



Disparity Study  
Presentation

to

Memphis/Shelby County  
Intergovernmental  
Consortium

*Submitted By*

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## EXECUTIVE SUMMARY

On July 1, 1993, the Memphis/Shelby County Intergovernmental Consortium (Memphis Consortium) engaged D. J. Miller & Associates, Inc. (DJMA) to conduct a disparity study as required by *City of Richmond v. J.A. Croson* (Croson). A disparity study is an investigation to determine whether there has been any discrimination against minority and women owned businesses (MWBES) seeking to do business with the Consortium members. The discrimination in which the Consortium members might be involved can be either active or passive. Active discrimination occurs when a particular agency discriminates directly against MWBES. Passive discrimination occurs when a governmental agency directly supports or perpetuates discrimination in the private marketplace.

DJMA spent 14 months conducting an analysis of the history of the participation of MWBES in the procurement of the nine members of the Memphis Consortium which consists of:

- Shelby County Government
- City of Memphis
- Memphis Light, Gas & Water Division
- Memphis Area Transit Authority
- Memphis/Shelby County Airport Authority
- Memphis Board of Education
- Shelby County School Board
- Memphis/Shelby County Port Commission
- The Regional Medical Center

The findings of this analysis are included in the following chapters:

- I. The Legal Framework for the Memphis/Shelby County Disparity Study
- II. Historical Conditions Affecting MWBE Utilization
- III. Economic Analysis of MWBE Availability and Marketplace Discrimination
- IV. Procurement: Policies, Procedures, Practices and Impact on MWBE Utilization
- V. Methodology for the Analysis of Availability and Utilization of MWBES
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- VII. Anecdotal Evidence of Discrimination in Memphis/Shelby County

- VIII. Alternatives to Race Conscious Goal Programs
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## I. THE LEGAL FRAMEWORK FOR THE MEMPHIS/SHELBY COUNTY DISPARITY STUDY

*City of Richmond v. J.A. Croson* established that public entities desiring to implement race conscious programs aimed at remedying past or present discrimination had to satisfy a two-pronged test: 1) governmental entities had to demonstrate a compelling governmental interest for having a race conscious program by indicating specific instances of discrimination; and 2) any race-conscious program had to be narrowly tailored. The legal analysis discusses in detail these requirements as established in *Croson* and its progeny.

The report that follows is divided principally into two sections. The first consists of the Historical and Economics chapters which seek to determine the existence of past and present discrimination against MWBEs in the government arena and the overall Memphis marketplace. The Anecdotal, Procurement, Statistical and Race Neutral Chapters seek to determine if the Consortium members have directly discriminated or been involved in any discrimination against MWBEs.

## II. HISTORICAL CONDITIONS AFFECTING MWBE UTILIZATION

Chapter II of the study provides historical data on governmental and general marketplace discrimination in the Memphis community. The history of racial discrimination in Memphis is revealed to have been better documented than in any of the other communities for which DJMA has conducted a disparity study analysis.

During the late 1800s and early 1900s, African American businesses thrived throughout the city. However, between 1910 and 1950, African American business development declined in numbers and quality as result of the impact of the control by the "political machinery" combined with legal and societal discrimination and macroeconomic factors (i.e. the Depression). In particular, trade unions, under the stronghold of the political machinery, actively discriminated against African Americans and to a lesser extent, women. Extensive trade union discrimination impeded the ability of minorities and women to obtain training critical to the establishment of business ventures in the construction and trades industry.

In the historical chapter, local governmental agencies were substantively involved in past discrimination against MWBEs. Police officers were permitted by the city officers to harass, beat and lynch African American political and business leaders at will. Prominent business persons were forced to leave the city under threats of violence from city police officers acting on behalf of the political machinery. To cite instances, all of the following individuals left Memphis under duress from local officials: Ida B. Wells, newspaper publisher and owner; Robert Church, Jr., local businessman; Dr. J.B. Martin, pharmacist and owner of the Memphis Red Sox baseball team; and Mr. Elmer Atkinson, proprietor of a cafe on Beale Street.

### III. ECONOMIC ANALYSIS OF MWBE AVAILABILITY AND MARKETPLACE DISCRIMINATION

Chapter III presents an analysis of statistical data on the economic status of minorities and women in general and MWBEs in particular in the Memphis marketplace. The chapter is divided into two parts. The first part reviews disparities in those economic and societal factors which affect the ability of a minority or woman to form a business. The data shows that, in most categories, minorities and women trail behind White males. For example, in household income, the average income in 1990 was: Asian/Pacific Islander, \$43,210; White, \$42,966; Native American, \$33,524; Hispanic, \$32,527; and African American, \$21,486. When viewed jointly with the historical information, MWBEs do not appear to have recovered from past discrimination. Since the demise of the Crump political influence, African Americans and women have continued to lag behind their White male counterparts and African Americans have been unable to regain the growth and development they experienced in the early 1900s.

The second part of the chapter compares the availability of MWBEs to their utilization (disparity ratio) in the overall Memphis marketplace. The disparity ratios for the overall Memphis marketplace in construction, wholesale trade and selected services showed underutilization of MWBEs. These disparity ratios reflect the existence of private and public discrimination. The Statistical Chapter tailors the disparity analysis to the specific contracting activity of the Consortium members.

Based on the data presented in the Economics Chapter, past effects of discrimination continue in the present. Additionally, present discrimination continues in the overall Memphis marketplace, as shown by the marketplace disparity ratios.

#### IV. *PROCUREMENT, POLICIES, PROCEDURES AND PRACTICES AND THEIR IMPACT ON MWBE UTILIZATION*

Chapter IV provides a descriptive overview of the procurement systems of the Consortium members and the identification and analysis of the barriers to MWBE participation in their respective procurement operations. Several common issues regarding the Consortium members' procurement systems emerged from our research: 1) lack of adequate monitoring and reporting systems by which an agency can track MWBE participation and monitor the purchasing activity of individual purchasing agents, 2) lack of interest and sensitivity in doing business with MWBEs, 3) high sensitivity to majority business owners threatening lawsuits if particular programs were targeted to the MWBE community.

MLGW and Shelby County had small business purchasing programs. The City of Memphis recently enacted a small business program, however it was too new to be assessed. The Airport Authority and MATA have federal DBE programs. These agencies typically did not utilize to the full extent their authority granted by their respective Councils or Boards of Directors. Contract sizing, bond waivers or assistance and insurance waivers or reductions are race neutral means of assisting MWBEs that have not utilized to the extent authorized. MWBEs are not solicited on a consistent basis by most agencies; outreach and technical assistance to the MWBE community is limited primarily to agency involvement in the Mid-South Minority Purchasing Council and Minority Vendor Day.

In addition to barriers inherent in the operation of the procurement systems, state laws impact the growth and development of MWBEs. The Consortium members must adhere to these laws, regardless of the impact on their ability to do business with MWBEs. Of the laws reviewed, state licensing laws have the fullest impact upon MWBEs. These laws determine the capacity of a contractor to bid on a specific project and assign a contractor dollar limit based on factors such as a company's financial status; the experience of the owners, partners or officers; office/warehouse capacity; and contractor's ability to obtain necessary equipment. Through this power, the state licensing board controls the growth and development of MWBEs. During anecdotal interviews, several MWBEs noted that the inability to obtain higher dollar thresholds from the state licensing board has limited their ability to bid on certain projects offered by Consortium members.

In some cases unfamiliarity with state laws reduced the ability of procurement agents to utilize race neutral means available to assist MWBEs. Even when there is authority to waive bonding requirements, some procurement agents were not doing so, justifying their actions as "state law

requirements." Of particular note, most procurement agents were not familiar with the Tennessee 1991 Prompt Pay Act, which is a race neutral means of assisting MWBEs in obtaining payment from both the agency and prime contractors.

Very little effort has been made by Consortium agencies to overcome the underutilization reflected in the Statistical chapter and the past discrimination reflected in the historical chapter. Procurement systems perpetuate past discrimination by institutionalizing barriers to MWBEs access to opportunities.

## V. METHODOLOGY FOR THE ANALYSIS OF AVAILABILITY AND UTILIZATION OF MWBES

Chapter V discusses the methodology for conducting the disparity analysis, followed by Chapter VI's presentation of actual availability, utilization and disparity ratios.

To determine the availability of MWBE firms that are ready, willing, and able to participate in Consortium member procurement, 17 separate models for estimating availability were explored. The most appropriate method for estimating availability was determined to be the "Ready, Willing and Able" (RWA) measurement which relies upon the Supreme Court's requirement that firms demonstrate not only their "availability" but their readiness and ability to perform work.

Utilization of MWBE firms in Consortium agencies' contracting process is that proportion of contracting dollars of the agencies received by MWBEs. This measure is therefore not an estimate, but an observation of actual occurrences. Utilization data were developed for three procurement categories: construction, and professional services and A/E and goods, and nonprofessional services. This was achieved by developing a larger pool of data extracted from contract files from each of the Consortium members.

After the availability and utilization of MWBE firms were developed, comparison between the two was made, producing disparity ratios. When these ratios are less than 1.0, utilization of MWBEs is occurring at a greater rate than the availability of MWBEs would suggest; when the ratio is 1.0, utilization equals availability; when the ratio is greater than 1.0, utilization is less than the availability and MWBEs are "underutilized."

