Whenever public officials attempt to end discrimination in the marketplace, they take a significant risk. How far can affirmative action go before it becomes reverse discrimination? Do set-aside programs provide equal access to competition, or do they eliminate it altogether? How does a government body determine the existence and the extent of abuses that need to be remedied, and how will they know when their work is completed? None of these questions are easily answered, but still there have been very few guidelines established for local governments to follow when taking corrective action in the awarding of public contracts.

Making this policy area especially treacherous was a 1989 United States Supreme Court decision in the case of City of Richmond, Virginia v. J.A. Croson. The city of Richmond had adopted legislation requiring at least 30 percent of all public contracts to be awarded to racial minorities and was sued for discrimination by a non-minority contractor. The Supreme Court found that Richmond's program was in violation of the Equal Protection Clause of the Fourteenth Amendment. Subsequently, and somewhat prematurely, most public jurisdictions across the country abandoned their minority-contractor hiring programs in order to avoid potential lawsuits.

Some Minnesota authorities were among them. The City of St. Paul had a set-aside program for minority and women business enterprises (MWBEs) instituted in 1976 and bolstered with an increased budget and staff in 1982.
Ramsey County had a similar program established in 1979. Independent School District #625 in St. Paul, formerly compliant with the city and county’s affirmative action programs through a Joint Purchasing Office, had its own purchasing office and set-aside goals established in 1985. But, based on the *Croson* decision, all three of these jurisdictions suspended their affirmative action programs by 1992 in favor of race- and gender-neutral policies that targeted small businesses. Although assistance to small businesses indirectly provides some assistance to MWBEs, the specific mandates for the hiring of minorities and women disappeared.

What made these policy reversals premature, however, was that the original set-aside programs may have been perfectly legal. In the *Croson* decision, the Supreme Court made it quite clear that despite the unconstitutionality of the Richmond program, public jurisdictions do have the authority to address identified discriminatory practices and, moreover, that a municipality has a *compelling interest* in remedying discrimination, including the use of race-conscious remedies under certain conditions. These conditions are that the compelling government interest must be demonstrated, the remedies must be narrowly tailored, and the program must be limited to the geographical boundaries of the enacting jurisdiction.

Further, the court allowed that when there is a significant disparity between the number of able, willing minority contractors available and the number of contracts they are awarded, there does not have to be a showing of *de facto* discrimination but only a *prima facie* showing. In other words, when there is a disparity in the numbers, discrimination needs only to be inferred rather than proven in order to justify corrective action, particularly when taken in combination with anecdotal and historical evidence of discrimination. Based on these guidelines, a number of authorities nationwide began initiating disparity studies in order to establish a solid legal foundation for MWBE set-aside programs.

Here in St. Paul, the Post-Croson Project was created in 1993 for this purpose by the Disparity Studies Joint Powers Board. Chaired by myself, the board also consisted of two representatives from each of the three participating jurisdictions: Ramsey County, the City of St. Paul, and Independent School District #625. Initially, the project was to be completed jointly with Hennepin County, The City of Minneapolis, and the Minneapolis Public Housing Agency, but these groups withdrew to conduct their studies independently.

For this project to be successful, several things were needed: first, an examination of other communities that had performed disparity studies in the area of public contracting; second, an evaluation of the hiring practices of several Twin Cities-area public jurisdictions to assess the need for anti-discrimination efforts; third, public hearings among minority and women businesses to gather anecdotal evidence of marketplace conditions; and finally, thorough recommendations for the design and implementation of anti-discrimination policies if found to be necessary.

**Nationwide Patterns**

To keep abreast of developments across the country in this area, and for guidance in the development of our own project, we reviewed disparity studies conducted in New York City; Seattle, Washington; Maricopa County, Arizona; and Phoenix, Arizona. Site visits were used in each case, and the above agenda for our project closely matched the methodologies used in each of these various studies.

The New York City Disparity Study revealed that qualified MWBEs received a significantly smaller share of contract dollars spent by the city than would reasonably be expected based on their general availability in the market area. These disparities were shown to have occurred among all major racial and ethnic groups—including African Americans, Asians, Hispanics, and American Indians—and among women, and they

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Cover photo: This study brought together representatives from three different government authorities. At the last meeting of the Disparity Studies Joint Powers Board, Lynn Geschwind, director of Ramsey County’s affirmative action office, and James Shelton, affirmative action program director for Independent School District #625, argued a point.

