counterparts, (2) M/WBE businesses pay substantially higher interest rates

27. Robert V. Fairlie & Alicia M. Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, U.S. DEP'T OF COMMERCE, MINORITY BUS. DEV. AGENCY (2010).

28. *Is Dodd-Frank Killing Community Banks? The More Important Question Is How to Save Them*, PUB. BANKING INST., <https://www.publicbankinginstitute.org/2018/10/20/is-dodd-frank-killing-community-banks-the-more-important-question-is-how-to-save-them/> [https://perma.cc/4XDG-ZY94].

29. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620-31 (2010) (codified as amended at 12 U.S.C. § 1851). The Volcker Rule is named after former Federal Reserve Chair Paul Volcker.

30. See Timothy Bates, William D. Bradford & William E. Jackson, *Are Minority-Owned Businesses Underserved by Financial Markets? Evidence from the Private-Equity Industry*, 50 SPRINGER SMALL BUS. ECON. 445, 446 (2018).

31. The SSBF is a nationally representative small-business database created by the Board of Governors of the Federal Reserve System and the Small Business Administration. The SSBF regularly surveys small businesses that indicate they need or want credit to grow. *Id.*

than white business owners, and (3) the nearly complete absence of private equity investment in M/WBEs persists.³²

The driving force behind the disparity is not solely the result of insufficient, inadequate, or even inattentive law and/or policymaking. The decision-making process during the application of the law and the policy—what the authors here identify as the practice—is a significant part of the problem. For example, as has been documented herein, M/WBEs are denied loans at a higher frequency than whites.³³ However, equally reliable research

finds that even when controlling for factors such as creditworthiness, gaps in approval rates and interest rates remain. That means that a Black business owner and a white business owner with similar credit scores, business age, business size, and other traits still do not have the same access to business financing.³⁴

Decision-makers, therefore, need to rethink the “credit score” and similar barriers and gating factors that become barriers for M/WBEs seeking capital. Many less-traditional financing institutions of the day, “alternative” business lenders, are in fact doing exactly that, profitably, but often with usurious rates.³⁵ This decision-making dissonance can be removed with the collection and reliance on good data versus old-line practices. In a recent article closely examining the disparity in access to capital that minority business owners experience, Carlos Berdejó, Professor of Law, Loyola Law School, Los Angeles, California, highlights that empirical data collected broadly and over time establishes that even when credit scores of prospective MBEs seeking capital are the same or similar to non-MBE business owners, the capital infusion—whether debt or equity—is less frequently granted and most often on less favorable terms. Berdejó opines that this outcome is rooted in assumptions about the less creditworthiness of MBEs despite the comparability of the age old and

32. *Id.*

33. *Id.*

34. See Eric Goldschein, *Racial Funding Gap Shows Black Business Owners Are Shut Out from Accessing Capital*, NERD WALLET (Jan. 8, 2021), <https://www.fundera.com/blog/racial-funding-gap> [https://perma.cc/4PUK-WH4F].

35. See *Alternative Loans for Small Business*, DUN & BRADSTREET, <https://www.dnb.com/resources/alternative-lending-for-business.html> (last visited Sept. 25, 2021).

allegedly objective credit score screen.³⁶ This is but one example of how the old-line practices, often rooted in old-line stereotypic assumptions about the relationship between race and reliability or race and business success, impede good laws and decent policy resulting in inequitable outcomes. This is not an indictment based on racial animus; rather, this is an observation about the failure to connect empirical data to practice to get more equitable outcomes.

We note here that access to private equity capital outside of that provided by institutional investors, another component in the funding continuum that is woefully disparate for M/WBEs, does not have the same mandated legal and regulatory framework as lending, and as such, “practice” and the decision making that supports it has an outsized effect on outcomes. Berdejó looks at this phenomenon and identifies information asymmetries as part of the reason minorities do not attract external equity investors. Minority business have a much less developed set of hard documents, which are typically available to potential equity investors to assess interest and risk,³⁷ Without the hard documents, Berdejó points out that the prospective equity investor is left to evaluate risk on “soft information” which is much more subjective.³⁸ The presentation of the soft information by the minority entrepreneur and the receipt and evaluation of the soft information by the equity investor is mismatched, another level of dissonance. Professor Berdejó lays out the dilemma and the dissonance clearly and persuasively:

[S]ocioeconomic and cultural differences between investors and entrepreneurs complicate the production and digestion of soft information. For example, it is easier for an investor to uncover and interpret soft information when that investor enjoys cultural proximity with the entrepreneur. Common networks are also critical for the collection, dissemination, and interpretation of soft information, as many investors informally rely on

36. See Carlos Berdejó, *Financing Minority Entrepreneurship*, 21 WIS. L. REV. 41 (2021).

37. *Id.*

38. *Id.*

acquaintances to act as “gatekeepers” for potential financings.³⁹

Moreover, the ability of the minority entrepreneur to present its “soft information” in ways that would drive equity investors to value and use it, is extremely limited because of information asymmetries. In other words, because there are very few legal and policy rules of the road for who, what, and how private equity capital is invested, industry “practice” is the standard and provides the guardrails. Access to private equity capital is most available to those with access to the private equity network. M/WBEs don’t have that network; they are not typically invited into that network, and the amount of private equity invested in them reflects that lack of access. A common phrase in the private equity world is that investors invest in “good” entrepreneurs. Implicit in that statement is that the investor must get to know and trust that an entrepreneur is “good.” The common encounters that would allow a prospective equity investor to know and understand the “good character” or “good work ethic” of a minority or woman business owner, all important factors to business success, do not readily occur between private equity investors and the ordinary M/WBE. Private equity is grounded in the most basic capitalist principal: put money into something to make more money than you invested and thus make profit. Yet, as Berdejó and Bates *et al.* point out, when it comes to investing private equity in M/WBEs, despite the obvious demand for such capital, despite the projected growth potential in the M/WBE market, and despite emerging evidence that the return to investors is better than average, the private equity dollar has not moved toward the demand and the potential profit.⁴⁰ Once again, the dissonance shows up in the practice of the private equity investing community.

In fairness to the private equity industry, it is important to note that because of the deep relationship basis of private equity investing—I give you my money in exchange for ownership of a piece of your company—M/WBEs report a significant lack of trust and therefore appetite for private equity, even when they know they need something other than debt to

39. *Id.*

40. See Berdejó, *supra* note 36, at 59–60; see also Bates et al., *supra* note 30, at 446.

grow.⁴¹ Since the death of George Floyd and the civil unrest that his death evoked, there has been increased interest by private equity in the M/WBE market.⁴² But the hesitancy of M/WBEs to take private equity funding, to share ownership as a pathway to growth, remains.

41. See Oscar Perry Abello, *Overcoming Trust Gap is Key to Supporting Black Owned Businesses*, NEXT CITY (Mar. 28, 2017), <https://d.nextcity.org/urbanist-news/entry/trust-gap-is-key-to-closing-racial-wealth-gaps> [<https://perma.cc/J9P8-QQRY>].

42. See Isaac Taylor, *Investors Scrutinize Private Equity's Diversity Efforts*, WALL STREET J. (Oct. 8, 2021), <https://www.wsj.com/articles/investors-scrutinize-private-equitys-diversity-efforts-11633685402> [<https://perma.cc/563T-24B2>]; see also John Reosti, *Banks Redouble Efforts to Aid Black-Owned Businesses*, AM. BANKER (Feb. 24, 2021), <https://www.americanbanker.com/news/banks-redouble-efforts-to-aid-black-owned-businesses> [<https://perma.cc/Q4Y6-P2AG>].

III. GENERAL INFORMATION ABOUT MINORITY AND WOMEN OWNED BUSINESS ENTERPRISES PROCUREMENT PROGRAMS

M/WBE procurement programs were intended to address the disparity in minority firm participation and to further the growth of such businesses through greater access to the large market of government contracts. These programs are aimed at addressing one of the other barriers to business growth: market opportunity. Such programs were an outgrowth of changes demanded in the 1960s during the Civil Rights Movement. President John F. Kennedy issued Executive Order 10,925 in March 1961, which established the President's Committee on Equal Employment Opportunity and mandated that projects financed with federal funds take affirmative action to ensure that hiring and employment practices were free of racial bias.⁴³

Although Congress passed SBA 8(a)⁴⁴ in 1953, which gave the SBA authority to enter into subcontracts with small businesses for the acquisition of goods and services “whenever it determines such action is necessary or appropriate,”⁴⁵ it was well over a decade later, in 1968, that President Lyndon Johnson directed the SBA to develop a program pursuant to its authority under Section 8(a) to assist small businesses owned by “socially or economically disadvantaged” persons to achieve a competitive position in the economy.⁴⁶ By 1972, the federal government began requiring its various agencies to advance affirmative action plans, including contracting programs for minority business enterprises. The first goal on the federal level that “at least ten percent of federal funds granted for local public work projects” go to minority owned businesses was set by the 1977 Public Works Employment Act.⁴⁷ At the state level, affirmative procurement programs started in 1972 or 1973 with Mississippi and Connecticut and grew to twenty-five more states by

43. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

44. Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691c-(2)(e)(2).

45. Small Business Act, 15 U.S.C. § 637(a)(1) (2006).

46. See *Fullilove v. Klutznick*, 448 U.S. 448, 463–64 (1980).

47. See 42 U.S.C. § 6705(f)(2). Most of this historical information was obtained from *Economic Development in Diverse Communities: Inclusive Procurement by Cities and Counties*, INSIGHT CTR. FOR CMTY. ECON. DEV., at 15 (2014), https://ccednet-rddec.ca/sites/ccednet-rddec.ca/files/041414insight_mwbe.pdf.