## VI. STATISTICAL ANALYSIS OF MWBE AVAILABILITY AND UTILIZATION

Chapter VI describes in detail the data collection efforts undertaken by DJMA for this study. The utilization tables present actual percentages of MWBE utilization for the study period 1988 to 1992, by ethnic/racial/gender group for each procurement category, i.e., construction, goods, professional services, and architecture and engineering services. To conduct the disparity analysis, DJMA reviewed over 1700 contract files for the eight agencies.

In reviewing the data, significant disparity greater than 1.0 exists for all agencies for all procurement categories, with few exceptions. For most agencies, an infinity symbol reflects the disparity for the different MWBE groups, as there was availability, but no utilization.

Two interesting points came to fore in this analysis: 1) *Cröson* assumes that subcontractor information on which to conduct a disparity analysis exists. Yet, only those entities that have implemented race conscious or small business programs track this type of data. For the four agencies that never established programs designed to remedy disparity in contracting with MWBEs, limited subcontractor information was available. 2) Agencies with race conscious or small business programs have been more successful in contracting with MWBEs. Despite this observation, Consortium members' programmatic initiatives have not been effective in eliminating disparity.

## VII. ANECDOTAL EVIDENCE OF DISCRIMINATION IN MEMPHIS/SHELBY COUNTY

This chapter presents anecdotal information captured during 60 confidential interviews with majority, minority and women business owners. The interview instrument was designed to capture detailed and particularized accounts of instances of discrimination from business owners in the Memphis community.

Substantial evidence of private sector discrimination is brought forth in this chapter. In fact, anecdotes strongly suggest that bid irregularities are commonplace in the Memphis contractor community. It is reported that majority subcontractors regularly submit extremely high bids to minority general contractors in order to purposely eliminate a minority general contractor from submitting a successful low bid and winning a contract. Additionally, majority prime contractors use their influence with purchasing agents to stall projects with minority bid preferences attached or to harass the minority subcontractors during the duration of the project by complaining to purchasing agents of the inadequacies or inefficiencies of MWBEs.

The anecdotes also reflect difficulties that MWBEs experience in doing business with the Consortium members. Several of these difficulties are common to all small businesses attempting to do business with public agencies. However, some appear particular to MWBEs, such as bid manipulation, unfair denials/reduction of contract awards, and problems with inspectors.

Consortium members' knowledge of discrimination by majority prime and subcontractor discrimination against MWBEs suggests that the Consortium members have passively participated in discrimination against MWBEs in the Memphis community.

### VIII. ALTERNATIVES TO RACE CONSCIOUS GOAL PROGRAMS

Chapter VIII presents descriptions and analyses of race neutral programs in Memphis to determine whether such programs have been sufficient to remedy the effects of past discrimination. Upon reviewing the programmatic initiatives, race neutral initiatives enacted are not the most efficient means of stimulating the growth and development of minority and women owned businesses. It is particularly interesting to note that minority and women businesses appear to have greater access to technical assistance than financial assistance through race neutral programs. While minorities and women are not restricted in accessing these programs, the programs' "neutrality" does not seem to allow them to address the needs of minority and women business owners as efficiently as do race/gender conscious programs.

### IX. CONCLUSIONS AND RECOMMENDATIONS

As stated earlier, *Croson* requires a showing of a compelling governmental interest in having a race conscious program by Consortium members actively or passively discriminating against MWBEs. The analysis presented in the preceding eight chapters shows that the Consortium members have 1) actively discriminated against MWBEs in the past, 2) perpetuated the effects of that past discrimination, and 3) passively participated in present day prime and subcontractor discrimination against MWBEs.

An MWBE program must be "narrowly tailored" to satisfy the constraints of the *Croson* decision. To assist agencies with this process and enhancing their efforts to do business with MWBEs, recommendations in the areas of procurement, racial neutral initiatives, and race and gender conscious programs are provided.

## Procurement Recommendations

Prior to providing individual agency procurement recommendations, the following general procurement recommendations are made for all agencies:

- *Database Management* – The Consortium members must implement data systems which can offer accurate and timely information regarding contract activity from solicitation to contract lose-out. Data systems should also reflect purchasing profiles of individual procurement agents. Accurate MWBE participation reports are fundamental in determining actual MWBE participation, in assessing the effectiveness of vendor outreach and in determining program areas in need of improvement.
- *Buyer Reviews* – Personnel involved in the buying cycle should be subjected to bi-annual performance reviews to ensure understanding of the objectives of the agencies' procurement systems and their proper functioning.
- *Buyer Training* – Buyers should undergo cultural diversity and sensitivity training, as well as training on the needs and operations of small businesses.
- *Investigation Center for Contractor Complaints* – To ensure that Consortium members are not involved in discriminatory bid irregularities practiced by majority prime and subcontractors, Consortium members should conduct an independent investigation of the allegations contained in the anecdotal chapter and any other complaints made by MWBEs.

## Race Neutral Initiatives

~~Crosor~~ requires public entities to consider race neutral alternatives. Several recommendations regarding race neutral initiatives include the following:

- *Bonding* – Consortium members can provide bonding assistance in the forms of bond guarantees, direct bonding and bond waivers. The most effective bonding assistance programs will involve coordination between Consortium members and surety companies.
- *Contract Sizing Program* – Reducing the size of contracts, and/or splitting them into small units, would benefit MWBEs by creating more opportunities within their capacity ranges as well as enabling them to perform as primes.

- *Slow Payment* - The State Prompt Payment Act should be actively enforced to ensure that Consortium members and prime contractors pay subcontractors on a timely basis.
- *Financial Assistance* - Consortium members should investigate the possibility of financial assistance to MWBEs in the form of working capital loan programs, contract financing and bank consortia lending.
- *Outreach* - Outreach should be aggressively pursued in print and broadcast media, as well as through individual contacts within the MWBE communities and to broader audiences.

### Race Conscious Programs

Race Conscious programs created should be narrowly tailored by including the following elements:

- Goal waiver provisions - exemption for contracts without sufficient available MWBEs, and good faith effort provisions.
- Sunset clauses - graduation programs, a definite end date to the program and/or an annual review of MWBE program efficacy, goals and MWBE utilization.
- Flexible goals - avoidance of rigid numerical quotas, except in severe cases of discrimination.
- Tailor any race conscious programs subject to *Crosbon* requirements to those minority groups against which identified discrimination has been shown.

If a Consortium member elects to have a race conscious program, the following recommendations are made for an efficient and effective MWBE program are:

- *Certification* - Consortium members have discussed the creation of an entity that would perform certifications for all agencies. DJMA recommends this approach be followed. However, DJMA cautions that extensive discussion should occur between the agencies regarding their different certification requirements such as federal standards and the views of some agencies regarding the non-recognition of women business owners.
- *Contract Review* - Periodic sampling of discretionary purchases can serve to monitor buyer discretion in small purchases which could provide important avenues for MWBE participation.

- *Monitoring Systems* – Effective monitoring systems should be developed in order to ensure that MWBEs are being utilized during the course of the project.
- *Goal Setting Methodology* – DJMA has included its ADM Target Methodology, which will assist Consortium members to establish goals based upon agency specific availability, utilization and disparity. By applying this methodology, agencies will be able to determine the level of the goals and the length of duration of a race conscious program necessary to remedy disparity.

### *SUMMARY*

The information revealed in the disparity study shows that a sufficient inference of discrimination can be made from this factual predicate to warrant the implementation of a race conscious procurement program. Should the proper governmental decision making bodies that direct the activities of the Consortium members make a policy finding that discrimination exists and should be remedied, properly tailored program of initiatives could be devised.

# INTRODUCTION

Today, Memphis stands at a critical point in its history as it surveys the role of minority and women businesses. In the late 1800s and early 1900s, African American businesses in Memphis were booming. Every category of industry included African American businesses thriving in abundance. Over 460 African American businesses served the community—pharmacists, grocers, newspapers, barbers, restaurateurs, small shop owners, blacksmiths, doctors, construction trades, tailors, dentists, beauticians. African American businesses flourished, and so did the entire Memphis economy. The advent of the political leadership of Mayor E.H. Crump in 1910 all but destroyed the vibrant African American business class.

Emerging from political and economic constraints at the end of the 1960s, Memphis struggled with a legacy of racism in attempting to move forward economically. In the mid-1970s Memphis moved toward increased participation of minorities and women in the political and economic affairs of the City. Even so, the expectations of some Memphians for progressive growth in the City following the Civil Rights Movement have yet to be achieved. As Dr. Michael Honey observed in 1991 in his book regarding the sanitation strike of 1968, *Southern Labor and Black Civil Rights*:

[T]he city finally came to the bargaining table; the sanitation workers achieved some of their demands. But many Whites, and especially the ruling Memphis families and the business establishment . . . "never had thought seriously about what happened.

Memphis is in the enviable position of being a distribution center for the Midwest, yet despite the headquarter locations of Federal Express and other international corporations, the City has not been able to fully capitalize on its strategic geographic location. Several major corporations have declined to relocate to the City, in part, because of the perception of unresolved racial tension. In addition, the City has experienced a severe "brain drain," as African American and White college-aged students leave the City due to the lack of corporate and entrepreneurial opportunities in Memphis.

Overall, government agencies are apathetic in their dealings with minority and women enterprises as reflected in the procurement offices of Consortium members. According to officials interviewed, prior to the early 1970s White government officials did not recognize that government contracting was an area of interest to African American entrepreneurs, nor did they think of doing business with African Americans. In the early 1970s, after the enactment of affirmative action initiatives

in employment, White purchasing agents became aware that African American business owners were vitally interested in government contracting opportunities.