Women-owned businesses enjoyed an almost threefold increase in government contracts after the Supreme Court’s 1989 *Croson* decision, while minority-owned firms felt a sharp decline in contracts.
were found to exist across the major industries enjoying the city’s business: commodities, construction, and personal and professional services. In many cases, women and the major racial minorities received, as groups, less than half of their expected contract dollars.

Although there was quite a deficiency of records for both Phoenix and Maricopa County, there were enough data to show a definite under-utilization pattern of MWBEs. Coupled with anecdotal testimony from affected minority and women business owners, a sufficient case was made for the establishment of MWBE programs in both jurisdictions. In Phoenix, disparities were also shown in the rate of business formation, with minority businesses being formed at approximately one-eighth the rate of White-owned businesses. In Seattle, as well, minorities received only 44 percent, and women roughly 20 percent, of the contracts that would be expected in a non-discriminatory environment.

The Local Situation

On June 6, 1995, the Disparity Study Joint Powers Board entered into a contract with BBC Research and Consulting to conduct a disparity study of MWBEs for the jurisdictions of Ramsey County, the City of St. Paul, and Independent School District #625. By assessing the condition of minority- and women-owned businesses and then comparing their availability with the local procurement contracts they received, the study would determine whether it would be legally possible in each area to institute affirmative action programs.

An examination of 1987 U.S. Economic Census data revealed significant disparities between the revenues of MWBEs and their White, male counterparts in the eleven-county Twin Cities metropolitan area (Figure 1). African American-owned businesses reported an average of 56 percent of the annual revenue of the average White-male-owned business, Asians 63 percent, American Indians 51 percent, and Hispanics only 27 percent. Women-owned businesses reported 33 percent. When these disparities are computed as actual dollars, the loss of revenues to these communities is severe: Hispanic-owned businesses generated an estimated $62 million less in annual revenues than would have been expected at the same contract rate as White-male businesses, Asians $78 million dollars less, African Americans $88 million, American Indians $12 million, and women a staggering $4.4 billion.

From 1985 to 1994 in Ramsey County and the City of St. Paul, and from 1988 to 1994 in Independent School District #625, approximately 2 percent of the combined prime contracts awarded by all three jurisdictions went to minority-owned firms, and approximately 3 percent to women-owned firms. In assessing the availability of MWBEs, or the number that are willing, able, and qualified to perform on a contract, we used information from the U.S. Census Bureau, telephone surveys, and bidder lists provided by the jurisdictions. None of these data sets alone would be sufficient for this type of study, but when taken in combination, a fairly comprehensive picture of marketplace activities began to emerge. Juxtaposed with the numbers of actual contracts awarded, the availability data showed, with few exceptions, at a 95 percent level of confidence, that all three jurisdictions gave evidence of both passive and active discrimination against MWBEs in all the major public contracting industries.

Interestingly, there was a sharp decline in the amount of business done with minority firms following the Supreme Court’s Croson decision, issued in 1989 (Figure 2). Prior to this, minority businesses received some $15 million in prime contracts from the three jurisdictions, and afterward that amount fell to $8.7 million, a 42 percent drop in business. Over the same period, transactions with women-owned businesses increased from $9.1 million to $27.2 million, an increase of almost 200 percent. Although the amount of business done with both still showed disparities with White-male-owned businesses, these data strongly suggest that there has been intensified discrimination against minority firms and a lessening of discrimination against female-owned firms since the Croson decision.

Public Hearings

The Disparity Study Joint Powers Board also contracted with the University of Minnesota Law School’s Institute on Race and Poverty (IRP) to design and conduct public hearings on marketplace discrimination in the Twin Cities area. Two hearings were held on January 11th and 22nd, 1996, in St. Paul, with over thirty individuals from all relevant groups providing sworn or written testimony. On this basis, independent of the previous statistical findings of BBC Research, the IRP found that all three jurisdictions were at least passive participants in a discriminatory marketplace.

Racial harassment on the job. A minority contractor described situations where non-minority contractors who were forced to hire minority subcontractors under a legal requirement would deliberately harass the subcontractors in an effort to force them off the job, often creating bogus disputes about the quality of their work and then withholding payments due. This tactic could be extended for a period of months, making it virtually impossible for the subcontractor to pay his employees.