1995.⁴⁸ City and county M/WBE programs also began in the late 1970s after the federal government began its programs to increase procurements from minority and woman owned firms.⁴⁹

Public procurement programs that prefer business owners from disadvantaged communities—whether in the form of M/WBE programs or Small Business Enterprise (SBE) programs—are thus intended to further the economic development of disadvantaged local communities, including communities of color and women, as well as other important groups. Therefore, they should provide an essential tool to eliminate barriers to economic opportunity and the lingering impacts of structural racism and sexism.

According to the 2000 U.S. Census, minority owned businesses (defined by the race, ethnicity, and gender of the people owning the majority interest in the business) are growing at more than six times the rate of all firms in the United States in number, and nearly twice the rate of all firms in annual sales.⁵⁰ As of 2018, approximately 18.3% (\$1 million) of all U.S. businesses were minority-owned and about 19.9% (\$1.1 million) of all businesses were owned by women.⁵¹ Add to this the compelling statistic that by 2045, the majority of the population in the United States will be people of color.⁵² Nonetheless, despite these procurement programs and the increase in M/WBEs, such businesses still receive a much smaller percentage of government contracts than their

48. *Id.*

49. *Id.*

50. Ian Pulsipher, *Minority-Owned Business Development*, National Conference of State Legislators: LEGISBRIEF, June/July 2004, <https://www.ncsl.org/documents/econ/MinorityOwned.pdf> [<https://perma.cc/QQW4-9NXV>].

51. See Press Release, U.S. Census Bureau, Annual Business Survey Release Provides Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses (Jan. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/annual-business-survey.html> [<https://perma.cc/FVQ4-HT7Z>].

52. See William H. Frey, *The US Will Become “Minority White” in 2045*, *Census Projects*, BROOKINGS INST. (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/> [<https://perma.cc/4V9H-X5LS>] (citing 2018 U.S. Census statistics that suggest the country will be “minority white” in 2045). Census statistics predict that by 2045, “whites will comprise 49.7 percent of the population in contrast to 24.6 percent for Hispanics, 13.1 percent for Blacks, 7.9 percent for Asians, and 3.8 percent for multiracial populations.” *Id.*

majority-owned peers.⁵³ The overall data reflects that majority-owned businesses still receive the lion's share of public contracts.

In view of the changing demographics, greater economic inclusion of M/WBEs would actually translate into greater economic growth not only for the local economy, but indeed for the national and global economies. Making meaningful changes now to address the practices which hinder such inclusion is critical to ensuring the next generation's business success.

The components of a public procurement program typically consist of a certification process which documents the eligibility of a business for the program and a registry of M/WBEs to be used by the governmental agency in advertising or soliciting business opportunities.⁵⁴ The contracts that may be awarded by a state or local government are defined by applicable state law or local ordinance, and typically are public contracts in areas such as construction, professional services, and purchase of goods or other services.⁵⁵ The category of professional services would include, but is not limited to, accountants, architects, engineers, and lawyers.⁵⁶

The United States Supreme Court's decisions in *City of Richmond v. J.A. Croson Co.* and *Adarand Constructors, Inc. v. Peña* established the standard a government M/WBE set-aside program must meet to pass

53. *Contracting Barriers and Factors Affecting Minority Business Enterprises*, MINORITY BUS. DEV. AGENCY (Dec. 16, 2016), <https://archive.mdba.gov/news/news-and-announcements/2017/01/contracting-barriers-and-factors-affecting-minority-business.html> [https://perma.cc/SA84-N9Y8].

54. See generally Benton & Lloyd, *supra* note 2, which provides a comprehensive overview of the certification programs and processes for certification in the State of Missouri. Given the space limitations, this Article does not address certification programs or the process for obtaining certification.

55. See, e.g., ST. LOUIS CTY., MO., CODE § 107.071-2 (2021) (“Contract shall mean a mutually-binding legal relationship or any modification thereof obligating the vendor to furnish construction, professional services, and/or supplies and contractual services and the County to pay for them”); and MO. REV. STAT. § 37.020(2) (2018), which references “participation of certified socially and economically disadvantaged small business concerns or minority business enterprises, directly or indirectly, in contracts for supplies, services, and construction contracts”

56. See, e.g., N.Y.C., N.Y., RULES OF N.Y.C., tit. 66, § 11-60(29) (2021) (“Professional services’ means services that require specialized skills and the exercise of judgment, including but not limited to accountants, lawyers, doctors, computer programmers and consultants, architectural and engineering services, and construction management services.”); HOUSTON, TEX., CODE OF ORDINANCES § 15-83(a) (2013); *Policies and Procedures, CITY OF HOUS. OFF. OF BUS. OPPORTUNITY*, Sept. 9, 2021, at 6, <https://www.houstontx.gov/obo/docsandforms/OBO-Policies-Procedures-2021-September.pdf>.

constitutional muster when considering race or gender.⁵⁷ The Court held in *Croson* that the Equal Protection Clause of the Fourteenth Amendment required strict scrutiny of state and local programs that were based on racial classifications. But the Court specifically exempted federal legislation from its holding, stating that “Congress may identify and redress the effects of society-wide discrimination.”⁵⁸ In *Adarand*, which was decided six years later, the Court upheld its decision in *Croson* and affirmed that the strict scrutiny standard of review also applied to federal racial classifications.⁵⁹ The strict scrutiny standard requires that an M/WBE program’s inclusion of race-based quotas or set-aside percentages be justified by a compelling governmental interest and be narrowly tailored to accomplish a remedial purpose.⁶⁰ Those Court decisions have led to what has become a common practice of conducting and utilizing objective disparity studies as evidence to support affirmative action in public procurement programs. Disparity studies examine the availability, capacity, and utilization of M/WBE firms in the jurisdiction.

The *Croson* and *Adarand* decisions have also resulted in government entities characterizing their M/WBE programs as either “race-neutral” or “race-conscious.” “Race-neutral” M/WBE programs do not include race preferences in public bidding projects, although they may employ strategies that increase the number and quality of M/WBE bids. In contrast, “race-conscious” M/WBE programs directly state diversity goals by putting in place either a binding M/WBE subcontracting program or an M/WBE bid discount/preference.⁶¹

To briefly explore market opportunity, in this Article, we survey and examine the M/WBE programs of the cities of Philadelphia, Pennsylvania; Houston, Texas; and Indianapolis, Indiana. Irrespective of whether a M/WBE program is characterized as “race-neutral” or “race-conscious,” the essential ingredients for an effective program, we submit, should be a commitment to the concept, commitment to effective policies and

57. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

58. *See Croson*, 488 U.S. at 490–91.

59. *See Adarand*, 515 U.S. at 223.

60. *See Croson*, 488 U.S. at 485–86.

61. *Economic Development in Diverse Communities: Inclusive Procurement by Cities and Counties*, INSIGHT CTR. FOR CMTY. ECON. DEV., at 5 n.3 (2014), <http://ww1.insightcced.org/uploads/publications/assets/econ-dev-diverse-communities.pdf> [https://perma.cc/PX4Q-QDV4].

practices, commitment to the implementation of those policies and practices throughout the procurement process, and a continuous process of improving the program. With such commitments in place and acted upon, there would be a better framework for harmony between the program goals and outcomes, along with the opportunity to gather information for ongoing program improvement, eliminating some of the dissonance. Our survey and examination are not exhaustive, but instead focus on three cities whose procurement programs and practices appear to be forward-looking given the changing demographics. We begin, however, with an overview of the M/WBE programs in the State of Missouri; the City of St. Louis, Missouri; St. Louis County, Missouri; and Kansas City, Missouri. Our intent is not to draw conclusions, but rather, to illuminate the data or lack thereof so that the reader could draw their own conclusions.

IV. M/WBE PROCUREMENT PROGRAMS IN THE STATE OF MISSOURI

In the State of Missouri, we reviewed the M/WBE procurement programs for: (1) the State, (2) the City of St. Louis, (3) St. Louis County, and (4) Kansas City.⁶²

A. State of Missouri

The State of Missouri has two M/WBE programs. They are under the auspices of (1) the Office of Administration; and (2) the Missouri Department of Transportation.⁶³

The Missouri Office of Equal Opportunity administers the MBE and WBE programs for the Office of Administration. All government related contracts entered into by the State of Missouri, excluding the Department of Transportation, are included within the scope of the programs.

The State of Missouri Department of Transportation's MBE and WBE programs are administered by the External Civil Rights Division of the Missouri Department of Transportation. The scope of the program

62. For the City of St. Louis, St. Louis County, and Kansas City, due to space limitations, we only reviewed the M/WBE procurement programs for the cities, not related agencies or other entities.

