

# **Unemployment Disparity in Minnesota**

## **Report of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights**

**DECEMBER 2013**

### **The State Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

### **State Advisory Committee Reports**

This report is the work of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by the Commission staff. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the Minnesota Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. government.

## **Executive Summary**

On September 15, 2011, the Minnesota Advisory Committee to the U.S. Commission on Civil Rights held a daylong community forum which focused on the unemployment disparities in Minnesota, the underlying causes of the racial disparities, and recommendations for change. The presenters represented a range of perspectives and diverse backgrounds including business, government, community-based organizations, the faith community, and nonprofits.

The common thread that flowed through each of the presentations is the belief that Minnesota's unemployment disparity, in which Blacks are more than three times as likely to be unemployed than their White counterparts, is detrimental to the African American community in particular, and to the current and future regional competitiveness of the State of Minnesota as a whole. This report includes various aspects of the testimony that was presented during the community forum, current trends that may be contributing to the racial disparities, and areas of opportunity to make a positive impact in closing the disparities in unemployment between Blacks and Whites in the Twin Cities metropolitan area.

This report follows two major reports that have been released in Minnesota in recent years to explore growing disparities between Whites and People of Color in Minnesota in income and employment. The first is a 2005 report by the Itasca Project and the Brookings Institute called "Mind the Gap" and the second is a report that was released in 2011 by the Ramsey County Blue Ribbon Commission entitled, "Everybody In." Like previous reports, this report examines the demographic shifts occurring in the State of Minnesota and their impacts on current employment opportunities and future workforce preparedness; and the challenges that exist regarding educational attainment for African Americans in Minnesota.

Further, this report provides an in depth analysis on topics that have not yet been fully explored in other reports examining unemployment disparities in Minnesota, such as the benefits of increasing access to government contracting opportunities; increasing access to capital for small and minority-owned businesses; and the impacts of arrest records and criminal justice contacts on African American employment prospects. While metropolitan areas across the nation are grappling with similar challenges, our research indicates that some of the issues that have resulted in intolerably high unemployment rates for African Americans are unique to Minnesota and the Twin Cities Metro area.

It is our hope that the U.S. Commission on Civil Rights will assist the Minnesota Advisory Committee in formulating and implementing concrete recommendations that will address what some are calling a crisis in Minnesota.

## **Acknowledgements**

The Minnesota State Advisory Committee (MNSAC) would like to thank the following individuals and groups for their vital assistance and diligent effort in completing this report and providing the information and critical insights that made this report possible.

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**Sub-committee Members:** Velma Korbel, D. Craig Taylor, Rev. Robert Battle.

Special thanks to U.S. Commission on Civil Rights Chair, Martin R. Castro for attending the fact finding meeting and providing remarks on behalf of the Commission. We would also like to thank David Mussatt, Director, Midwestern Regional Office U.S. Commission on Civil Rights and Carolyn Allen of the Midwestern Regional Office for their ongoing support of this endeavor.

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\*Participating in the peer review process does not equate to an endorsement of the findings contained within this report.

## Chair's Letter

The Minnesota Advisory Committee to the U.S. Commission on Civil Rights submits this report, *Unemployment Disparity in Minnesota*, as part of its responsibility to examine and report on civil rights issues in Minnesota under the jurisdiction of the Commission. This report follows a fact-finding meeting on the issue in September 2011. The report was adopted by a vote of 6 to 1.

Most stakeholders will agree that a 2010 report by Algernon Austin of the Economic Policy Institute was a wakeup call that racial disparities in unemployment threaten the future viability of our state and must be addressed with a sense of urgency. No longer are we able to rest on Minnesota's long-standing reputation as a national leader in quality of life for its residents. In order to reverse the alarming disparities that exist in our state, it is imperative that we are educated about the issues and collectively resolve to use our time, talents, and resources to close the disturbing gaps and to work towards equity and justice for those who lack access to equal opportunity. Although not everyone may agree that race is a factor, it is important that we acknowledge the role that racial bias may play in fueling these intolerable disparities and be willing to have honest conversations about issues at the intersection of race and poverty. (This will become increasingly important as Minnesota's population is poised to become significantly more racially and ethnically diverse in the coming years.)

As illustrated throughout this report, the disparities in unemployment are symptomatic of gaps in educational attainment, uneven criminal justice impacts, and limitations on business development and government contracting opportunities facing African Americans in Minnesota. Solutions to these challenges must be creative, comprehensive, and targeted to achieve results. Thus, it is my hope that this report will shed light on both the challenges that exist, as well as the opportunities to reverse these intolerable disparities in our state.