The 1980s saw the rebounding of African American businesses. Of the current top 25 African American businesses in Memphis, 13 were founded after 1980, six were founded in the 1970s, and six were founded prior to the 1970s. With a small but emphatic voice, African American entrepreneurs began demanding to be recognized as viable businesses available for work with government agencies. Even so, one African American business leader stated, "They [Whites] still don't take us seriously."

The voice of women entrepreneurs remains too small to be heard, either by female political leaders or female purchasing agents. Interviews with purchasing agents at the member agencies revealed that women businesses today are viewed as African American businesses were in the 1970s; in other words, women business owners are not viewed as being interested in nor eligible for "serious" contracting opportunities.

The increase in the number of African American political leaders has created a voice for African American business people in Memphis; their opinions are heard and their views represented within government agencies. By increasing their agencies' sensitivity to MWBE issues, African American politicians and board members are directly responsible for many contracting opportunities opened to African American business people. These African American leaders, however, recognize the tenuous nature of their power and their limited ability to affect change in the character and culture of government organizations merely by the presence of their leadership. They also worry that the fight for jobs, opportunity and power will move back into the streets if they do not produce results for the anxiously awaiting African American community.

In this atmosphere, Mayor W.W. Herenton is attempting to build a coalition of African Americans and Whites to further the economic development of the entire city. Progressive leaders of both races are joining his efforts and are working toward the City's long-term development plans. As this committed core of Memphians attempts to lay a new foundation for the City's economic and social growth, they continue to contend with entrenched traditional attitudes of old-time Memphis power brokers on one hand, and demands for immediate results from those alienated from opportunity on the other. It is in this unstable environment that nascent African American and women owned businesses are trying valiantly to grow and develop.

In response to a suit against Shelby County and a desire to establish the legal foundations upon which race conscious programs could be established, on July 14, 1993, the Memphis/Shelby County Intergovernmental Consortium (Consortium) commissioned D.J. Miller & Associates, Inc. (DJMA) to conduct a disparity study in order to establish the factual predicate identifying specific instances of

discrimination, if any existed. For the Regional Medical Center, DJMA was commissioned to develop a Minority and Women Business Development Program. In conducting this disparity study, DJMA collected and developed evidence regarding the nature and extent of discrimination against MWBEs by the Consortium, if any. This study is intended to serve as a factual predicate supporting future policy initiatives. The proper decision making bodies are responsible for making legislative findings to document discrimination and for devising properly tailored programs responsive to the study's findings.

The disparity study was necessitated by the Supreme Court case of *City of Richmond v. J. A. Croson*. The Court held that prior to instituting any race conscious program, municipalities were required to make proper findings to define both the scope of the injury caused by discrimination and the extent of the remedy necessary to cure the effects of that discrimination. On the basis of this holding, several localities are reviewing the operation of purchasing programs and minority and women business enterprise programs.

This disparity study is the result of 14 months of research which was approached as seven distinct phases of investigation:

- Procurement policy and procedure assessment that involved research into and review of Consortium members' organizational structures; review of past and present procurement laws, policies, procedures and practices; interviews with elected officials and top administrators as well as procurement and MWBE program personnel
- Data collection and analysis which involved collection and analysis of each entity's historical purchasing and contracting records and level of MWBE participation; review of budgets; compilation of vendor lists and MWBE and DBE certification lists
- Anecdotal interviews with majority, minority and women business owners
- Market survey analysis
- Examination of historical and economic factors in the Consortium's market areas
- Review of laws, regulations and codes for evidence of judicial and administrative discrimination; and
- Analysis of race neutral alternatives to minority and women business goal based programs.

Functionally, this study analyzes ten issue areas:

- 1) Legal framework
- 2) Historical framework
- 3) Economic market
- 4) Majority, minority, and women business community (survey and interviews)
- 5) Business and community leaders (interviews)
- 6) Consortium procurement policy and procedures
- 7) Availability of MWBE firms for contracting
- 8) Utilization of MWBE firms by the Consortium members
- 9) Disparity between the availability of MWBE firms compared with their utilization by the Consortium
- 10) The race neutral programs available to MWBEs.

Each of the issues analyzed is important because of its impact on the pool of available businesses or because of the information it could yield concerning the disparities in contracting with the Consortium. DJMA examined the Consortium's legal and historical background to document prior discrimination which may still have an effect on the status of MWBEs; we analyzed the Memphis/Shelby County area economy to determine if there is widespread discrimination against MWBEs in the local economy, thus indicating discrimination in which the entities may be "passively participating." DJMA surveyed and interviewed members of the community in an effort to report individual instances of discrimination, their type and scope as part of patterns or practices documented in other sections of the study. We examined the entities' policies and procedures to identify barriers that may have given rise to disparity in the use of MWBEs, and statistically analyzed the actual availability and use of MWBEs in governmental contracting to determine if disparity exists. Race neutral programs were examined to determine if they have any influence on the ability of MWBEs to participate in the economy.

This report contains the findings of our research, analyses of those findings, and recommendations and conclusions based on our analyses. These findings are divided into the distinct chapters of legal, historical, economic, anecdotal/survey, procurement, statistical, and race neutral providing a complete, thorough, and integral review of all evidence regarding discrimination in the Memphis/Shelby County area, thereby giving an overall picture of the economic environment in which minority and women business owners operate.

The goal of this report is to provide the Consortium policy makers with information to establish public policy needed to remedy discrimination against MWBEs or their underutilization. To effectively utilize this document, the policy maker should carefully review the document in its entirety to appreciate the interdependencies of the chapters. Only a full understanding of the entire economic environment for minorities and women will lead to effective policy making.

## ORGANIZATION OF THE STUDY

The Disparity study is organized into eight chapters.

*Legal Analysis* (Chapter I) presents a discussion of *Croson* and its progeny.

*Historical Analysis of Discrimination* (Chapter II) traces the development of the City of Memphis/Shelby County from its genesis to present day activities. Laws, ordinances, cases, history books, and scholarly dissertations were investigated to identify instances of prior discrimination in the Memphis/Shelby County area. Statutes and cases were identified that have expressly and specifically discriminated against African Americans and women.

*Economic Market Analysis* (Chapter III) presents an economic view of business conditions in the Memphis Metropolitan Statistical Area (MSA) to objectively determine the market availability and utilization of minority and women owned businesses by the private sector. This analysis is undertaken to analyze market conditions and to provide a subsequent frame of reference and "guidance for a legislative body to determine the precise scope of injury it seeks to remedy," as noted by the Supreme Court in its *Croson* decision.

This chapter examines several factors in assessing the economic capacity of minorities and women to undertake business enterprises: 1) home equity available to leverage mortgage loans; 2) unearned income as indicative of wealth available for business start-ups; 3) income from self-employment as most representative of individuals holding themselves out as independent businesses ready, willing and able to do business; and 4) self-employment availability in construction, procurement and professional services. These factors were used to determine market disparities in the construction, procurement and professional services industries in the Memphis metropolitan area.

*Alternatives to Race Conscious Goal Programs* (Chapter IV) presents analyses of race neutral programs to determine if they stimulate the utilization of MWBEs without having been specifically designed to do so.

Chapter V reviews the *Procurement Policies and Practices & Their Impact on MWBE Participation* to identify current procurement practices to determine if they present any barriers to the participation of MWBEs in the purchasing operations of the Consortium. This analysis will reveal whether the entities have any effect on disparity beyond their general participation in the marketplace.

*Statistical Analysis of the Availability and Utilization of MWBEs* (Chapter VI) commences with a determination of the relevant market for the entities and then provides a variety of methodologies for the determination of the availability of MWBEs before documenting the findings on the utilization of these firms by the Consortium. The chapter concludes with a section on the disparity ratios that result from the computation of various business availabilities to their utilization, by industry, within the relevant market.

In addition to quantitative economic data, this study includes *Comments from the Marketplace* (Chapter VII), a presentation of the findings of anecdotal input garnered from interviews with both majority and MWBE business owners supported by a Business Utilization Survey. This anecdotal information concerned specific instances of discrimination.

*Recommendations* (Chapter VIII) presents suggestions to overcoming barriers and other systemic problems. It also suggests courses of action in setting remedial goals.

Each of the analyses found in these chapters is intended examine information regarding the presence or absence of discrimination and disparity. Taken as a whole, the study presents a complete picture concerning minority and women business involvement in public and private sector business opportunities. After reviewing the study, the appropriate legislative bodies must make legislative findings whether discrimination exists and whether it should be remedied. Any legislation attempting to remedy that discrimination must be narrowly tailored.

## INTRODUCTION

As stated in Chapter I, *Croson* is clear in providing that race conscious measures adopted by state and local entities must be based on a compelling governmental interest in remedying identified discrimination and be "narrowly tailored" to accomplish their purposes of remedying past or present discrimination.

## CONCLUSIONS

Based on the evidence presented in the eight chapters of this study, DJMA concludes that the Consortium members have 1) actively discriminated against MWBEs in the past, 2) perpetuated the effects of that past discrimination and 3) passively participated in present day prime contractor discrimination against MWBEs, especially in the construction procurement category.

Past discrimination was evidenced in Chapter II. This Chapter highlighted the impact that the political machinery of Memphis had on MWBE development through direct discriminatory acts against Black owned businesses and through control of the trade unions which practiced discrimination against minority and women union members. Based on findings of de jure segregation and direct acts of discrimination and violence, the historical evidence also showed sustained governmental discrimination in institutions and activities which have an impact on MWBE development (education, trade union participation, housing and voting).