63. *Supplier Diversity*, MO. OFF. OF EQUAL OPPORTUNITY, https://oeo.mo.gov/oeo_certifications/ [https://perma.cc/ZQL2-7G4M].

includes all government-related contracts entered into by the Missouri Department of Transportation. The annual participation goal for years 2018, 2019, and 2020 was 15.38%.⁶⁴

1. The Office of Administration

Section 37.020 of the Missouri Revised Statutes provides that the Office of Administration, in consultation with each department, must establish and implement a plan to increase and maintain the participation of certified socially and economically disadvantaged small business concerns or minority business enterprises in contracts for supplies, services, and construction contracts. The plan implemented by the State of Missouri must be consistent with goals determined after an appropriate study to determine the availability of socially and economically disadvantaged small business concerns and minority business enterprises in the marketplace.⁶⁵ Despite the enactment of Section 37.020 in 1990, it was not until October 2015 that the Governor of Missouri issued Executive Order No. 15-06, which provided, *inter alia*, that “[a]ll state agencies shall make every feasible effort to increase the percentage of goods and services procured from certified M/WBEs in order to achieve the annual goals of 10% MBEs and 10% WBEs of all Executive Branch procurement funds.”⁶⁶ Executive Order No. 15-06 relied on a disparity study completed on October 24, 2014, that studied the utilization of M/WBEs in state contracts and the availability of M/WBEs in the marketplace.

64. MO. DEP’T OF TRANSP., DISADVANTAGED BUSINESS ENTERPRISE SUBMITTAL – PROGRAM SUBMITTAL 31 (2017) https://www.modot.org/sites/default/files/documents/external_civil_rights/dbeprogramssubmitlffy18-updated.pdf [<https://perma.cc/UWK8-9ZVS>].

65. MO. REV. STAT. § 37.020(2) (2018).

66. § 37.020; Mo. Exec. Order No. 15-06 para. 1 (2015), <https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2015/15-06.pdf> [<https://perma.cc/3BGQ-PWET>]; *see also* MO. CODE REGS. ANN. tit. 1 § 30-5.010(5)(B) (2015).

The disparity study provided the following data on the availability of minority and women owned firms in Missouri:⁶⁷

Demo-graphic Group	Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE
Weighted Availability	6.23%	1.15%	0.89%	0.77%	9.03%	10.40%	19.43%	80.18% ⁶⁸

i. Program Requirements

Pursuant to Executive Order 15-06, Section 1, and Mo. Code Regs. Ann. Title. 1 § 30-5.010(5)(B) (2016), Missouri has committed to “make every feasible effort to increase the percentage of goods and services procured from certified M/WBEs in order to achieve the annual goals of 10% MBEs and 10% WBEs of all annual Executive Branch procurement funds.” The language is that the State will “make every feasible effort” to increase its annual goals.⁶⁹

ii. Annual Report and Data – Annual Number and Amount of Contract Awards

During fiscal years 2014–2020, the amounts of contract expenditures made by Missouri to businesses were as follows:

67. Mo. Exec. Order No. 15-06 para. 1 (2015).

68. MO. OFF. OF ADMIN., DISPARITY STUDY 2014, at 7 (2014), [<https://perma.cc/5QTV-AHLM>].

69. Mo. Exec. Order No. 15-06 para. 1 (2015); *see also* MO. CODE REGS. ANN. tit. 1 § 30-5.010(5)(B) (2015).

Fiscal Year	MBE Expenditures	WBE Expenditures	Non-M/WBE Expenditures	Total Expenditures	MBE %	WBE %
FY2014 ⁷⁰	\$72,793,186 & \$37,398,584	\$17,868,239 & \$29,510,765	Not available	\$1,171,478,501	9.41%	4.04%
FY2015 ⁷¹	\$129,086,788 ⁷²	\$52,932,642	\$1,033,723,624	\$1,215,743,055	11.24%	4.61%
FY2016 ⁷³	\$138,081,911	\$53,643,888	\$1,076,855,761	\$1,268,581,560	13.73%	5.33%
FY2017 ⁷⁴	\$92,403,679	\$37,903,002	\$1,099,759,270	\$1,230,065,951	12.42%	5.09%
FY2018 ⁷⁵	\$89,929,064	\$32,465,372	\$1,102,212,800	\$1,224,607,236	10.65%	3.85%
FY2019 ⁷⁶	\$79,160,067	\$33,762,819	\$1,133,295,735	\$1,301,215,916	10.04%	4.28%
FY2020 ⁷⁷	\$86,832,898	\$35,210,960	Not available	\$1,246,218,621	6.66%	2.70%

2. Missouri Department of Transportation M/WBE Procurement Programs

Pursuant to 49 C.F.R. Part 26.45, the Missouri Department of Transportation (“MoDOT”) operates a M/WBE program through the Disadvantaged Business Enterprise Program, a legislatively mandated United States Department of Transportation program that applies to federal-aid highway dollars expended on federally assisted contracts

70. MO. OFF. OF EQUAL OPPORTUNITY, OEO ANNUAL REPORT – FY 2014, at 15 (2015), <https://oio.mo.gov/wp-content/uploads/sites/6/2021/02/FY2019-Annual-Report.pdf> [<https://perma.cc/RM9H-ZYZ4>].

71. MO. OFF. OF EQUAL OPPORTUNITY, OEO ANNUAL REPORT – FY 2015, at 21 (2016), <https://oio.mo.gov/wp-content/uploads/sites/6/2015/12/Annual-Report-2015.pdf> [<https://perma.cc/F25K-GT3X>].

72. The “Expenditures” dollar amounts with cents for FY2015, FY2016, FY2017, FY2018, FY2019, and FY2020 have been rounded up or down to the nearest dollar.

73. MO. OFF. OF EQUAL OPPORTUNITY, OEO ANNUAL REPORT – FY 2016, at 30 (2016), <https://oio.mo.gov/wp-content/uploads/sites/6/2015/12/Annual-Report-2016.pdf> [<https://perma.cc/3VM9-68JE>].

74. MO. OFF. OF EQUAL OPPORTUNITY, OEO ANNUAL REPORT – FY 2017, at 21 (2018), <https://oio.mo.gov/wp-content/uploads/sites/6/2021/02/FY17-ANNUAL-REPORT.pdf> [<https://perma.cc/Q84S-MLD8>].

75. MO. OFF. OF EQUAL OPPORTUNITY, OEO ANNUAL REPORT – FY 2018, at 35 (2019), <https://oio.mo.gov/wp-content/uploads/sites/6/2021/02/FY18-Annual-Report.pdf> [<https://perma.cc/T9CF-PTK4>].

76. MO. OFF. OF EQUAL OPPORTUNITY, OEO ANNUAL REPORT – FY 2019, at 24 (2020), <https://oio.mo.gov/wp-content/uploads/sites/6/2021/02/FY2019-Annual-Report.pdf> [<https://perma.cc/9WXA-D8UR>].

77. MO. OFF. OF EQUAL OPPORTUNITY, ANNUAL REPORT – FY 2020, at 7 (2021), https://oio.mo.gov/wp-content/uploads/sites/6/2021/07/FY20-Annual-Report_FINAL.pdf [<https://perma.cc/2QJN-XNVA>].

issued by the U.S. Department of Transportation.⁷⁸ The participants in the program are classified as disadvantaged business enterprises (“DBE”).

In 2012, MoDOT completed a disparity study, *The State of Minority- and Women-Owned Business Enterprise: Evidence from Missouri*, which was prepared for MoDOT by NERA Economic Consulting. The disparity study examined DBEs for construction or for construction-related professional services (“consulting”).⁷⁹ The DBEs were categorized in the study as African-American, Hispanic, Asian/Pacific Islander, Native American, and MBE Nonminority Female, presumably meaning Caucasian females.⁸⁰ MoDOT’s relevant geographic market area was determined to include the State of Missouri plus the Kansas portion of the Kansas City, MO-KS Metropolitan Statistical Area, and the Illinois portion of the St. Louis, MO-IL Metropolitan Statistical Area.⁸¹ According to the disparity study, overall estimated DBE availability in MoDOT’s construction and consulting market areas was as follows:

Demographic ⁸² Group	DBE%	Non-DBE%
Construction	20.40	79.60
Consulting	21.53	78.47

78. 49 C.F.R. § 26.45 (2021).

79. NERA ECON. CONSULTING, *THE STATE OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MISSOURI 2* (2012), <https://www.modot.org/sites/default/files/documents/ecr/ecr/documents/neramodotdisparitystudyfinal3.pdf> [https://perma.cc/8C46-SQG5].

80. *Id.* at 4 tbl.A1.

81. *Id.* at 2.

82. *Id.* at 4 tbl.A1.

i. Program Requirements

Based upon the 2012 disparity study availability data, MoDOT established an overall DBE goal for Federal Fiscal Years (FFY) 2014–2017 of 15.38%.⁸³ MoDOT had a Federal Highway Administration approved overall DBE goal of 16.05% for M/WBEs for FFY 2018–2020.⁸⁴

ii. Annual Report and Data – Annual Number and Amount of Contract Awards

The following data identifies the amount of work performed by certified DBEs on federal-aid projects from 2014 through 2019. The median for MoDOT’s participation for FFY 2014 through FFY 2018 was 11.63%.

83. MoDOT’s DBE Program – FAQs, MO. DEP’T OF TRANSP. 2 (Oct. 25, 2019), <https://www.modot.org/sites/default/files/documents/FAQS%20on%20DBEs.pdf> [<https://perma.cc/7XRM-7UM2>].

84. *Id.* As of November 18, 2021, MoDOT was updating the DBE overall goal for the Transit Section for applicable services and projects for fiscal years 2022–2024, beginning October 1, 2021, and ending September 30, 2024. The proposed goal to be submitted to the Federal Transit Administration was .62%. *DBE Program*, MO. DEP’T OF TRANSP., <https://www.modot.org/dbeprogram> [<https://perma.cc/DY2Y-CVVQ>].