In conclusion, I would like to thank all of the esteemed individuals who provided testimony at the fact-finding meeting and agreed to serve as peer reviewers of this report by providing important insights and feedback. We could not have completed this report without your generosity, kindness, and thoughtfulness. I am also grateful to Velma Korb, D. Craig Taylor, and Rev. Robert Battle for serving on the subcommittee and providing guidance and direction throughout this process. And last but not least, I would like to thank my colleague, Dr. Artika Tyner and the numerous law student interns from the University of St. Thomas Law School who have worked so diligently and steadfastly in helping to prepare this report for publication. Thank you for your hard work and commitment to this work.

Sincerely,

Nekima Levy-Pounds

Chair, Minnesota Advisory Committee to the U.S. Commission on Civil Rights

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## Background

In 2007, the United States entered into a recession unlike any it had seen since the Great Depression. By the fall of 2008, the economy was in a rapid decline and on its way to losing eight million jobs. In 2011, the national unemployment rate had “settled” at nine percent for 21 months, and some economists had begun to consider high unemployment rates the “new normal.”<sup>1</sup> Such unemployment, and specifically sustained unemployment, causes significant harm to families and communities. Communities all over the country suffered greatly from the Great Recession of 2007-2009 and are still feeling the impact of that recession. However, this suffering was not equal.

A study by Algernon Austin of the Economic Policy Institute found that Minneapolis-St. Paul had the worst relative disparity in the nation as the metropolitan area with the highest African American-White unemployment ratio. The study found that the unemployment rate for African Americans in the Minneapolis area was over three times that of Whites.<sup>2</sup> In addition, the African American unemployment rate of over 20 percent in Minneapolis-St. Paul was the second highest rate in the country, just behind the Detroit metropolitan area. Worse yet, the disparity appears to be growing. The *Star Tribune* reported in March 2011 that 2010 unemployment data revealed that the African American jobless rate in the Twin Cities was at 22%, 3.4 times the White rate of 6.4 percent.<sup>3</sup>

The reasons for the disparity are not certain, but most agree that some factors likely contribute.<sup>4</sup> First, disparities in education levels may be a factor. White Twin Cities’ residents have higher rates of educational attainment than their counterparts in most other metro areas, while African American Twin Cities’ residents have somewhat lower

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<sup>1</sup> Annalyn Censky, *The New Normal Unemployment Rate: 6.7%*, CNN MONEY (Feb. 14, 2011, 3:48 PM). [http://money.cnn.com/2011/02/14/news/economy/fed\\_unemployment/index.htm](http://money.cnn.com/2011/02/14/news/economy/fed_unemployment/index.htm).

<sup>2</sup> Algernon Austin, Economic Policy Inst., *Uneven Pain: Unemployment by Metropolitan Area and Race 7* (Issue Brief #278, June 8, 2010).

<sup>3</sup> Randy Furst, *Twin Cities Jobless Gap Worst in Nation* as part of the series Beyond the Great Recession, STAR TRIBUNE, available at <http://www.startribune.com/business/118476099.html?refer=y> (last updated Mar. 25, 2011. 6:11 PM)

<sup>4</sup> See Dr. Samuel Myers, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 61-62 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “One thing that we know nationally is the fact that there's a relationship between business cycles and racial disparities on our unemployment rate. Typically, what you observe is a widening of the racial gap in unemployment during the downturn and a narrowing of the gap during the recovery. But there are factors historically predicted that explain differences in unemployment between Whites and non-Whites, between Whites and Blacks, between Whites and Hispanics. And that includes educational attainment. It includes regional shifts in migration patterns. It includes occupational and industrial composition. And there seems to be over a relatively long period of time beginning largely in the 1940s, a widening of the gap to about two to one between Blacks and Whites. Going all the way back to 1880s, there wasn't a gap in unemployment between Blacks and Whites. This is using national data for this information.”).

levels of education than African Americans elsewhere.<sup>5</sup> Second, unemployment nationally is higher among young people in general. This matters because the state's African American population is five years younger, on average, than the African American population nationally. Third, many African American Twin Cities' residents feel they simply do not have similar connections to jobs as their White counterparts.<sup>6</sup> Finally, fewer White Minnesotans have criminal records than Whites nationally, while the opposite is true for African American Minnesotans. The disparity between African Americans and Whites in regard to criminal records is four times higher in this state than for the country as a whole.

In response to this unemployment disparity, Minnesota Governor Mark Dayton held the Twin Cities Economic Development Summit on March 30, 2011. Six individuals presented issues related to this problem to the Governor and six of his commissioners. After listening to the presentations and recommendations, the Governor promised a written response within nine days regarding immediate actions that could be taken to address the problems. Governor Dayton released a 17-page response that discussed the current status and efforts his administration was making to address the problems cited during the Economic Summit.