Chapter III, Economic Analysis, showed the continued effects of past discrimination against MWBEs. Minorities and women consistently lagged far behind White males in education, income and wealth generation. These factors contribute significantly to an MWBE's ability to form and sustain a business venture. The Economics Chapter also reflected private disparity across all industry categories. From this disparity, an inference of discrimination in private industry can be made.

In Chapter IV, DJMA reviewed the procurement policies, procedures and practices of the Consortium members and their impact on MWBE utilization. Based on our analysis, DJMA concludes that procurement systems present barriers to MWBEs attempting to do business with the Consortium members, thereby, perpetuating the effects of past discrimination. Generally, procurement agents showed a lack of interest in doing business with MWBEs and performed very limited outreach to this

community. Procurement agents were also highly sensitive to the complaints and threats of lawsuits by majority contractors.

The legal foundation and methodology for conducting the disparity analysis was described in Chapter V. Upon applying this methodology to the data collected from the respective agencies, in Chapter VI, DJMA found significant disparity existed in all procurement categories for the Consortium members. From this disparity, an inference of discrimination can be drawn.

Other interesting points arose in the statistical analysis:

- *Croson* assumes that subcontractor information on which to conduct a disparity analysis exists. This disparity study shows that only those entities that have implemented race conscious or race neutral programs track this type of data. For the four agencies that had no history of a program, limited subcontractor information was available. For the four agencies that have programs, subcontractor information was generally available.
- Agencies with race conscious or race neutral programs have been more successful in contracting with MWBEs. Despite this observation, no Consortium members' programmatic initiatives have been effective in rectifying the underutilization of MWBEs.

Passive participation in majority contractor discrimination is evidenced in Chapter VII. Anecdotal evidence presented in this chapter documents widespread discrimination against MWBEs, especially in the construction industry. Majority prime subcontractors regularly practice bid collusion against minority general contractors. Majority contractors have been able to exert their influence on procurement agents. In most of the cases of reported discriminations by majority prime or subcontractor discrimination, the MWBE notified the Consortium member of the discriminatory and illegal activity. Despite having knowledge of the discrimination, Consortium members did not punitive action against the majority contractors.

*Croson* requires public entities to consider race neutral means of assisting MWBEs. In reviewing current race neutral measures to remedy discrimination in the Memphis marketplace, DJMA found that these programmatic initiatives were not effective.

## RECOMMENDATIONS

While a local entity must craft its own policies regarding race conscious and race neutral programmatic initiatives, this chapter serves to highlight policy and program considerations that are grounded in the findings of this study. First, any plan of action developed by a Memphis Consortium member must consider race

neutral measures. Second, the plan should avoid the use of rigid numerical quotas.<sup>1</sup> Third, the program must be limited in its effective scope to the boundaries of the member governmental entity.

*Croson* found the 30 percent quota in Richmond to be a rigid numerical quota without justification, "except perhaps outright racial balancing." Given that the city had to consider bids and waivers on a case-by-case basis, the Court found no need for the rigid quotas. In creating a plan, a public entity cannot employ quotas simply to avoid "the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination."<sup>2</sup>

Yet, upon the showing of a significant statistical disparity, the public entity can then institute measures to "end the discriminatory exclusion." In fact, in severe showings of discrimination, quotas or set-asides can be employed: "in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."<sup>3</sup> Even so, any plan of action by a Memphis Consortium member containing preferences should be grounded in the statistical assessment of disparity.

In *Hillsborough County*, the Court found that goals, as opposed to quotas, were flexible because the goals were set for each individual project based on the number of qualified minorities. If three qualified minorities were not available, no goal was set for the project. Additionally, no goal could exceed 50 percent and the ordinances required only that a prime contractor demonstrate a good faith effort in obtaining MBEs.<sup>4</sup>

In *Concrete Works*, the Court held that goals are "flexible aspirational goals" because they were set on a project-by-project basis and goals were rarely ever met. Goals could be set for minority groups with statistically insignificant numbers in order to avoid a circular argument: "discrimination against these groups may not be remedied because discrimination, among other things, has kept their numbers so small that discrimination cannot be proven with airtight statistical significance."<sup>5</sup>

A narrowly tailored program should also contain waivers. In *City of Philadelphia*,<sup>6</sup> a 15 percent goal was applied to all contracts, thereby creating an issue of fact as to whether the goal was narrowly tailored. However, there were several types of waivers to the City's 15 percent goal—contracts without sufficient available minorities were exempted, prime contractors could be exempted upon showing a

<sup>1</sup>*City of Richmond v. Croson*, 488 U.S. 467, 109 S.Ct. 706, 724 (1989).

<sup>2</sup>*Id.* at 729.

<sup>3</sup>*Id.* at 729.

<sup>4</sup>*Cone v. Hillsborough County*, 905 F.2d 908 (1990)

<sup>5</sup>*Concrete Works v. County of Denver*, 823 F. Supp. 821, 843 (1993).

<sup>6</sup>*Contractor's Association Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (1993).

good faith effort, and successful minority businesses were excluded from the program.

A sunset clause is also a component of a narrowly tailored MWBE program. This can involve: 1) a graduation program such as was approved in *AGC v. Coalition for Economic Equality*,<sup>7</sup> 2) a definite date to end the program as in *AGC v. San Francisco*,<sup>8</sup> or 3) an annual review of MWBE program efficacy, goals and MWBE utilization.

Additionally, any race conscious program or other remedial action should not extend its benefits to minorities outside the municipality, unless the minorities can show that they have suffered discrimination within the locale. "[A] state or local subdivision has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."<sup>9</sup> The program or ordinance can only apply to contracts let by the public entity for work to be performed within its jurisdiction.<sup>10</sup> In *Concrete Works*,<sup>11</sup> the court found the MWBEs outside the state must either attest to city-sponsored discrimination or show that they attempted to work in the Denver MSA in the period before the program; that is, the period during which discrimination can be inferred. The ordinance was intended to benefit those MWBEs inside the Denver MSA and those outside it who had suffered local discrimination.

Racial groups not represented in Denver may not avail themselves of the Ordinance and neither may individuals even of the protected groups who nevertheless have never attempted to do business in Denver. Moreover, if Denver tried to limit the remedy for its own discrimination to contractors based on residence, it would face even more serious constitutional challenges from contractors who allege discrimination by Denver but have been excluded from the remedy.<sup>12</sup>

In *Coral Construction*, the court found that the program did not limit its scope to within the county and, therefore, was overbroad. The program allowed a minority business to qualify for preferential treatment if the business had been discriminated against "in the particular geographical areas in which [it] operated." In finding this language overbroad, the court held that the relevant question was whether the MWBE has been a victim of discrimination within King County.

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<sup>7</sup>950 F.2d 1407, 1417 (1991).

<sup>8</sup>748 F. Supp. 1443, 1454 (1990).

<sup>9</sup>*Croson*, supra n. 1, at 720.

<sup>10</sup>*Concrete Works*, supra n. 5. This was true even if the statistical evidence shows discrimination by contractors in cities in other locales.

<sup>11</sup>*Id.* at 234.

<sup>12</sup>*Id.* at 234.

The question is not one of business location, but of business participation. Indeed, an MBE headquartered in Seattle might not be eligible for preferential treatment, whereas a similar business located in Miami might. In order for an MBE to reap the benefits of King County's MBE program, it is necessary to determine if the company has ever been victimized by discrimination within King County.<sup>13</sup>

The court held that any MWBE which previously sought to do business within the county is presumed to have been discriminated against, whereas MWBEs with no prior contact with the county could not benefit from the program. Unfortunately, it is not clear what level of particularized evidence is required for determining whether a non-local MBE has been discriminated against.

The case law discussed above has the following implications:

- Rigid numerical quotas run a greater risk of being overturned by judicial review than do flexible goals.
- MWBE programs should not be designed to be permanent fixtures in a procurement system without regard to remedying bias in standard procurement operations.
- MWBE programs should be instituted after, or in conjunction with, race neutral programs.
- MWBE programs should be limited in scope to the jurisdiction enacting the program.

## Procurement Objectives

The foundation of any race conscious or race neutral program is an efficiently operating procurement system. An entity cannot ensure that it is not discriminating against MWBEs nor can it measure the effectiveness of any programmatic initiatives designed to address prior discrimination or disparity without a fully operational and effective procurement system. A coordinated, comprehensive policy covering the entire spectrum of activity associated with the purchasing cycle must be developed and include, but is not limited to:

- Budgeting and Forecasting
- Specifications
- Standardization
- Requisitioning

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<sup>13</sup>*Coral Construction v. King County*, 941 F.2d 910, 925 (1991).

- Solicitation
- Vendor Selection
- Contract Award
- Vendor Product/Performance Evaluation

Each member of the Consortium should review their procurement system to ensure that the above mechanisms are securely in place, to create an environment of accountability and accessibility. Additionally, the Consortium members should conduct regular procurement audits to assess the effectiveness, fairness and impact of procurement policies, procedures and practices the on involvement of MWBEs.