FFY DBE Participation⁸⁵

Federal Fiscal Year	DBE Percent
2014	9.71%
2015	11.59%
2016	11.63%
2017	13.50%
2018	13.29%
2019	10.74%

B. The City of St. Louis M/WBE Procurement Program

There are three primary M/WBE programs in the St. Louis, Missouri area: (1) the City of St. Louis, Missouri; (2) the St. Louis Lambert International Airport; and (3) the Metropolitan St. Louis Sewer District.⁸⁶ Given space limitations, we only examined the data for the City of St. Louis.

The City of St. Louis established goals for M/WBE participation through Executive Order No. 59 and Section 3.110.030 of the St. Louis, Mo., Code of Ordinances⁸⁷ and established an M/WBE Program under St. Louis City Ordinance No. 70767.⁸⁸ The St. Louis Development Corporation of the City of St. Louis (“SLDC”) is charged with overall responsibility for the administration and enforcement of the M/WBE Program.⁸⁹ SLDC selected the St. Louis Lambert International Airport to

85. MO. DEP’T OF TRANSP., DISADVANTAGED BUSINESS ENTERPRISE – PROGRAM SUBMITTAL 34 (2020), <https://www.modot.org/sites/default/files/documents/DBE%20Program%20Submittal%20FFY20.pdf> [<https://perma.cc/EDM9-549R>].

86. *Disadvantaged, Minority, and Women Owned Business Enterprises*, CITY OF ST. LOUIS, MO., <https://www.stlouis-mo.gov/government/departments/dmwbe.cfm> [<https://perma.cc/C2F8-XYWR>]; *Get Certified*, ST. LOUIS LAMBERT INT’L AIRPORT, <https://www.flystl.com/business/business-diversity-development-1/get-certified> [<https://perma.cc/29N5-Q9QJ>]; *Supplier Diversity*, METRO. ST. LOUIS SEWER DIST., <http://www.stlmsd.com/msd-work/supplier-diversity> [<https://perma.cc/UV2C-6TVC>].

87. St. Louis, Mo., Mayor Exec. Order No. 59 (May 16, 2017) (extending St. Louis, Mo., Mayor Exec. Order No. 28 (July 24, 1997)), https://www.flystl.com/uploads/documents/programs/meo_with-EO-59.pdf [<https://perma.cc/R4AX-CL2G>]; ST. LOUIS, MO., CODE OF ORDINANCES § 3.110.030 (2018).

88. St. Louis, Mo., Ordinance 70767 (May 4, 2018).

89. City of St. Louis Minority and Women’s Business Enterprise Program: Certification and Compliance Rules § I(C)(40) (2020), <https://www.stlouis-mo.gov/government/departments/sldc/documents/upload/Final-M-WBE-Cert-Compliance-Rules.pdf> [<https://perma.cc/2J5K-N6BS>].

manage the M/WBE Certification Program and delegated certain duties to the Business Diversity Development department of St. Louis Lambert International Airport (“BDD”).⁹⁰ The BDD’s Business Diversity Development Annual Report Fiscal Year 2018–2019 states that BDD provides leadership and oversight of the M/WBE Program, the Disadvantaged Business Enterprise Program, and the related Airport Concessions Disadvantaged Business Enterprise Program.⁹¹ Included in the programs are all contracts receiving city funds (including incentives) located in the City of St. Louis, Missouri, and those related to the St. Louis Lambert International Airport.⁹²

According to the City of St. Louis’s disparity study, more than 75% of the contract dollars awarded by the City of St. Louis went to businesses located in the City of St. Louis and St. Louis County. The study considered these findings as specific evidence that the contracting pattern of the City of St. Louis supports a market area that includes both the City of St. Louis and St. Louis County.⁹³ The disparity study provided the following demographics for the City of St. Louis regarding availability of M/WBEs.⁹⁴

90. *Id.* §§ I(C)(5), I(D)(2).

91. Bus. Diversity Dev. Off., *Annual Report Fiscal Year 2018–2019*, ST. LOUIS LAMBERT INT’L AIRPORT 6, <https://www.flystl.com/uploads/documents/business-diversity-development/Fiscal-Year-2019-BDD-Annual-Report.pdf> [<https://perma.cc/J86L-X27N>] [hereinafter *2018–2019 Report*].

92. St. Louis, Mo., Mayor Exec. Order No. 59 (May 16, 2017).

93. MASON TILLMAN ASSOCS, LTD., CITY OF ST. LOUIS DISPARITY STUDY 4-4 (2015), <https://www.stlouis-mo.gov/government/departments/slde/documents/upload/City-of-St-Louis-Disparity-Study-Final-5-11-15.pdf> [<https://perma.cc/A9A8-CCBM>].

94. *Id.* at 3–4. The disparity study also contained tables identifying available construction subcontractors by Ethnicity and Gender, Minority and Gender, and Minority and Females. The subcontractor utilization analysis was limited to the construction industry.

Available Construction Subcontractors

Ethnicity	African Americans	Asian Americans	Hispanic Americans	Native American	Caucasian Females	Non-Minority Males
Percentage of Contracts	12.63%	0.20%	0.30%	0.10%	12.83%	73.94%

1. Program Requirements

Pursuant to Executive Order No. 59, the City of St. Louis shall establish a goal of at least 25% minority business enterprise participation and at least 5% women's business enterprise participation in contracts and purchases of the city.⁹⁵ Under the M/WBE Program, the utilization goals for minority and women businesses in construction are 21% certified African American-owned business, 2% Hispanic American-owned business, 0.5% Asian American-owned business, 0.5% Native American-owned business, and at least 11% certified women-owned business enterprise participation for construction contracts.⁹⁶ These goals are not to be construed as quotas or set-asides.⁹⁷ The goals for professional services (Board of Public Service and Redevelopment Projects) are 25% MBE and 5% WBE participation.⁹⁸

2. Annual Report and Data – Annual Number and Amount of Contract Awards

During fiscal years 2016–2019, the amount of contract expenditures made by the City of St. Louis to businesses were as follows:

95. City of St. Louis Mayor Exec. Order No. 59.

96. Certification and Compliance Rules, *supra* note 89, § II(B).

97. *Id.*

98. *Id.* § II(C).

General Services Contracts⁹⁹

Fiscal Year	MBE Expenditures	WBE Expenditures	Non-Certified M/WBE Expenditures	Total Expenditures	MBE %	WBE %	Non-Certified M/WBE %
2016 ¹⁰⁰	\$7,174,498	\$1,789,815	\$ 27,964,338	*	26%	6%	*
2017 ¹⁰¹	\$11,988,850	\$3,024,338	\$29,402,153	*	27%	7%	66%
2018 ¹⁰²	\$9,498,477	\$1,432,829	\$18,638,519	*	32%	5%	63%
2019 ¹⁰³	\$7,496,283	\$1,667,437	\$13,088,161	\$22,251,881	34%	7%	59%

Construction and Professional Services Contracts

Fiscal Year	MBE Expenditures	WBE Expenditures	Non-Certified M/WBE Expenditures	Total Expenditures	MBE %	WBE %	Non-Certified M/WBE %
2016 ¹⁰⁴	\$14,528,706	\$2,996,565	*	\$44,831,410	32%	7%	*
2017 ¹⁰⁵	\$2,497,101	\$1,189,459	\$3,895,627	*	33%	16%	51%
2018 ¹⁰⁶	\$3,586,556	\$1,302,442	\$5,670,948	*	34%	12%	54%
2019 ¹⁰⁷	\$3,498,318	\$1,105,041	\$8,381,137	\$12,984,496	27%	36%	64%

C. St. Louis County M/WBE Procurement Program

The St. Louis County's M/WBE programs are administered by the Business Development and Contract Compliance Department.¹⁰⁸ Section

99. An asterisk indicates the information was not provided in the source for the chart data.

100. Bus. Diversity Dev. Off., *Annual Report Fiscal Year 2015–2016*, ST. LOUIS LAMBERT INT'L AIRPORT 11, <https://www.flystl.com/uploads/documents/business-diversity-development/Annual-Report-Final-Revised-March-23-002.pdf> [<https://perma.cc/E6N6-EU8A>] [hereinafter *2015–2016 Report*].

101. Bus. Diversity Dev. Off., *Annual Report Fiscal Year 2016–2017*, ST. LOUIS LAMBERT INT'L AIRPORT 12, <https://www.flystl.com/uploads/documents/business-diversity-development/Fiscal-Year-2017-BDD-Annual-Report.pdf> [<https://perma.cc/UTZ9-WWHE>] [hereinafter *2016–2017 Report*].

102. Bus. Diversity Dev. Off., *Annual Report Fiscal Year 2017–2018*, ST. LOUIS LAMBERT INT'L AIRPORT 12, <https://www.flystl.com/uploads/documents/business-diversity-development/Fiscal-Year-2018-BDD-Annual-Report.pdf> [<https://perma.cc/L9J4-PV6S>] [hereinafter *2017–2018 Report*].

103. *2018–2019 Report*, *supra* note 91, at 12.

104. *2015–2016 Report*, *supra* note 100, at 12.

105. *2016–2017 Report*, *supra* note 101, at 13.

106. *2017–2018 Report*, *supra* note 102, at 12.

107. *2018–2019 Report*, *supra* note 91, at 12.