A minority owner of a construction firm in business for over fifteen years testified of harassment he had faced while working as general contractor on a project for the City of St. Paul. The city inspector, contrary to normal procedure, demanded

![Figure 1. Average Annual Income of Twin Cities Area Businesses by Type of Owner *](image-url)

* Numbers are for the eleven-county Twin Cities Standard Metropolitan Statistical Area (SMSA).
to review all subcontracting bids and instructed him not to accept two minority bidders because the inspector found them inadequate. The contractor was then forced to hire two non-minority bidders at a substantially higher cost. Given that the city inspector had no authority to dictate subcontracting decisions, it was the opinion of the general contractor that the inspector had allowed his perception of the inability of minority contractors to perform on the job to conflict with normal business practice, and the contractor acquiesced to the demands only from fear of losing the contract.

Bid shopping. A minority contractor also testified that he submitted a timely bid on an annual maintenance contract with a large Twin Cities corporation. When inquiring about the status of the contract after the bid process had closed, he was informed that his bid had apparently been lost in the mail. He insisted otherwise, and as a result of his persistence the document reappeared a few days later, at which time he was informed that he had been under-bid and the contract was awarded to the firm that previously held the contract. The minority contractor suspected at that point that his bid had been “shopped,” or illegally shared with the other contractor as a way of getting a lower bid, particularly in view of the fact that his competition underbid him by less than 1 percent on a contract of $850,000.

The contractor protested and was given some non-bid contracts with the corporation in exchange for his silence, which he accepted as a way of getting his foot in the door. But soon a change in management occurred within the corporation, and, almost immediately, he began receiving conflicting information about job assignments and negative evaluations of his work. He successfully challenged the action of corporate management through their compliance office, but, according to the contractor, the management decided that because of the informal nature of his contract and what they saw as their potential exposure, it was better for them to allow his contract to lapse rather than sanction the manager responsible for the discriminatory action. The contractor did not sue the corporation because he felt that it would have a long-term negative effect on his ability to get work in the industry.

Another minority contractor testified about general contractors shopping his bids to his non-minority competitors, something he knew to be true because, on occasion, he would be informed of this practice by White contractors who did not participate in nor appreciate these practices. The contractor stated that he reported these incidents to the appropriate contracting public jurisdictions, but they said they were powerless to regulate the subcontracting activities of general contractors.

Predatory business practices. A minority business owner who operated a trucking business for eleven years testified that after expanding his business into the area of truck brokering, his two largest competitors colluded with a large contractor to disrupt his business. The contractor ordered trucks from the minority broker, then immediately used his competitors to fill the same demand and canceled the original orders. According to the broker, this became a repeated pattern which created complete chaos for his business and eventually drove him out of business.

In the area of product pricing, a minority business owner won a seven-figure contract with the State of Minnesota and the University of Minnesota to supply them with light bulbs and lamps. As distributor for a large manufacturer, he negotiated a fixed price with the manufacturer, but the manufacturer then granted one of his competitors—who had previously held the contracts—a favorite son price which was even lower. The

Minority business owners competing for government contracts testified to a wide variety of discriminatory practices in public hearings held in St. Paul in 1996.
More reliable enforcement of affirmative action laws would relieve many minorities and women of the burden of fighting discrimination themselves.

Additional enforcement of affirmative action laws would relieve many minorities or girlfriend to president and general company would elevate his wife, daughter, instances, a White, male owner of a companies owned and operated by companies to the exclusion of legitimate extensive business with female front that public jurisdictions willingly conduct getting a contract. In other words, they would illegally use his name to qualify as a minority business. Operated by the trades them but nonetheless are willing to provide women vendors are aware of these fronts but nonetheless are willing to provide them with contracts so they can claim increased business activity with women contractors.

**Discrimination in training.** It was also testified that many minority males who are interested in entering the building trades are kept out because the training school in Roseville, Minnesota, makes no real effort to recruit and admit minority males. Operated by the trades themselves, the school has existed for over ten years and, according to one minority contractor, not more than five black men have finished the labor apprenticeship program during that pe-riod. Since most construction businesses are formed by individuals who have themselves had successful apprenticeship experiences, the lack of access to this type of training correspondingly reduces the formation of minority-owned construction businesses.

Additionally, he testified that the school admits only persons between the ages of sixteen and twenty-four, which he believes to be in violation of the age discrimination law.

This contractor also made the point that working for, or being sponsored by, a contractor is a prerequisite for admission to the school, and therefore many black males cannot attend the school because general contractors will not hire them. Given these types of barriers, as he stated, many young black men interested in the construction trades resort to working short-term jobs as a way of building up some work history and skills. But, over an extended period of time in these alternative arrangements, many of the young men very quickly find themselves beyond the cutoff age for admission to the apprenticeship school. Though skilled, they have no formal apprenticeship record, which literally forces them into a long-term situation of earning below their skill level and doing so without the benefits of insurance and retirement plans.