### Database Management

A particularly troublesome area for all Consortium members is the procurement operations data management system. The range of procurement systems spans from no computerization and limited hard copy documentation to incomplete computerization and hard copy documentation. Database management is critical to tracking the performance of the procurement function and the participation of MWBEs with a particular agency. It is also critical to measuring individual buyer performance in doing business with MWBEs. At all times, an agency should be able to obtain immediately information regarding:

- Past procurement activity by commodity and contract type
- Projected procurement opportunity by commodity type
- MWBEs' participation rates by dollar volume:
  - By awardee name
  - By awards
  - By final payment
  - By specific commodity area
  - By contract type: construction, professional services, architectural engineering and procurement of goods and services, prime and subcontractor
  - By race/ethnicity/gender
- Individual buyer/contract administrator reports by:
  - The level of procurement activity by commodity
  - The dollar volume of procurement with MWBEs

If Consortium members expect to design initiatives and strategies which foster MWBE participation, they must implement data systems which can offer accurate and timely information with some degree of specificity. Accurate MWBE participation reports are fundamental in determining actual MWBE participation, in assessing the effectiveness of vendor outreach, and in determining program areas in need of improvement. For agencies that destroy hard copy information, more procurement information should be computerized, assuring that questions

regarding the foundation for the MWBE reports can be readily answered and documented.

To facilitate tracking of contracting activity post award, the procurement database management system should interface with Finance, Accounting and any central information system or department.

A sound procurement management system demands an information system which supports management controls and allows for continuous evaluation of policy and practice. Adequate automation of purchasing data is not a solution unto itself; it will, however, generate accurate data which will facilitate proper management. This understanding is particularly critical for organizations seeking to effectuate changes such as increasing MWBE participation. A solid management information system encompasses forecasting, design of procurement strategies, an early warning system, etc.—all essential to increasing MWBE participation.

### Buyer Reviews

In order to ensure that the procurement system is functioning properly, personnel involved in the buying cycle should receive bi-annual performance reviews. To perform these evaluations, buyers should have previously established goals for a diverse portfolio, which includes goals at the prime and subcontractor levels. Buyers must thoroughly document bidders contacted and awards made. This practice is especially critical for informal contracts, where buyers have the most decision making discretion. Without some level of documentation of a buyer's activity, Purchasing Directors have no accurate way to measure buyer performance. Purchasing Directors should establish bonus/penalty systems for diversity of procurement portfolios. In order to assist buyers in contacting MWBEs, all agencies should create their own MWBE Business Directories, especially on commodities that are unique purchases by a particular agency.

### Buyer Training

During interviews with several buyers, DJMA learned that many had not developed the sensitivity necessary to do business with business owners of different races, ethnicities and gender. To rectify this situation, all Consortium members' procurement agents should:

- Receive immediate cultural diversity and sensitivity training. This training should not simply focus upon "sensitizing" procurement agents to their respective views regarding minorities and women, but should also focus on the development of communication skills. Consortium members should implement an evaluation technique to determine the effectiveness of a purchasing agent's ability to communicate with business owners of different races, ethnicities and gender.

- Receive small business training. Purchasing agents must develop an understanding of the needs and problems faced by small businesses, to better interact with them in a manner that is supportive. Such training can include outreach techniques such as company visitation day, in which purchasing agents visit the operations of small businesses in order to better acquaint themselves with potential vendors.

## Investigation Center for Contractor Complaints

According to *Croson*, Consortium members should not do business with vendors they know to be discriminating against MWBEs, or they will be deemed "passive participants" in the discrimination and will be held liable for the contractors' discriminatory behavior. The anecdotal evidence suggests widespread discrimination by prime contractors and subcontractors, especially in the construction industry. To ensure that Consortium members are not involved in this discriminatory and illegal activity of bidding irregularities Consortium members should engage an independent legal/legislative body to investigate the allegations contained in the anecdotal chapter and any on going complaints made by MWBEs. Upon finding that a majority prime contractor or subcontractor has discriminated against MWBEs, Consortium members should establish penalties against that contractor, such as the inability to contract with a member of the Consortium group for a specified period of time (i.e., one year).

## Individual Agency Procurement Recommendations

### Shelby County Government

- 1) Require departments to submit procurement needs on a timely basis, in order to increase efficient purchasing. Restructure purchasing system facilitate buyers interfacing with division directors during the planning period in order to determine the departmental needs.
- 2) Hold procurement personnel responsible and accountable for implementation of purchasing procedures and of pertinent race conscious and race neutral initiatives.
- 3) Require procurement personnel to gain greater knowledge of existing minority and women businesses available to do business with Shelby County, and to use reference directories for easy contact.
- 4) Implement the suggestions of the MIS Director regarding connecting Purchasing, Finance and Accounting functions and MIS onto the same computer system.

- 5) Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to EOC office. Purchasing and Engineering should require monthly contract activity reports from prime contractors and prime consultants, identifying activities of MWBE subconsultant and subcontractors. This information should be retained in the hard copy contract file and on microfilm when hard copy documents are destroyed.
- 6) Create one contract file which contains both contract award and bidder files. Eliminate EOC and Finance vendor numbers and have one vendor number issued by Purchasing. This number will be utilized by both EOC and Finance.
- 7) Increase procurement personnel participation in trade fairs and MWBE association meetings, regardless of the existence of a race conscious program.
- 8) Increase outreach efforts to MWBEs. Create routine open-door policy which provides on-going access to buyers and procurement information.
- 9) Routinely conduct seminars or workshops on "how to do business" with Shelby County Government.
- 10) Institute cultural diversity training. Upon completion, evaluate procurement personnel's willingness, openness and ability to do business with MWBEs.
- 11) Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.

City of Memphis

- 1) Require purchasing personnel to interact with vendors, both minority and female, in order to encourage them to increase communication skills and ability to do business with MWBEs.
- 2) Hold procurement personnel responsible and accountable for implementation of purchasing procedures and of pertinent race conscious and race neutral initiatives.
- 3) Create a computerized data management system. Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to Purchasing or a designated office. Purchasing and Engineering should require monthly contract activity reports from prime contractors and prime consultants identifying activities of MWBE

subconsultant and subcontractors. This information should be retained microfilm when hard copy documents are destroyed.

- 4) Institute cultural diversity training. Upon completion, evaluate procurement personnel's willingness, openness and ability to do business with MWBEs.
- 5) Require divisions to submit procurement needs on a timely basis. Mayor should issue an executive order which mandates compliance with restrictions of emergency and sole source purchases. Routinely monitor and report to Mayor on division compliance with this requirement. Restructure purchasing system to facilitate buyer interface with division directors during the planning period in determine the departmental needs.
- 6) Eliminate ability of division directors to override the decisions of procurement agents by implementing a penalty system against those who do so.
- 7) Encourage purchasing agents to attend MWBE trade association meetings and vendor fairs. Expand outreach to include contact and regular networking with MWBEs formally and informally
- 8) Routinely conduct seminar/workshops on "how to do business" with the City of Memphis.
- 9) Institute buyer reviews to ensure that buyer discretion is not being abused and equitable opportunities are maintained.
- 10) Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.

#### Memphis Light, Gas and Water

- 1) Centralize contracting activity for construction and professional services.
- 2) Address the need for procurement policy on contract extensions, which should be used only rarely and not exclude other vendors. LSBPP goals should be extended to contract extensions. Contracts should be monitored to ensure compliance on extensions.
- 3) Provide a LSBPP Director in order to ensure the efficient operation of the LSBPP, to insure compliance with LSBPP goals, a certification process, to train division directors regarding LSBPP procedures, to evaluate performance and to make recommendations for changes and report to the President and Board of Directors.

- 4) Encourage purchasing agents to attend MWBE trade association meetings and vendor fairs. Expand outreach to include contact and regular networking with MWBEs formally and informally.
- 5) Routinely conduct seminar and workshops on "how to do business" with MLGW.
- 6) Require prime contractors and prime consultants to submit monthly contract activity reports identifying activities of MWBE subconsultants and subcontractors. Consistently maintain monthly contract activity reports in contract files.
- 7) Require prime contractors and prime consultants to provide subcontractor quotes as opposed to a percentage of a contract to be handled by a particular subcontractor.
- 8) Institute buyer reviews in order to ensure that buyer discretion is not being abused and equitable opportunities are maintained.
- 9) Require certifications to be performed by LSBPP Manager. Certification should involve an investigation of owners knowledge and experience to operate the business.
- 10) Increase sensitivity of purchasing personnel to women business owners. Track women participation.
- 11) Include Gas Purchases in LSBPP program, if LSBPP vendors are available.
- 12) LSBPP program should be integrated into purchasing policies and procedures.
- 13) Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.

#### Memphis Area Transit Authority

- 1) Centralize Purchasing System for construction and professional services. Reorganize Purchasing Office so that purchasing agents and contract administrators report to the Purchasing Director.
- 2) Perform buyer reviews in order to insure that buyer discretion on informal contracts is not being abused and all vendors are afforded the opportunity to compete.

- 3) Provide adequate full-time DBE staff in order to ensure sufficient time for certification, program review, contract compliance and outreach.
- 4) Institute adequate tracking system with DBE Officer periodically checking actual contract files for appropriate documentation. Create a computerized data management system. Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to DBE office. Purchasing should require monthly contract activity reports from prime contractors and prime consultants identifying activities of MWBE subconsultant and subcontractors. This information should be retained on microfilm when hard copy documents are destroyed.
- 5) Address the need for procurement policy on contract extensions, which should be used only rarely and not exclude other vendors.
- 6) Implement sensitivity training of procurement personnel and DBE training of Senior Management.
- 7) Require DBE reporting for federal and local/state requirements.
- 8) Increase outreach to MWBEs. Consider quarterly vendor orientation sessions and annual vendor exhibitions.
- 9) Increase integration and importance of DBE program in agency operations.
- 10) Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.