108. *Minority and Women-Owned Business Enterprise Program – 2020 Annual Report*, ST. LOUIS CTY., MO. 7, <https://stlouiscountymo.gov/st-louis-county-departments/administration/procurement/minority-women-owned-business/2020-mwbe-program-annual-report/> (last visited Nov. 18, 2021).

107.071-1 of the St. Louis County Code of Ordinances provides that the St. Louis County Department of Administration Division of Purchasing (“DOP”) must present an annual report by January 31 of each year to the County Executive and County Council and hold a public forum no later than February 28 of each year, detailing the participation of M/WBEs on St. Louis County contracts and all economic development partnerships.¹⁰⁹ St. Louis County obtained a disparity study in 2017, but that study is not available on its website.¹¹⁰

1. Program Requirements

Section 107.071-3(c) of the St. Louis County Code of Ordinances provides that the construction subcontract goal shall be 24% for MBEs and 9.5% for WBEs available for construction, and 16% for MBEs and 15% for WBEs for architecture and engineering projects, or as determined by the most recent St. Louis County disparity study, currently the 2017 Study.¹¹¹

2. Annual Report and Data – Annual Number and Amount of Contract Awards

According to the *St. Louis County, Missouri Minority and Women-Owned Business Enterprise Program – 2020 Annual Report*, in 2020, the following expenditures were made to MBEs and WBEs:¹¹²

Construction Services¹¹³

Fiscal Year	MBE Expenditures	WBE Expenditures	Total Expenditures	MBE %	WBE %
2020	\$1,672,464	\$274,820	Not available	24.3%	4.0%

109. ST. LOUIS CTY., MO., CODE OF ORDINANCES § 107.071-1(b) (2018).

110. See *Minority- and Women-Owned Business Enterprises Program*, ST. LOUIS CTY., MO., <https://stlouiscountymo.gov/st-louis-county-departments/administration/procurement/minority-women-owned-business/> [<https://perma.cc/SWB2-PWL5>].

111. § 107.071.3(c)(3).

112. *Minority and Women-Owned Business Enterprise Program – 2020 Annual Report*, *supra* note 108.

113. *Id.* at 13.

Architecture and Engineering¹¹⁴

Fiscal Year	MBE Expenditures	WBE Expenditures	Total Expenditures	MBE %	WBE %
2020	\$14,020	\$14,025	Not available	5.5%	5.6%

D. Kansas City, Missouri Procurement Programs

The Kansas City, Missouri area has three primary M/WBE programs: (1) the City of Kansas City, Missouri; (2) the Kansas City International Airport; and (3) the Kansas City Area Transit Authority. Only the City of Kansas City will be examined here.

The City of Kansas City, Missouri M/WBE programs are administered by the Human Relations Department of the City of Kansas City, Missouri.¹¹⁵ The City of Kansas City also offers a DBE program and a SBE program.¹¹⁶ The programs include all city-funded (including incentives) contracts located in the City of Kansas City, except those related to the Kansas City International Airport and Kansas City Area Transit Authority.¹¹⁷

Section 3-423 of the Kansas City, Missouri Code of Ordinances provides that each contractor or developer with whom the city or an incentive agency enters into a contract for which goals have been set shall either meet or exceed the (participation) goals set for that contract; or make and provide evidence of good-faith efforts to achieve the goals and request a waiver of the contract goals. A waiver will be granted in the event the contractor or developer demonstrates that it has made a good-faith effort to meet or exceed the goals.¹¹⁸ The disparity study conducted by Kansas City in 2016 provided the following demographics concerning the availability of M/WBEs:¹¹⁹

114. *Id.* at 14.

115. *Minority, Women and Disadvantaged Business Enterprise (MWDBE) and Airport Concession Disadvantage Business Enterprise (ACDBE)*, CITY OF KAN. CITY, MO., <https://www.kcmo.gov/city-hall/departments/human-relations/certification-and-compliance/minority-women-and-disadvantaged-business-enterprise-mwdbe> [<https://perma.cc/4Q9C-6WDQ>].

116. *Id.*

117. *Id.*

118. KAN. CITY, MO., CODE OF ORDINANCES § 3-423 (2018).

119. *Disparity Study 2016*, CITY OF KAN. CITY, MO. 77–84, <https://www.kcmo.gov/home/showpublisheddocument/1299/636957158399100000> [<https://perma.cc/F8P8-3NFC>].

All Sectors Aggregated Weighted Availability

Black	Hispanic	Asian	Native American	MBE	WBE	Non-M/WBE	TOTAL
7.1%	4.0%	1.6%	1.9%	14.7%	14.4%	71.0%	100.0%

Construction Aggregated Weighted Availability

Black	Hispanic	Asian	Native American	MBE	WBE	Non-M/WBE	TOTAL
7.9%	5.4%	1.8%	2.5%	17.6%	17.8%	64.6%	100.0%

Professional Services Aggregated Weighted Availability

Black	Hispanic	Asian	Native American	MBE	WBE	Non-M/WBE	TOTAL
11.8%	1.4%	1.6%	14.5%	29.3%	4.6%	66.1%	100.0%

Other Services Aggregated Weighted Availability

Black	Hispanic	Asian	Native American	MBE	WBE	Non-M/WBE	TOTAL
4.4%	0.5%	0.4%	0.4%	5.6%	3.3%	91.0%	100.0%

Materials and Supplies Aggregated Weighted Availability

Black	Hispanic	Asian	Native American	MBE	WBE	Non-M/WBE	TOTAL
3.2%	0.6%	0.4%	0.3%	4.6%	7.9%	87.4%	100.0%

1. Program Requirements

Section 3-427(a) of the Kansas City, Missouri Code of Ordinances provides that the city-wide goals set by Kansas City for participation in all contracts entered into by the City each year are 14.7% for MBEs and 14.4% WBEs.¹²⁰

120. KAN. CITY, MO., CODE OF ORDINANCES § 3-427(a) (2018).

2. Annual Report and Data – Annual Number and Amount of Contract Awards

According to Kansas City’s M/WBE Primes and Subcontractors’ Contracts Awarded Reports for fiscal years 2016–2017, 2017–2018, and 2018–2019, Kansas City awarded the following contract amounts to M/WBEs:

Construction

Fiscal Year	Total M/WBE Amt. Awarded	% of Total Amt. Awarded	Number of Contracts
FY 2016-2017 ¹²¹	\$23,909,294	17.76%	213
FY 2017-2018 ¹²²	\$33,080,847	15.71%	268
FY 2018-2019 ¹²³	\$33,162,670	18.07%	260

Professional Services

Fiscal Year	Total M/WBE Amt. Awarded	% of Total Amt. Awarded	Number of Contracts
FY 2016-2017 ¹²⁴	\$7,899,343	20.51%	200
FY 2017-2018 ¹²⁵	\$14,656,801	25.29%	155
FY 2018-2019 ¹²⁶	\$14,708,542	20.76%	207

121. *Human Relations Department M/WBE Primes and Subcontractors’ Contracts Awarded FY 2016–17 Detailed Report (May 1, 2016 through April 30, 2017)*, CITY OF KAN. CITY, MO., <https://www.kcmo.gov/home/showpublisheddocument/1315/636957158454430000> [<https://perma.cc/Q6MR-P5NX>] [hereinafter *FY 2016–2017 Detailed Report*].

122. *Human Relations Department M/WBE Primes and Subcontractors’ Contracts Awarded FY 2017–18 Detailed Report (May 1, 2017, through April 30, 2018)*, CITY OF KAN. CITY, MO., <https://www.kcmo.gov/home/showpublisheddocument/1317/636957158457230000> [<https://perma.cc/XTT2-CBE2>] [hereinafter *FY 2017–2018 Detailed Report*].

123. *Human Relations Department M/WBE Primes and Subcontractors’ Contracts Awarded FY 2018-19 Detailed Report (May 1, 2018, through March 31, 2019)*, CITY OF KAN. CITY, MO., <https://www.kcmo.gov/home/showpublisheddocument/1315/636957158454430000> [<https://perma.cc/D3WH-LV94>] [hereinafter *FY 2018-2019 Detailed Report*].

124. *FY 2016–17 Detailed Report*, *supra* note 121.

125. *FY 2017–18 Detailed Report*, *supra* note 122.

126. *FY 2018–19 Detailed Report*, *supra* note 123.

Purchasing

Fiscal Year	Total M/WBE Amt. Awarded	% of Total Amt. Awarded	Number of Contracts
FY 2016-2017 ¹²⁷	\$4,432,472	9.93%	86
FY 2017-2018 ¹²⁸	\$2,559,038	7.52%	47
FY 2018-2019 ¹²⁹	\$3,698,996	10.17%	70

Total Number of Contracts Awarded to M/WBEs

Fiscal Year	Total M/WBE Amt. Awarded	% of Total Amt. Awarded	Number of Contracts
FY 2016-2017 ¹³⁰	\$36,241,110	16.64%	499
FY 2017-2018 ¹³¹	\$50,296,685	16.63%	470
FY 2018-2019 ¹³²	\$51,570,208	17.73%	537

127. *FY 2016–17 Detailed Report*, *supra* note 121.

128. *FY 2017–18 Detailed Report*, *supra* note 122.

129. *FY 2018–19 Detailed Report*, *supra* note 123.

130. *FY 2016–17 Detailed Report*, *supra* note 121.

131. *FY 2017–18 Detailed Report*, *supra* note 122.

132. *FY 2018–19 Detailed Report*, *supra* note 123.