**Recommendations**

Based on the combined findings of BBC Research and Consulting, sworn testimony provided at the public hearings, and subsequent analysis by the Institute on Race and Poverty, the board concluded that each of the three jurisdictions—Ramsey County, the City of St. Paul, and Independent School District #625—met the legal standard of having the compelling state interest necessary to institute corrective action programs for racial minorities and women. This finding applied to nearly all the industries involved in public contracting, to nearly every racial group, and to women in each jurisdiction (Table 1).

The board also felt that there was a troubling possibility that policymakers could unknowingly implement programs that either were insufficient to redress the unfair discrimination or which exceeded the findings of the study and therefore would be subject to a legal challenge similar to the Croson case. As a result, we created a framework of guidelines, in sixty-six specific recommendations, for any jurisdiction to use in the designing of corrective programs. Following are some of the most important of them.

**Outreach to MWBEs.** Jurisdictions must publicize their programs to potential MWBE firms. Mass media advertising, seminars and trade shows, and a telephone help line are a good start. In relation to particular contracts, they should better advertise bidding opportu-
nities, maintain a bidder list of minority firms, and develop systems for immediate notification. We also recommend publishing a subcontracting and supplier directory for firms after contracts are awarded.

**MWBE business development.** For minority businesses that lack the training or access necessary for success, jurisdictions should provide appropriate referrals to training programs and technical assistance, in addition to funding existing training organizations. To foster relationships within an industry, they should also begin the practice of introducing minority and women subcontractors to suppliers and establish a mentor or protégé program to pair small, emerging firms with larger, well-established firms.

**Improvement of contract procedures.** One of the contracting elements most punishing to MWBEs is the requirement of security bonds to bid on projects. The Phoenix and Maricopa County disparity studies, discussed earlier, reported some of the largest disparities for minority and women hiring, and these two jurisdictions also had by far the most restrictive and inflexible bid bond requirements. But the perception often held of these requirements as a guarantee of reliability has been called into question by a bonding study done in conjunction with the New York Disparity Study which found that many contractors, both large and small, simply did not bid on jobs that required bid bonds, yet these firms’ rates of defaulting on a job were on average only 0.6 percent higher than the rates of bidding firms. Given also that smaller firms pay disproportionately more for bonding than do higher revenue firms, we recommend that jurisdictions allow more discretion in waiving bond requirements altogether, or, at the least, consider bonding in phases.

When bonds are still required, we recommend the change made by Maricopa County, Arizona, with encouraging results. It requires that a **good faith effort** be made to assist an MWBE contractor in securing the financial assistance necessary for a bond bid, and backs the requirement with a reliable enforcement program. Also, for many firms the cost of insurance is not proportionate to a firm’s volume, and therefore the access to insurance should be equalized by more closely matching the insurance level with the actual degree of risk. Finally, to increase opportunities for small firms, the amount of time allotted for the receipt of contract bids should be increased, the size and scope of contracts should be reduced, and unnecessarily restrictive contract specifications such as high-priced brand preferences should be eliminated.

**Reliable enforcement.** Minority and women business owners increasingly have found themselves needing to become aggressive advocates for addressing the enforcement failures of a program, which in effect puts them in direct conflict with the very businesses with which they need to develop networking relationships. Consequently, these programs are often seen by the broader business community as simply a legal requirement rather than a corrective social statement which, in turn, increases the likelihood of MWBEs being thought of as **affirmative action businesses or tokens.**

An excellent example to follow in alleviating this condition is the city of Seattle, which linked its MWBE program directly to its civil rights enforcement agency, thereby elevating the program’s activities to the level of civil rights while simultaneously providing a legal mechanism for its enforcement. In Seattle, the city’s human rights director is given both broad powers to demand compliance with the program’s provisions and the responsibility for educating the community about the benefits of the MWBE program.

In addition, any government body issuing contracts must ensure that its existing anti-discrimination laws are strictly enforced, including the requirement of prompt payments and the full disclosure of all subcontracting bids to a governmental authority in order to reduce predatory business practices. This would be complemented by the establishment of reliable tracking mechanisms for the hiring of, and the payments to, MWBE subcontractors. And, to ensure access to government contracting, jurisdictions could set flexible target goals for the hiring of MWBEs.