#### Memphis-Shelby County Airport Authority

- 1) Centralize purchasing for construction and professional services.
- 2) Expand upon DBE requirements cited in general policies and procedures, such that departmental managers responsible for monitoring contracts are fully aware of all local, state and federal DBE requirements.
- 3) Provide adequate full-time DBE staffing to ensure sufficient resources for certification, outreach, and program development.
- 4) Produce DBE reports by specific contract awards as well as by dollar volume activity.
- 5) Ensure that DBE reports and DBE certification lists reflect the DBE credits actually given prime contractors.

- 6) Periodically check contract files in order to ensure that appropriate information is being tracked and consistent information is being reported to the DBE Officer. Expand the capacity of accounting and financial reports to capture DBE dollar expenditures by race, ethnicity, national origin as a confirmation tracking of participation based on payments.
- 7) Address the need for procurement policy on contract extension, especially for professional service contracts. Contract extensions should be used only rarely and not exclude other vendors.
- 8) Increase integration and importance of DBE program in agency operations.
- 9) Conduct buyer reviews in order to ensure that purchasing discretion is not being abused. Train buyers to facilitate their understanding of and commitment to DBE goals, specifically to increase their outreach to DBEs when they can exercise discretion.
- 10) Develop separate Purchasing Policy and Procedures Manual.
- 11) Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.

#### Memphis City Schools

- 1) Develop consistent policies regarding bonding requirements. Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.
- 2) Increase buyer sensitivity to doing business with MWBEs through training programs and vendor outreach. Institute cultural diversity training. Upon completion, evaluate procurement personnel's willingness, openness and ability to do business with MWBEs.
- 3) Conduct buyer reviews to ensure that buyer discretion is not being abused.
- 4) Institute a formalized tracking system which monitors subcontracting activity. Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to Purchasing or a designated office. Purchasing and Engineering should require monthly contract activity reports from prime contractors and prime consultants identifying activities of MWBE subconsultant and subcontractors. This

information should be retained microfilm when hard copy documents are destroyed.

- 5) Hold procurement personnel responsible and accountable for implementation of purchasing procedures and for race conscious and race neutral initiatives.
- 6) Include reporting on capital projects in Affirmative Action reports.
- 7) Encourage purchasing agents to attend MWBE trade association meetings and vendor fairs.
- 8) Routinely conduct seminars and workshops on "how to do business" with the Memphis City Schools.

#### Shelby County School Board

- 1) Diversify procurement staff. Institute cultural diversity training. Upon completion, evaluate procurement personnel's willingness, openness and ability to do business with MWBEs.
- 2) Develop consistent policies regarding bonding requirements.
- 3) Outreach to MWBEs to ensure that all segments of the business community are aware of contracting opportunities on a regular basis.
- 4) Eliminate rotating list for architects and engineers.
- 5) Create Procurement policies and procedures, even if it is a handbook of state laws by which SCSB is governed, such that procurement personnel and vendors can easily familiarize themselves with the laws/procedures.
- 6) Increase Senior Management support of the procurement function and MWBE participation.
- 7) Conduct periodic seminars on doing business with SCSB.
- 8) Create a computerized data management system. Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to Purchasing or a designated office. Purchasing should require monthly contract activity reports from prime contractors and prime consultants identifying activities of MWBE subconsultant and subcontractors. This information should be retained microfilm when hard copy documents are destroyed.

- 9) Encourage purchasing agents to regularly attend MWBE trade associations meetings and minority vendor shows.
- 10) Reduce insurance and bonding requirements to State law requirements to induce greater MWBE participation.

#### Port Commission

- 1) Determine whether City of Memphis or Shelby County will have any responsibility and/or involvement in Port Commission contracting activity.
- 2) Develop Procurement policies and procedures which address the relationship between Port Commission, City of Memphis and Shelby County.
- 3) Create a computerized data management system. Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to Purchasing or a designated office. Purchasing and Engineering should require monthly contract activity reports from prime contractors and prime consultants identifying activities of MWBE subconsultant and subcontractors. This information should be retained microfilm when hard copy documents are destroyed.
- 4) Develop a MWBE vendor list or obtain MWBE vendor list created and maintained by other Consortium members.
- 5) Conduct purchasing agent reviews in order to ensure that purchasing discretion is not being abused.
- 6) Encourage purchasing agents to regularly attend MWBE trade associations meetings and minority vendor shows.
- 7) Conduct periodic seminars on doing business with Port Commission.

#### Regional Medical Center

- 1) Revamp Purchasing policies and procedures to provide clear guidance to purchasing agents regarding standards and expectations. These new policies and procedures should incorporate any MWBE program policies and procedures.
- 2) Conduct buyer reviews to ensure that buyer discretion is not being abused.

- 3) Create a MWBE Vendor Directory to be utilized by purchasing agents.
- 4) Encourage purchasing agents to attend trade fairs and MWBE association meetings, especially at the national level, given the limited number of MWBE medical suppliers in Memphis.
- 5) Provide periodic seminars on doing business with the Med.
- 6) Create a computerized data management system. Require Purchasing and Engineering to submit detailed monthly MWBE participation reports on contract activities to Purchasing or a designated office. Purchasing and Engineering should require monthly contract activity reports from prime contractors and prime consultants identifying activities of MWBE subconsultant and subcontractors. This information should be retained microfilm when hard copy documents are destroyed.
- 7) Review bonding requirements and establish vendor sensitive standards which induce competition.

### Race Neutral Initiatives

As discussed in Chapter I, *Croson* requires the consideration of race neutral programs to remedy the effects of past discrimination on MBEs. Existing race neutral programs are discussed in Chapter VIII. There are several such initiatives, some mentioned in the *Croson* case itself, which are absent in Memphis. These are discussed below.

### Contract Sizing Programs

Contract sizing was identified as a barrier by many MWBEs interviewed by DJMA. The Consortium members do not have a standard policy or practice regarding reducing the size of large contracts when this is feasible. Reducing the size of contracts, or splitting them into smaller parts would benefit MWBEs by creating more opportunities within their capacity ranges as well as enabling them to perform as primes.

The Consortium members should adopt the practice at least through administrative order of having all contracts above a certain size reviewed for contract sizing purposes; that is, evaluating whether the contracts can be divided into units more readily managed and executed by small companies.

### Bonding Assistance

Lack of access to bonding is a strong concern to MWBEs. A major barrier to MWBE bonding is the technical requirements of underwriters, in particular, the financial record keeping requirements. The Consortium should utilize existing minority

business development agencies that provide technical bonding assistance to assist in this function. Naturally, any additional efforts in the area of technical assistance should be coordinated with existing programs.

There are several approaches to handling the MWBE bonding problem:

- Bond guarantees. A local bond guarantee program can be supported by a consortium of funds pooled by the Consortium members. For example, a pool of \$20,000 can leverage \$1 million in bonds, subject to actual confirmation. Such a guarantee program would in turn reinsure commercially rated surety companies that participated in the program.

This approach has been applied with some success by the New York State Economic Development Bank, the Florida Black Business Investment Board, and the New Jersey Casino Program. The SBA also guarantees between 70 and 90 percent of a maximum \$1.25 million surety bond. In essence these programs provide collateral to MWBEs seeking bonds.

- Direct bonding. Certain states, such as Maryland, provide bonding for small and minority contractors.
- Consortium. A government agency can initiate and subsidize a consortium of private sureties. This approach is currently under consideration in Louisiana.
- Bond waiver program. Federal agencies, for example, issue bond waivers periodically on SBA funded projects. However, bond waivers do not facilitate MWBE growth and development because surety agencies classify work completed under a bond waiver as "unbonded" work.
- In cases where bond waivers apply, DJMA makes the following suggestions:
  - Limit bond requirements to state law thresholds.
  - On professional services contracts, waive performance bond requirement or require performance bond equivalent to one month of contract payments.
  - On goods and services contracts, eliminate bond requirements.
  - Allow contractors to bill for insurance and bonding up front,

instead of over 12 month process.

One approach to bonding taken by a local agency is that of the Los Angeles Transportation Commission. Funds for this program are generated by a Los Angeles County tax on gasoline, a portion of which is devoted to mass transit purposes. The City of Los Angeles and the Los Angeles County Transportation Commission have each deposited \$7.5 million from these funds in two commercial banks. Private contractors refer subcontractors who are unable to obtain bonding from private surety companies to the Transit Bond Guarantee Program. The program determines that the MWBE is competent to perform the subcontracting work, has properly estimated the job, has the management and technical capacity to perform, and is otherwise eligible for bond assistance. If these and other criteria are satisfied, the bond guarantee program will obtain bonding for the subcontractor from one of four participating surety companies. One of the two banks then issues an irrevocable letter of credit to the surety company in an amount identified by that surety company as necessary to secure its bond. The program also provides bonding assistance to MWBE prime contractors who are bidding on contracts under \$1 million. Although the program has been underutilized, it offers one innovative but relatively low risk model for increasing the involvement of MWBEs more fully in the economic mainstream.

DJMA recommends an aggressive approach by the Consortium members to coordinate its bonding requirements with the appropriate surety companies to support small contractors in their quest to qualify for bonds.