V. REVIEW OF M/WBE PROGRAMS FROM OTHER JURISDICTIONS

A. Philadelphia, Pennsylvania M/WBE Program and Demographics

Section 6-109 of the Philadelphia Home Rule Charter¹³³ requires that at least thirty days before the start of each fiscal year, Philadelphia's ("Philadelphia" or the "City") Finance Director must file with the Mayor a written report and up-to-date study analyzing the participation of DBEs in City contracts for the purchase of goods and services, compared to the percentage of qualified DBEs available to participate in such contracts. At the same time that the report is filed with the Mayor, the Finance Director must file a copy with the Department of Records and with the President and Chief Clerk of Council and shall arrange for publication of the report on the City's official website.

The City's Annual Disparity Study for Fiscal Year 2019 ("2019 Annual Disparity Study"), which is prepared by the Office of Economic Opportunity ("OEO") presents the annual compilation of contract awards made by both the City and quasi-public agencies. According to the 2019 Annual Disparity Study, "the availability of minority laborers in the construction trades comprises 59.0[%] and skilled workers in the trades total 40.9[%]." The percentage of women laborers (4.7%) available "in the City is nearly double the percentage of skilled women workers (2.8[%])." With respect to utilization, the tables in the study present a breakdown for minorities and women—"African Americans (18.3[%]), followed by Hispanic Americans (14.1[%]), Women (2.8[%]), Other Employees (1.6[%]) Asian Americans (0.7[%]), Native Americans (0.5[%]) and Two or More Races Employees (0.01[%])."¹³⁴

133. Philadelphia, Pa., Home Rule Charter art. VI, ch. 1, §6-109(1).

134. Off. of Econ. Opportunity, *Fiscal Year 2019 Disparity Study*, CITY OF PHILA., PA. 10–11, <https://www.phila.gov/media/20200826084552/OEO-FY19-Disparity-Study.pdf> [<https://perma.cc/3CY5-L6W9>] [hereinafter *2019 Annual Disparity Study*].

1. Program Requirements

Chapter 17-1500 of the Philadelphia Code contains the requirements of the annual disparity study and participation goals that must be set by law by the City of Philadelphia. Section 17-1502 identified DBE categories that must be separately considered, which are

- “(a) DBE’s owned by African Americans;
- (b) DBE’s owned by Hispanic Americans;
- (c) DBE’s owned by Asian Americans;
- (d) DBE’s owned by Native Americans;
- (e) DBE’s owned by women;
- (f) DBE’s owned by disabled persons.”¹³⁵

Section 17-1502 further provides that pursuant to the City’s Home Rule Charter, the Finance Director shall separately consider the following categories of contracts:

- “(a) Professional services contracts;
- (b) Public works contracts.”¹³⁶

Section 17-1503 of Philadelphia’s Ordinances provides a mandatory formula which Philadelphia must apply to calculate participation rates. That formula is “the total dollar value of contracts awarded to for-profit M/W/DSBE¹³⁷ prime contractors and subcontractors registered by the City’s Office of Economic Opportunity (the numerator) divided by the dollar value of all City contracts awarded to all for-profit prime contractors and subcontractors (the denominator).” The City established workforce goals of 5% and 40%, respectively, for women and all minorities in 2019.¹³⁸

135. Philadelphia, Pa. Code §17-1502 (2021).

136. *Id.*

137. Philadelphia, Pa. Code §17-1503 defines M/W/DSBE as Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs), and Disabled Business Enterprises (DSBEs) (collectively known as M/W/DSBEs).

138. 2019 Annual Disparity Study, *supra* note 134, at 14.

2. Annual Report and Data – Annual Number and Amount of Contract Awards

The 2019 Annual Disparity Study states that unlike disparity studies that are required to support race-conscious remedial programs subject to strict constitutional scrutiny, the City's program is a forward-looking program, which "seeks to eradicate present-day discrimination by removing barriers for M/W/DSBE's, employing race and gender neutral strategies as practicable and leveling the playing field for all businesses to participate in City contracting."¹³⁹

The OEO plans focused on outreach efforts to M/W/DSBEs in Fiscal Year 2021 to facilitate their certification by the Procurement Department as Local Business Enterprises ("LBE") which will fully enable M/W/DSBEs to participate in the Local Business Purchasing Initiative. M/WBEs currently comprise 17% of certified LBEs; through educational outreach, OEO's target is that 25–30% of the OEO Registry will be certified as LBE at the end of Fiscal Year 2021. For Fiscal Year 2021, the City will continue to aspire to a 40% goal for minority journeypersons (22% for African American, 3% for Asian, 15% for Hispanic) and 5% for female journeypersons.¹⁴⁰

139. *Id.* at 1.

140. *Id.* at 13.

According to the Annual Disparity Studies identified below, M/W/DSBEs achieved, through prime and subcontracting, the following percentages of amounts on City contracts:¹⁴¹

Fiscal Year	Total City Expenditures	MBE %	WBE %	DSBE %	Total MWDBE %	Total MWDBE Participation Goal %
2015	\$951,000,000	19.2%	14.3%	0.00%	30.6%	35.0% ¹⁴²
2016	\$991,000,000	20.0%	13.2%	0.00%	30.7%	35.0% ¹⁴³
2017	\$976,000,000	19.3%	16.9%	0.00%	33.5%	35.0% ¹⁴⁴
2018	\$1,450,000,000	20.4%	16.6%	0.00%	32.9%	35.0% ¹⁴⁵
2019	\$821,570,910	20.37%	10.79%	0.00%	31.36%	35.0% ¹⁴⁶

Philadelphia's continued efforts to remove barriers for M/W/DSBEs is reflected by the Philadelphia Bonding Education Program, which is an "inclusive, hands-on, multi-component program designed to address the needs of small disadvantaged businesses to become bond ready, increase their capacity, and compete for the participation on transportation related contracts."¹⁴⁷ Other practices that will be implemented for FY 2021 include "(1) Hosting quarterly meetings of the National Disadvantaged Business Enterprise Roundtable[,] (2) Increasing exposure of Philadelphia's minority business owners and entrepreneurs and other public procurement opportunities through OEO's 'Doing Business with the City' and (3) Promoting M/W/DSBE's usage of the City of

141. *Id.* at 2.

142. Off. of Econ. Opportunity, *Fiscal Year 2015 Disparity Study*, CITY OF PHILA., PA., iii, vii–viii, <https://www.phila.gov/media/20180710160037/FY15-disparity-study.pdf> [<https://perma.cc/NG5A-A4NJ>].

143. Off. of Econ. Opportunity, *Fiscal Year 2016 Disparity Study*, CITY OF PHILA., PA., vi, x, <https://www.phila.gov/media/20180710162548/FY16-Disparity-Study.pdf> [<https://perma.cc/7744-7ZZV>].

144. Off. of Econ. Opportunity, *Fiscal Year 2017 Disparity Study*, CITY OF PHILA., PA., v–vi, x, <https://www.phila.gov/media/20180710163422/FY17-Disparity-Study.pdf> [<https://perma.cc/7W99-GK65>].

145. Off. of Econ. Opportunity, *Fiscal Year 2018 Disparity Study*, CITY OF PHILADELPHIA, PA., v–vi, x, <https://www.phila.gov/media/20190605161233/oeo-disparity-study-fy18-1.pdf> [<https://perma.cc/26F9-CEJL>].

146. *2019 Annual Disparity Study*, *supra* note 134, at 4–5.

147. *Id.* at 6.

Philadelphia’s new Contracts Hub, a one-stop resource for all opportunities available to work with the City.”¹⁴⁸

B. Houston, Texas M/WBE Procurement Program and Demographics

Section 15-83 of the Houston, Texas Code of Ordinances provides that Houston’s city council must set annual city-wide percentage goals for city contracting with MWSBEs.¹⁴⁹ Section 15-83 further provides that Houston’s Office of Business Opportunity must submit a progress report on the M/WBE program to the city council each year.¹⁵⁰ We reviewed the City of Houston’s Minority, Women and Small Business Enterprise Program Report on M/WBE Compliance dated November 28, 2018 (“2018 Annual Report”).

1. Program Requirements

As required by Section 15-83, Houston’s progress report must include two percentage figures that should, as closely as possible, represent the ratio of the prior year’s measured utilization and availability of local M/WSBEs to contract to do business with Houston. The 2018 Annual Report identified the City’s aspirational goals as follows:

- a. Construction Contracts: 34% M/WBE Goal (23% MBE, 11% WBE)
- b. Professional Services Contracts: M/WBE Goal 24%
- c. Purchasing Contracts: M/WBE Goal 11%¹⁵¹

According to Houston’s current Minority, Women and Small Business Enterprise Policies, these percentages are the City’s current city-wide aspirational goals for city contracts.¹⁵²

148. *Id.* at 5–6.

149. HOUSTON, TEX., CODE OF ORDINANCES § 15-83(a)–(b) (2013).

150. § 15-83(a).

151. Off. of Bus. Opportunity, *MWBE Compliance*, CITY OF HOUS., TEX. 8, <https://www.houstontx.gov/obo/docsandforms/MWBE-Compliance-for-All-Contract-Types.pdf> [<https://perma.cc/AGM3-KA5X>] [hereinafter *MWBE Compliance, Houston*].