**General administration and review.**

A fair and accurate assessment of which firms should be entitled to MWBE benefits is fundamental to all of these recommendations. With any program there should be developed a uniform set of standards for certifying the eligibility of a minority- or female-led business, and along with it come adequate sanctions for violators. Jurisdictions should also consider the development of a single regional certification procedure incorporating as many public and private agencies as practicable.

A program must also have a review framework capable of accurately assessing problems in the system. The policies must be both effectively tailored to respond to specific disparities and periodically reviewed so that ineffective remedies may be promptly updated. A jurisdiction should provide guidelines for the discontinuance of all programs after their stated goals have been met, and each program and activity should contain mechanisms that signal its own end. Finally, as numeric data play a critical role in any remedial effort, so too does anecdotal information, and programs typically dependent on numeric data must make an effort to look at anecdotal information as well.

**Implementations.**

The Disparity Studies Joint Powers Board held its final meeting on September 12, 1996, at which time it submitted its final report to the St. Paul City Council, the Ramsey County Board of Commissioners,

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**Table 1. Discrimination Found in Public Contracting**

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* Combined findings of BBC Research and Consulting and the Institute on Race and Poverty, University of Minnesota.

** Other services include legal, advertising, and security.
and the St. Paul Board of Education. The board also recommended that action to implement the remedies outlined in the report be taken within ninety days of its acceptance. Given that this study shows there have been obvious violations of the law, failure to institute corrective programs such as those we recommend demonstrates a willingness to continue to perpetuate unfair discrimination against minority and women citizens.

On August 20 and September 16, 1997, the city and the county respectively adopted versions of the programs recommended in our report, and it was very recently reported that the Board of Education plans to adopt its own program early in 1998. In the two completed adoptions, however, there is a remarkable difference. Ramsey County complied with sixty-four of our sixty-six specific recommendations, while St. Paul complied with only twenty. Those accepted by St. Paul appear to represent each of the major areas outlined above—mass media advertising, providing feedback to unsuccessful bidders, lengthening the lead time on contract bids, and setting flexible hiring goals for MWBEs, to name a few—but they mostly omit many large areas of concern such as providing support services, increases in training and financial assistance, requiring improvements in contract specifications, and involvement of the Human Rights Department.

Furthermore, one of the biggest differences between the city and county programs is that the City of St. Paul’s program assists not only MWBEs but also economically disadvantaged businesses, although no disparity studies have been conducted by the city to show any record of discrimination against businesses designated as economically disadvantaged. Many minority and women business owners have expressed displeasure over this inclusion, feeling that a program established to address their problems is only diluted by adding large numbers of other businesses to the pool.

In support of their position, the critics cite the 1996 annual report of the Targeted Vendor Development Program, which found that MWBEs represented only 34 percent of all businesses certified by the city as targeted vendors while economically disadvantaged businesses composed the remaining 66 percent.* This program had been created as a neutral way of assisting struggling businesses after the Croson decision, yet its only requirement for disadvantaged status was that the business be a small one, and, as the recent report shows, most of its beneficiaries have been White male-owned businesses. The City of St. Paul’s choices in implementing our recommendations suggest a desire to match their Targeted Vendor Program as closely as possible, thereby favoring the status quo over more extensive MWBE anti-discrimination efforts.

Despite our disappointment with the City of St. Paul initiatives, we are greatly encouraged by the actions taken by Ramsey County as a result of our post-Croson project, and we look forward to similar endorsement from the Board of Education. Ideally these districts will provide an example for other jurisdictions across the country seeking to provide fair opportunities for minorities and women but wary of overextending their efforts and becoming subject to a court challenge. We hope that they will now have the framework for legally-sound programs and can safely begin the work of combating discrimination.

Bill Wilson worked as coordinator of intercultural programs with CURA from 1969 to 1975. He served as Minnesota’s Commissioner of Human Rights from 1975 to 1979 and as a member of the St. Paul City Council from 1980 to 1993. He is now a research fellow with CURA and coordinator of Common Ground in the College of Education and Human Development at the University of Minnesota.

Wilson chaired the multi-jurisdictional Disparity Studies Joint Powers Board that met from 1993 through 1996 to oversee the post-Croson project described here. His time on the project was funded by a grant from the St. Paul Companies. Funding for the research of BBC Research and Consulting and the Institute on Race and Poverty (University of Minnesota Law School) came from Ramsey County, the City of St. Paul, Independent School District #625, and the St. Paul Port Authority. A more detailed account of the entire project (Final Report of the Post-Croson Project by William L. Wilson) is available from CURA upon request.

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