### Prompt Payment System

Minority businesses operate frequently without the benefit of significant cash reserves and certainly with lesser amounts of capital than their majority counterparts. This situation renders them vulnerable to unpredictable payment cycles and slow payments. Indeed, many MWBEs report that over and above the difficulties inflicted by slow payment mechanisms inherent in the procurement cycle, they feel that majority contractors create ways to retard payment to the subcontractors. This practice has the deleterious consequence of rendering the subcontractors delinquent in their own payment requirements.

Because delays in payment either by the prime contractors or the Consortium member often force MWBEs to operate on uncomfortably tight budgets, we recommend as follows:

- Enforce Prompt Pay Act at agency and prime contractor levels.
- Establish clear criteria for how soon primes must disburse payment to the subcontractors.

- In instances where significant amounts are due to subcontractors, require primes to report monthly payments to subcontractors and have compliance officers verify the payments received.
- Require the prime contractors to certify in writing, under penalty, that all subcontractors have been paid from payments received from the Consortium members which included payment for work done by subcontractors prior to contract close-out and release of final payments. This policy could be implemented through the creation of a Request for Verification of Payment to Subcontractors form.
- Upon request, inform the subcontractors when the primes have been paid.
- Reduce the payment cycle to not less than once each month to prime contractors, subject to satisfactory contract progress.
- Require prime contractors to make payment to subcontractors within ten days of receipt of payment from the Consortium members.
- Authorize aggregate purchase of materials by prime contractors for subcontractors.
- Develop a "Suppliers Loan Fund" to aid MWBEs in acquiring capital to purchase materials.

To facilitate payment and financial assistance to MWBEs, Consortium members should consider designating small business accounting representatives in the accounting departments to handle issues/payment problems impacting MWBEs and other small businesses. These representatives could establish different payment criteria and schedules, such as paying small vendors on a bi-monthly basis.

## Outreach Programs

Outreach techniques are indicators of efforts made by an agency to make the entire business community aware of contract opportunities. DJMA suggests the following forms of outreach be instituted, in addition to advertising:

- Develop a Consortium monthly newsletter or in-house bulletin boards announcing upcoming bid opportunities, in addition to any agency.
- Disseminate bid opportunities immediately to MWBE trade associations.
- Utilize radio media for advertising opportunities.

The most effective outreach effort is maintaining ongoing and open communication with MWBEs. Networking at trade fairs and workshops is essential as are formal and informal contacts initiated by buyers and compliance staff to sustain positive relationships with MWBEs.

## Technical Assistance Programs

Technical and financial assistance techniques provide direct support to MWBEs in the form of training and support in identifying financial resources for companies wishing to do business with an agency. Existing technical and financial assistance programs are discussed in detail in Chapter VIII. Additional programs should be coordinated with existing programs. While technical and financial assistance are crucial to the success of an MWBE program, such assistance does not necessarily have to be race or gender conscious in design. DJMA suggests the following Consortium sponsored technical assistance programs:

**Consortium Incubator Program.** Due to the lack of development of MWBE firms in Memphis, DJMA suggests a multi-tiered incubator program with an in-house technical support staff supported by public and private agencies offering a wide area of services and support to MWBEs. The incubator would be located in a government supported space which would facilitate a switchboard and other services such as a copying center and graphics support, that could be utilized by all MWBEs housed in the incubator building. It is envisioned that most support services would be provided by incubator businesses. The incubator would have an experienced staff to provide management, financial, marketing, estimating, bonding and project management assistance to incubator businesses. In-house staff would be responsible for developing a capital pool for grants and loans to incubator businesses. This capital pool would consist of funds from Consortium

members, federal moneys (such as HUD funds, MBDC funds, SBA funds), private and banking funding, venture capital and foundation grants. The level of support provided by the in-house staff would depend upon the stage of development of an MWBE. The stages and levels of support are as follows:

- Newly created business - Businesses that have just started on their own or have obtained capital injections from private companies interested in procuring the services of these businesses. These businesses would have the full support of the in-house staff-thus, all functions would be performed with the support of in-house personnel.
- Intermediate level business - Businesses that need some technical assistance and cost savings of a government operated building facility.
- Graduate level businesses - Businesses that need cost savings of a government operated building facility. In order to remain a resident in the incubator, graduate level businesses would procure services from newly created and intermediate level businesses.
- Graduated, existing developed MWBEs or businesses needing low cost services - Businesses that are outside the incubator facility, but are in need of technical assistance or services, such as graphic support. These businesses would pay a predetermined fee for services.

To support these incubator businesses, private entities and public entities with set-aside programs would be encourage to established guaranteed opportunities to these businesses. Businesses utilizing incubator services would be required to complete incubator classes in entrepreneurship, management, leadership and other courses established by in-house personnel.

Small Business Support Group. The Small Business Support group offered by the Chamber of Commerce should be re-instituted and expanded. During anecdotal interviews, contractors stated that this support group increased understanding and communication between small businesses, regardless of race, ethnicity or gender. DJMA suggests the following additions to the support group functions:

- Case studies program, taught by established business owners or professors of business.

- Crisis management, taught by established business owners or professors of business.
- Demonstration classes, i.e. effective on-site marketing techniques in person or videotaped taught by established business owners.

### Small Contractors Assistance Program

Construction is an area of procurement where the management and technical assistance needs are the greatest. Consequently, many cities have established programs targeting small and disadvantaged contractors. Such programs typically encompass the following services:

- Serve as a clearinghouse for city, county, state and federal contracting opportunities.
- Assist contractors in bid estimation and bid development.
- Provide a plan room and blueprint reproduction services.
- Offer seminars of use to contractors.
- Foster mentor-protégé relationships with majority contractors, including SCORE (Service Corps of Retired Executives) arrangements where retired general contractors mentor MWBE contractors.
- Attend pre-bid conferences.
- Encourage majority constructors to either joint venture with MWBEs or utilize MWBE business owners on majority contracts at the project management level.

Typically these programs are funded with Community Development Block Grant funds.

### Financial Assistance Programs

Adequate levels of contract financing are an issue in Memphis as in many parts of the country. A typical problem is for an MWBE to have the qualifications to secure a contract, actually win the contract, but be incapable performing a contract because banks do not accept contracts as collateral to secure the needed financing to complete a contract. The following programs would be valuable in Memphis in addressing these problems:

**Bank Consortia.** The revisions to the Community Reinvestment Act (CRA) provides the Consortium members with an important opportunity to address this gap in MWBE financing. As a result of the awarded CRA, numerous financial institutions are forming consortium to facilitate lending to CRA-targeted businesses. One example of this is the Entrepreneurial Development Loan Fund (EDLF) in Atlanta. The EDLF was organized by the Atlanta Chamber of Commerce in conjunction with several major Atlanta banks. The EDLF is administered by GRASP, an Atlanta economic development organization.

**Working Capital Loan Program.** The Consortium members take bids from local financial institutions to lend a MWBE holding a Consortium contract or subcontract up to 5 percent of the contract amount. The bank would review and approve/disapprove each application, and if approved, monitor proper application of installment payments due to the MWBE as the work progresses. The bids received from the banks would be evaluated by a Consortium committee on the basis of (1) the lowest APR which will be offered to the MWBE firms, (2) the credit criteria utilized by the bank and (3) the percentage of risk which the bank will assume. The Consortium would guarantee the bank's receipt of the remaining portion of the loan.

**Contract Financing.** An important vehicle for providing working capital is contract financing, a financial approach that banks find expensive to administer. Public subsidized contract financing provides a low cost alternative to costly factoring services which is often the only alternative small companies have for obtaining working capital.

**Public Venture Capital Funds.** Some cities have collaborated with states to create such semi-public venture capital funds. BIDCO in Detroit, Michigan is one such fund that provides preferred stock and/or long-term debt to promising firms.

## Race and Gender Conscious Programs

A race and gender conscious program is one that provides goals or set-asides targeted to minority and women businesses. Goals should consider separately, targets for prime contractor participation, joint ventures, subcontractor participation and project management arrangement. Certification programs and contract monitoring support the efficient operations of a race and gender conscious program.

*Certification* techniques define the screening process employed by an agency to encourage and ensure that the intended beneficiaries (i.e., MWBEs) are ready,

willing and able to meet its needs. Only MATA and the Airport Authority have race conscious certification requirements. This certification process is accompanied by field audits. On the one hand, some MWBEs found compliance with MWBE certification requirements burdensome. On the other hand, MWBEs reported that shams and fronts were still a problem with MATA and Airport Authority DBE programs. Consequently, there is a need to balance extensive certification requirements with costs.

Consortium members have discussed the creation of an entity that would perform certifications for all agencies. DJMA recommends this approach be followed. However, DJMA cautions that discussion should occur between the agencies regarding their different certification requirements (such as federal standards) and the views of some agencies regarding the non-recognition of women business owners.

*Review of contracts awarded* is the mechanism by which an agency assures MWBE inclusion and constitutes a double-check of the performance of agency personnel who are responsible for contract awards during a project's execution. Properly constructed management information system (MIS) to track MWBE procurement greatly facilitates both internal and external review, of an MWBE program. The most effective MIS system for these purposes is one that tracks data in the categories most consistent with *Crosby*-style analysis. While such information may be in excess of that required for normal management review the 'excess' detail should be available for external review and in the event of litigation.

*Monitoring Systems* ensure compliance and are the means by which performance is confirmed during a project's execution. When contracts remain open over two to three years, compliance officers may change and MWBE participation may change as well. Accordingly, it is important that award and close-out do not constitute the only periods of heightened awareness of MWBE contract participation. In addition, there should be firm requirements for subcontractors, including agency approval of changes in subcontractors, and verification that MWBE subcontractors are being actually involved in a contract.