The 2018 Annual Report further explained that the MBE and WBE goals are treated as separate goals which must be met individually.¹⁵³ The process for doing this is illustrated by three examples which describe how a proposed prime contractor's MBE and WBE participation plan may meet or fail to comply with the City of Houston's separate goal requirements.¹⁵⁴

2. Annual Report and Data – Annual Number and Amount of Contract Awards

According to the 2018 Annual Report, the City of Houston “establishes goals on contracts as a way to increase participation of MWSBEs.” The Report states that these goals are not quotas.¹⁵⁵ The most current information we found concerning the annual number and amounts of contract awards is as follows.

152. Off. of Bus. Opportunity, *Minority, Women, and Small Business Enterprise Program Policies*, CITY OF HOUS., TEX. 9 (2020), <https://www.houstontx.gov/obo/docsandforms/OBO-MWSBE-Program-Policies-20210628.pdf> [<https://perma.cc/TGL2-9BXS>].

153. *MWBE Compliance, Houston*, *supra* note 151, at 9.

154. *Id.* at 11–13.

155. *Id.* at 7.

Construction Goal 34%:¹⁵⁶

Fiscal Year	Total Contract Amounts Awarded	MWSBE Contract Amounts Awarded	MWSBE %
2016	\$523,571,549	\$116,203,755	22.2%
2017	\$396,293,167	\$120,819,447	30.5%
2018	\$621,644,519	\$182,351,603	29.3%
2019	\$1,195,829,340	\$348,434,958	29.1%
2020	\$1,844,472,172	\$514,629,628	27.9%

Professional Services Goal 24%

Fiscal Year	Total Contract Amounts Awarded	MWSBE Contract Amounts Awarded	MWSBE %
2016	\$149,691,265	\$62,591,886	41.8%
2017	\$194,668,887	\$62,586,848	32.2%
2018	\$233,603,362	\$114,078,855	48.8%
2019	\$468,434,198	\$134,298,932	28.7%
2020	\$436,348,052	\$153,762,737	35.3%

Goods and Services 11%

Fiscal Year	Total Contract Amounts Awarded	MWSBE Contract Amounts Awarded	MWSBE %
2016	\$402,941,315	\$61,021,377	15.1%
2017	\$209,342,983	\$34,174,863	16.3%
2018	\$351,051,751	\$60,639,610	17.3%
2019	\$385,457,567	\$68,677,246	17.8%
2020	\$691,471,238	\$70,334,176	10.2%

156. Off. of Bus. Opportunity, *Minority, Women, and Small Business Enterprise Awards Report FY 2016*, CITY OF HOUS., TEX. 3–7, <https://www.houstontx.gov/obo/reports/fy2016annualawardsreport.pdf> [https://perma.cc/LGB5-XXRW]; Off. of Bus. Opportunity, *Minority, Women, and Small Business Enterprise Awards Report FY 2017*, CITY OF HOUS., TEX., <https://www.houstontx.gov/obo/reports/fy2017-annual-MWSBE-awards-report.pdf> [https://perma.cc/XKG6-NGPH]; Off. of Bus. Opportunity, *Minority, Women, and Small Business Enterprise Awards Report FY 2018*, CITY OF HOUS., TEX. 3–6, <http://houstontx.gov/obo/reports/fy2019-MWSBE-Awards-Report-1stqtr-ytd.pdf> [https://perma.cc/6ZMG-YK6G] (the 2018 Annual Report identifies a number of approaches that were taken by the City of Houston to increase attainment of M/WBE goals and encourage vendors to utilize M/WBEs); Off. of Bus. Opportunity, *Minority, Women, and Small Business Enterprise Awards Report FY 2019*, CITY OF HOUS., TEX. 3–8, <http://www.houstontx.gov/obo/reports/FY2019-Annual-MWSBE-Awards-Report.pdf> [https://perma.cc/GX3U-U4C9]; Off. of Bus. Opportunity, *Minority, Women, and Small Business Enterprise Awards Report FY 2020*, CITY OF HOUS., TEX. 3–8, <https://www.houstontx.gov/obo/reports/FY2020-Annual-MWSBE-Awards-Report.pdf> [https://perma.cc/JK3J-59M8].

Total Contract Amounts Awarded To MWSBE

Fiscal Year	Total Contract Amounts Awarded	MWSBE Contract Amounts Awarded	MWSBE %
2016	\$1,076,204,429	\$239,817,019	22.3%
2017	\$800,305,038	\$217,581,158	27.2%
2018	\$1,233,953,365	\$360,896,585	29.2%
2019	\$2,049,721,106	\$551,411,135	26.9%
2020	\$2,993,569,102	\$741,732,397	24.8%

MBE Professional Services

Fiscal Year	MBE Contract Amounts Awarded	MBE %
2016	\$40,017,239	26.7%
2017	\$12,168,979	6.3%
2018	\$50,918,104	21.8%
2019	\$28,275,160	6.0%
2020	\$50,003,120	11.5%

C. Indianapolis, Indiana M/WBE Procurement Program and Demographics

Pursuant to Section 202-401 of the Revised Code of the Consolidated City of Indianapolis/Marion County (Revised Code),¹⁵⁷ the City of Indianapolis and Marion County utilizes Minority-owned Business Enterprises/Woman-owned Business Enterprises/Veteran-owned Business Enterprises/Disabled-owned Business Enterprises (“MBE”/“WBE”/“VBE”/“DOBE”) for public works projects, procurement of goods and supplies, and services for the City of Indianapolis and Marion County. Indianapolis established the Office of Minority and Women Business Development (“OMWBD Program”) to administer the equal opportunity policy to utilize these business enterprises in public purchases, services, and work.¹⁵⁸ The Consolidated City of Indianapolis and Marion County MBE/WBE/VBE/DOBE Business Utilization Plan in Indianapolis Government followed by Indianapolis in administering the Office of Minority and Women Business Development “OMWBD” Program was

157. CONSOL. CITY OF INDIANAPOLIS & MARION CTY., IND., REVISED CODE § 202-401 (2020) [hereinafter IND. REVISED CODE].

158. IND. REVISED CODE § 202-402.

revised in 2021 to incorporate remedies to address the findings of passive discrimination found in the 2019 City of Indianapolis and Marion County Disparity Study obtained by the City of Indianapolis and Marion County (the “Indianapolis Disparity Study”).¹⁵⁹

The study period for the Indianapolis Disparity Study was January 1, 2014, through December 31, 2018.¹⁶⁰ The Indianapolis Disparity Study provides demographic information concerning the availability of MBE/WBE/VBE/DOBE businesses for various contracts awarded by Indianapolis in “construction; architecture and engineering; other professional services; and goods and services” during the study period. City certified MBE/WBE/VBE/DOBE businesses are collectively referred to as XBEs.¹⁶¹

The availability of M/WBE owned businesses, considered together using dollar-weighted estimates for city contracts and procurements, was 19.3%, “indicating that minority- and woman-owned businesses might be expected to receive 19.3% of the dollars that the City awards in construction; architecture and engineering; other professional services; and goods and services.”¹⁶² “[T]he availability of minority- and woman-owned businesses considered together, for prime contracts and sub-contracts was lower for City prime contracts (17.2%) than for subcontracts (31.0%),” which tended to be for much smaller amounts. With respect to the utilization of M/WBE owned businesses, the Indianapolis Disparity Study indicated that “overall, minority- and woman-owned businesses considered together received 14.6% of the relevant contracting dollars that the city awarded during the study period.”¹⁶³ “[T]he participation of minority- and woman-owned businesses considered together was much lower in City prime contracts (8.2%) than in subcontracts (51.5%).”¹⁶⁴ The participation of M/WBE owned businesses, considered together on an

159. BBC RSCH. & CONSULTING, 2019 DISPARITY STUDY – CITY OF INDIANAPOLIS AND MARION COUNTY, <https://citybase-cms-prod.s3.amazonaws.com/bb5cf8d1f83042cb9240af08f9569454.pdf> [<https://perma.cc/R6CE-CPCV>] [hereinafter “INDIANAPOLIS DISPARITY STUDY”].

160. *Id.* ch. ES, at 1.

161. *Id.* ch. 1, at 3–4.

162. *Id.* ch. ES, at 3–4.

163. *Id.* at 6–7.

164. *Id.* at 7. The Indianapolis Disparity Study states that Indianapolis’s use of MBE/WBE goals in awarding individual contracts and procurements is designed to encourage minority and woman owned business participation specifically as subcontractors. *Id.* at 6.

industry basis, was “highest for architecture and engineering contracts (27.3%) and lowest for goods and services contracts (7.6%).”¹⁶⁵

1. Program Requirements

Section 202-403(1)(e) provides that the goals for all contracts shall be, for the amount of the contract, 15% for MBE participation, 8% for WBE participation, 3% for VBE participation, and 1% for DOBE participation. Public works contracts of \$150,000 or greater and goods and supplies, professional services, and services contracts \$50,000 or greater to be awarded competitively, are reviewed by the Office of Minority and Women Business Development for MBE/WBE/VBE/DOBE utilization responsiveness and compliance.¹⁶⁶ These requirements are further delineated in Indianapolis’s Utilization Plan.¹⁶⁷

2. Annual Report and Data – Annual Number and Amount of Contract Awards

The 2018 and 2019 Annual Utilization Reports prepared by Indianapolis as required by statute provided that the following contract awards amounts were made by Indianapolis to MBE/WBE/VBE/DOBE during the stated period.

Fiscal Year 2018¹⁶⁸

Total City Expenditures	MBE Expenditures	WBE Expenditures	VBE %	DOBE%	Total XBE%
\$168,630,134.49	\$13,215,935.25	\$7,536,140.48	0.71%	0.05%	13.07%

165. *Id.* at 7.