### Narrow Tailoring of Race Conscious Programs

The only race conscious programs in existence in Memphis are the federal DBE programs at MATA and Airport Authority. These programs are not tailored to *Crosby* requirements which apply to local and state race conscious programs. In reviewing these program's written policies and procedures, DJMA found no evidence of narrow tailoring (not unsurprisingly since these are modeled on national laws).

- Neither program has goal waiver provisions
- Neither program has a sunset clause

- Both programs have overall goals, which could raise an issue of fact as to whether the goals are flexible and reflect project conditions.

These race conscious programs, along with any other race conscious programs developed by other Consortium members, local or state entities, should include the six basic program elements enumerated above.

In addition, *Crososn* requires that race conscious programs cover only those minorities against which identified discrimination exists. In reviewing the evidence in totality, DJMA recommends that race conscious programs be directed toward African American and women owned businesses only.

## Consideration Of Goal/Target Setting Methodology

### Course of Action

The actual setting of MWBE goals is a policy decision and requires action by the Consortium's legislative authorities. The agencies' Board of Directors or Council and the Mayors should establish overall policy goals which can then be translated by MWBE staff into annual targets.

The designated MWBE office should develop an action plan that specifies procedural, program, and goal improvements that will be made and the timeline allocated for those tasks.

### Goal/Target Setting Methodology

To assist the Consortium in its efforts to establish objective targets for MWBE participation within the goal portion of the MWBE program, DJMA has applied our ADM Target Methodology to sample data to provide an agency with an indication of this algorithm's function.

This study indicates disparity in the utilization of minority and women businesses contract opportunities by the Consortium. Using this information as a factual predicate, we believe the application of the ADM Methodology is warranted.

Therefore, in light of this evidence, it is suggested that the Consortium consider this MWBE target methodology to define appropriate participation targets relevant to each racial/ethnic/gender group within the MWBE program to correct the stated disparities in utilization. This methodology has been designed to assist the agency in providing a realistic and statistically valid model. It relies on a two-part process. First, the examination of market conditions presented in our fact finding study can be consulted in making a policy determination regarding MWBE participation

levels. Second, a determination of the Consortium's actual level of MWBE participation must be calculated.

In the policy arena we have not set a goal nor recommended a specific goal. The actual setting of goals is a policy decision reserved for the Consortium's decision makers who must determine "who gets what, where, and when." One decision making paradigm ties an agency's utilization with the level of MWBE availability. Within this framework, the number of MWBEs in the relevant market would drive an agency's policy decisions regarding the its goal.

A practical goal-setting methodology that reflects legal thought should incorporate the seven factors used in the report in establishing the current levels of subcontractor availability and the subsequent disparities in utilization:

- 1) the size of female and minority populations in the relevant market area
- 2) the number of female and minority owned businesses in the relevant market area
- 3) the availability of female and minority-owned businesses in the relevant market area willing to do business with the Consortium
- 4) the general availability of minorities and females having the requisite skills to manage and/or form businesses in the relevant market area
- 5) the percentage of minority and female businesses compared to the total number of businesses in the relevant market area
- 6) the availability of minority and female businesses in the relevant market area which an agency can reasonably add to its certification list
- 7) the degree of outreach and training that the Agency is reasonably able to undertake as a means of making opportunity available to minority and female businesses.

*The second part of the process charts a course for determining MWBE utilization targets in order to achieve the goals established by the policy. This section sets forth a process and methodology that can be used to determine appropriate levels of MWBE participation to be the utilization targets. There is, however, no simple one-two-three calculation which can be used to determine MWBE utilization. We caution the reader against the false comfort produced by a simple mathematical formula which seeks to create MWBE utilization targets. Many variables impact the data which composes the mathematical basis for subsequent calculations. This caution articulated, DJMA has developed the ADM formula (Algorithm Development Model), a five-step algorithm to assist in establishing MWBE utilization targets.*

The algorithm methodology for developing specific MWBE participation targets requires a five-step computation process.

- Step 1:* Compute the Agency's cumulative dollar expenditure for the desired time frame. This requires that the Agency establish a base year or starting point. We recommend Fiscal Year 1988 since this is the first year of the study period.
- Step 2:* Compute Agency's minority cumulative dollar expenditures, assuming goal for time frame. This requires computation of Agency's cumulative contracting and procurement dollar history from base year to current year. That is, each succeeding year's total dollar volume of contracts and procurement is added to the sum of the previous year.
- Step 3:* Compute difference between cumulative MWBE dollar expenditures for time frame and current cumulative minority dollar expenditures. This requires computation of the Agency's cumulative dollars spent with minorities and women from base year to current year.
- Step 4:* Divide Step 3 by total years between time frame and current. This requires the selection of a time frame for which the Agency desires to bring minority and women contracting and procurement targets into conformance with the stated goals.
- Step 5:* Divide Step 4 by projected annual Agency dollar expenditures. This requires the selection of a final goal objective. This goal objective will be a function of the several variables described above:

Target =  $f$ , total population, minority population, total business population, total minority business population, total procurement and contracting dollars spent, total procurement and contracting dollars spent with minorities, other relevant considerations unique to the Agency.

- Step 6:* Estimate Agency contracting dollars from the current year to the time frame year. The Agency must engage a capital project program administrator, budget director and other qualified individuals capable of developing sound targets. In the absence of another methodology, a department may use constant or percentage growth rates.

In addition to these steps, as mentioned earlier, Agency decision makers must determine the annual goal to be set. An agency may wish to average the goal over the selected time frame. It may decide on a linear, increasing or decreasing goal.

The ADM algorithm simply restates the target setting methodology in an easy to follow mathematical formula that is easy to compute. D. J. Miller & Associates has developed an algorithm and applied it to hypothetical MWBE goals for the Consortium. The annual minority targets, ATM, can be determined by the ADM formula:

**ADM Formula  
for Computing Annual Targets for minority Participation**

$$ATM = \frac{G_p(TCE_t) - TME_p}{T - P} + TE_a$$

where

$G_p$  = policy goal for MWBE participation. When the policy goal is used to bring utilization in line with availability, then

$$G_p = ATM.$$

- $TCE_t$  = total cumulative expenditure at time frame
- $TE_a$  = total annual Agency's expenditure
- $TME_p$  = total minority cumulative expenditure at present
- $T$  = time frame year
- $P$  = present year

The ADM formula allows for the computation of an overall minority targets as well as targets for individual minority groups, e.g., Black, Hispanic, Other, women, etc. Using data for a capital construction example, a matrix has been created to demonstrate how variances in the policy goal and time frame of the program change the annual MWBE targets. For example, using a study period of FY 1982 and 1986-1992 in construction, if the agency's policy goal were 15 percent utilization of minority and women owned firms, and the length of the program 15 years, then the annual target for MWBE utilization would be 17 percent based on current utilization.

- $TCE_{2007} = \$369,980,918 + 15 \cdot 46,247,615$
- $= \$370 \text{ million} + 15 \cdot 46.2 \text{ million}$
- $= \$1,063 \text{ million}$
- $TME_{1992} = \$40.9 \text{ million}$
- $TE = \$46.2 \text{ million}$
- $P = 1992$
- $T = 2007$
- Goal = 15%
- ADM =  $\frac{(15\%) (\$1,063 \text{ million}) - \$40.9 \text{ million}}{2007 - 1992} + \$46.2 \text{ million}$
- $= \frac{\$159.45 \text{ million} - \$40.9 \text{ million}}{15} + \$46.2 \text{ million}$
- $= \frac{\$118 \text{ million}}{15 \cdot 46.2 \text{ million}} = 17\%$

Table 7.1  
Sample Agency  
ADM Formula Matrix  
Policy Goal/Program Target  
Construction

Program Length (years)	Policy Goal (%)					
	15	20	25	30	35	40
5	21	34	47	60	73	86
10	18	27	36	45	54	63
15	17	25	32	40	48	55
20	17	24	31	38	45	52
25	16	23	29	36	43	47

Source: DJMA

For professional services, the following numbers are used with the base year of 1986 (study period 1986-1992).

$TCE_t$	=	\$57.9 million + program length • \$8.3 million
$TME_p$	=	\$2.3 million
$TE$	=	\$8.3 million
$P$	=	1992
$T$	=	Set by Entity
$G_p$	=	Set by Entity

Table 7.2  
Sample Agency  
ADM Formula Matrix  
Policy Goal/Program Target  
Professional Services

Program Length (years)	Policy Goal (%)					
	15	20	25	30	35	40
5	30	42	54	66	84	90
10	23	31	45	48	57	65
15	20	28	35	43	50	58
20	19	26	32	39	46	53
25	18	24	31	37	44	50

Source: DJMA.

## SUMMARY

D. J. Miller & Associates, Inc. submits that the findings of disparity between the availability of women and minority business enterprises and their utilization by the participating agencies in the relevant marketplace create an inference of discrimination. African American owned businesses experienced the greatest degree of disparity, largely as a result of the past and present discrimination against this group as exhibited in the historical, economic and anecdotal sections of this report. The Consortium members have been active and passive participants in the discrimination.

The statistical analyses in this study can serve as the basis for policy decisions regarding the establishment of MWBE participation goals for specific racial, ethnic and gender groups in a race conscious program.