166. IND. REVISED CODE § 202-403(1)(e).

167. OFF. OF MINORITY & WOMEN BUS. DEV., CITY OF INDIANAPOLIS, THE CONSOLIDATED CITY OF INDIANAPOLIS AND MARION CTY MBE/WBE/VBE/DOBE BUS. UTILIZATION PLAN IN INDIANAPOLIS GOVERNMENT 10–11, <https://citybase-cms-prod.s3.amazonaws.com/67dadbe223334ea3a4901c8eb59d8c81.pdf> [https://perma.cc/HDR5-C4HY].

168. Off. of Minority & Women Bus. Dev., *2018 Annual Utilization Report*, CITY OF INDIANAPOLIS AND MARION CNY., IND., <https://citybase-cms-prod.s3.amazonaws.com/ba53cf19ba4746719be4d7cfd572717b.pdf> [https://perma.cc/K3JM-LA43]. The information identified applies to the City of Indianapolis only.

Fiscal Year 2019¹⁶⁹

Total City Expenditures	MBE Expenditures	WBE Expenditures	VBE %	DOBE %	Total XBE%
\$195,113,707.63	\$17,325,188.42	\$12,132,997.76	8.88%	0.10%	16.35%

VI. OBSERVATIONS OF UNIQUE CHARACTERISTICS FROM M/WBE PROCUREMENT PROGRAMS IN OTHER JURISDICTIONS

To be clear, we do not suggest that these are model programs—only forward-looking. The M/WBE programs which we examined in Philadelphia, Houston, and Indianapolis appear to have, in general, several characteristics: clear goals/objectives and processes for ongoing improvement, such as continuous feedback, benchmarks, and ongoing community outreach. We made the following observations from these procurement programs, as well as others that we reviewed, but because of space limitations could not include in this Article:

1. One of the fundamental characteristics found during the review of M/WBE programs, in some of these jurisdictions and others that were not yet discussed in this Article, was a clear policy that demonstrated the buy-in of the jurisdiction's elected officials. For instance, the Philadelphia Home Rule Charter was amended in 2006 to require the Finance Director to file an "Annual Disparity Study" and devise "Annual Participation Goals" for the upcoming City Fiscal Year (July 1–June 30).¹⁷⁰ This requirement was codified in Chapter 17-1500 of The Philadelphia Code, "Annual Disparity Study and Participation Goals." It included a formula to determine participation rates for minority, women, and disabled owned business enterprises (M/W/DSBEs) on for-profit City contracts.

169. Off. of Minority & Women Bus. Dev., *2019 Annual Utilization Report*, CITY OF INDIANAPOLIS AND MARION COUNTY, IND., <https://citybase-cms-prod.s3.amazonaws.com/15f65aff721c4389b6d179511180689d.pdf> [<https://perma.cc/Y44J-8GNW>]. The information applies to the City of Indianapolis only.

170. Philadelphia, Pa. Code §§ 6-109, 7-401(d), 3-806 (2021).

2. The City's 2019 Disparity Study states that "[u]nlike traditional disparity studies that are required to support race-conscious remedial programs subject to strict constitutional scrutiny[, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)], the City's Office of Economic Opportunity (OEO) program is *forward looking*, and seeks to eradicate present-day discrimination by removing barriers for M/W/DSBE's, employing race and gender neutral strategies as practicable and leveling the playing field for all businesses to participate in City contracting."¹⁷¹
3. M/WBE policies containing clear goals or objectives aimed at addressing specific disparities and barriers confronting M/WBEs in the geographic area. If the disparity study shows underutilization of M/WBEs in the areas of construction, professional services, and other goods and services, the goals or objectives should focus on addressing the disparities in these areas. Utilizing only, or primarily, construction services to fulfill participation goals or objectives does nothing to remedy the effects of past discrimination in the other areas where there were disparities and is analogous to putting a band aid on a gunshot wound.
4. One reporting agency is designated for the entire city or county in order to ensure coordinated implementation of program goals/objectives in all participating departments. This approach is used in Philadelphia and Houston.
5. The annual report includes the breakdown by dollar amount, the percentage of total procurement, spending activity for each agency or department with purchasing authority, the category (i.e., construction, professional services, purchase of goods or other services), and the percentage of dollars going to M/WBE. The practice in Philadelphia and Houston is to provide straightforward

171. 2019 Disparity Study, *supra* note 134, at 1.

reporting of data.¹⁷² That data is analyzed and then used to make program adjustments. Houston's Office of Business Opportunity states in its policies and procedures that easily accessible data and statistics allows it to adjust its participation goals as needed given that the City Council is required to set annual city-wide percentage goals for city contracting with MWSBEs, which underscores the importance of current data.¹⁷³ The annual report should be readily available and accessible by the general public. Data and statistics on M/WBE participation should be detailed, transparent, and easily accessible to the general public.

6. Cross-agency coordination to foster closer working relationships between government agencies involved with or impacting minority and women owned businesses. In an effort to make its M/WBE program more effective, in Denver (which was not one of the jurisdictions discussed in this Article) the largest agencies developed an agency-wide and a city-wide Master Plan to align recommendations from both the community and disparity study, outlining new programs and policies intended to increase participation of small, minority, and women owned businesses on city contracts.¹⁷⁴
7. While most jurisdictions seemed to recognize that good faith efforts play a significant role in M/WBE program operations, some jurisdictions more rigorously enforce the good faith effort requirements with bidders, which provides the program a tool to increase its effectiveness. For example, the Indianapolis City-County Council voted in September 2020 to enforce penalties against contractors

172. *Id.* at 2–6; *Minority, Women, and Small Business Enterprise Awards Report FY 2020*, *supra* note 156, 6–33.

173. *Policies and Procedures*, *supra* note 56, at 23.

174. Div. of Small Bus. Opportunity, *2018 Annual Report, A Look Ahead*, https://www.denvergov.org/content/dam/denvergov/Portals/690/Reports%20and%20Studies/DEDO_DSBOAnnualReportFINAL%20PRINT%20READY_093019.pdf [https://perma.cc/5R86-22YW].

for failure to make good faith efforts to meet contracting goals.¹⁷⁵

8. Some jurisdictions provide training on the process for certification and bidding, along with other relevant topics, to assist M/WBEs. Philadelphia emphasizes training for both program participants and OEO officers to better accomplish the City's goals for the program.¹⁷⁶
9. Bonding programs that have as an objective providing education on the bonding process and capacity building of M/WBEs are essential. Bonding, insurance, and financing have long been a barrier for many construction contractors. One of the most innovative practices was in Minneapolis (which was not one of the jurisdictions discussed in this Article), which put into place a group policy bonding, where a group of contractors (i.e., primes and subcontractors) can be bonded together. Minneapolis has also put in place a working capital loan program where subcontractors can collateralize city subcontracts.¹⁷⁷ Philadelphia has a Bonding Education Program, which is a multi-component program designed to help M/WBEs become bond ready, increase their capacity, and compete for participation on transportation related contracts.
10. There are avenues for feedback and to solicit suggestions for continual policy and program review and improvement. In Philadelphia, regular feedback is solicited from the City Council, an Advisory Committee, M/WBE firms, prime contractors, and others.

175. Samm Quinn, Indianapolis Imposes Penalties on Vendors that Don't Meet Minority-Contracting Goals, *THE INDIANA LAW*, (Sept. 17, 2020) <https://www.theindianalawyer.com/articles/indianapolis-imposes-penalties-on-vendors-that-dont-meet-minority-contracting-goals> [<https://perma.cc/F27Q-MGGY>].

176. City of Phila., Exec. Order No. 3-12, Section 4.C.11 (Sept. 2012), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/2012_EO03-12.pdf [<https://perma.cc/LC2A-87EM>].

177. Local and Regional Gov't Alliance on Race and Equity, *Contracting for Equity, Best Local Government Practices that Advance Racial Equity in Government Contracting and Procurement*, INSIGHT CTR. FOR CMTY ECON. DEV., at 14, https://haasinstitute.berkeley.edu/sites/default/files/gare-contract_for_equity_0.pdf [<https://perma.cc/X9DN-PK79>].

Indianapolis's OMWBD maintains close partnerships with local organizations and municipal corporations, which allows the city to reach a broad range of local businesses via networking and outreach events.

CONCLUSION

This Article presents an overview of an extensive set of laws, policies, and implementing regulations; that is, good laws that have been in place for sufficient time to assess impact. There is, however, ample evidence to conclude that the laws, policies, and implementing regulations have failed to eliminate disparity in business financing and the opportunity to scale economic growth for the vast majority of M/WBEs in this country. In closing, this Article is less about the laws, more about policy (with the assumption that policy makes law actionable), and most about practices. It looks at the practices that have flawed the implementation of otherwise good, not perfect, but good laws. Practice that is rooted in historical assumptions; practice that cannot be changed by law alone. What we attempt here is to shine a bright light on the incongruence so that solutions can be crafted that buffet against bad, disparate, and discriminatory practices—solutions that take out the cognitive dissonance between what the law says and what is actually done.

We recognize that this Article is more informative than dispositive. But, as we stated at the onset, it will take a variety of examining eyes to begin to address the disconnect between law, policy, practice, and desired outcomes to change the cycle of behavior illuminated here. Behavior that is so clearly stifling economic growth for M/WBEs.