On September 15, 2011, the Minnesota Advisory Committee to the U.S. Commission on Civil Rights held a day long fact finding meeting which focused on the unemployment disparities in the Twin Cities Metro Area, the underlying causes of these racial disparities, and recommendations for change. The presenters represented a range of perspectives and diverse backgrounds. The common thread that flowed through each of the presentations was the notion that Minnesota's unemployment disparity is detrimental to the African American community in particular, and to the State of Minnesota as a whole. This report includes various aspects of the testimony that was presented during the Minnesota Advisory Committee forum, current trends that are contributing to the racial disparities, and areas of opportunity to make a positive impact in closing the disparities in unemployment between African Americans and Whites in Minnesota. It is our hope that the U.S. Commission on Civil Rights will assist the Minnesota Advisory Committee in formulating and implementing concrete recommendations that will address what some are calling a crisis in Minnesota.

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<sup>5</sup> Algernon Austin, Economic Policy Inst., *Uneven Pain: Unemployment by Metropolitan Area and Race* 7 (Issue Brief #278, June 8, 2010). The author points out that his study showed that disparities still exist even when educational levels are the same for African American and White residents. Thus, the relevance of education level is in dispute among community members.

<sup>6</sup> Reverend Charles Gill, Testimony before the Minnesota Advisory Committee to the U.S. Committee on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 184 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that "[...] And then when we arrive now, we realize that we have been taught and told that if you get a good education, you do well. And then we later on find out that to do well means that you have to not only know well and have a good education, but you also have to know the right people.").

# MINNESOTA'S CHANGING DEMOGRAPHICS

## Introduction

Minnesota is generally regarded as one of the best places in the country to live and raise a family. For the past decade, Minnesota has consistently been named as one of the “Most Livable States.”<sup>7</sup> However, these rankings and recognitions may be misleading. Underneath the generally accepted high quality of life in Minnesota is a disturbing problem with serious consequences: African Americans in the Twin Cities Metro Area are three times as likely to be unemployed than their White counterparts.<sup>8</sup> This unemployment disparity is the largest in the country.<sup>9</sup> While this report examines racial disparities across the state, it places special emphasis on Minneapolis and St. Paul given the level of diversity that exists in these geographic areas. While there are several initiatives in place to begin the process of addressing the racial disparities that exist, much work remains to be done. It is imperative as this work continues that the initiatives are well coordinated and are focused on strengthening regional competitiveness.

This section seeks to provide an overall picture of the quality of life in Minnesota. While this picture is generally thought to be positive, a closer examination of the quality of life for the poor and unemployed citizens of Minnesota shows another reality. This reality is one that is often hidden, unrecognized, and yet very prevalent in the Metro Area.

## Life in Minnesota

Picturing life in Minnesota usually brings to mind images of families spending time together under sunny skies, people playing water sports and fishing in the 10,000 lakes, cross-country skiers in snow-covered state parks, and ice hockey. In addition to sports, Minnesota has many cultural attractions, including museums, theaters, and shopping. Additionally, the economy in Minnesota supports and is bolstered by the presence of several large corporations. Fortune 500 companies headquartered in Minnesota include United Health Group, Target Corporation, U.S. Bancorp, Medtronic, and General Mills.<sup>10</sup>

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<sup>7</sup> Dept. of Emp't and Econ. Dev., *Explore Minnesota Living*, POSITIVELY MINNESOTA, [www.positivelyminnesota.com/.../Explore\\_Minnesota\\_Living.pdf](http://www.positivelyminnesota.com/.../Explore_Minnesota_Living.pdf). (last visited Feb. 10, 2013). [Hereinafter *Explore Minnesota Living*.]

<sup>8</sup> Mark Brinda, Testimony before the Minnesota Advisory Committee to the U.S. Commission of Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 23 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>9</sup> *Id.*

<sup>10</sup> Dept. of Emp't and Econ. Dev., *Fortune 500 Companies in Minnesota*, POSITIVELY MINNESOTA, [http://www.positivelyminnesota.com/Business/Locating\\_in\\_Minnesota/Major\\_Companies\\_Employers/Fortune\\_500\\_Companies.aspx](http://www.positivelyminnesota.com/Business/Locating_in_Minnesota/Major_Companies_Employers/Fortune_500_Companies.aspx) (last visited Feb. 10, 2013).

The presence of these large public corporations supports Minnesota's robust economy on the individual level as well. Family household income in Minnesota is high compared to other states. Minnesota's median household income from 2007-2011 was \$58,476, which was above the national median household income of \$52,762.<sup>11</sup> Minnesota also has fewer people living below the federal poverty level than in other states. From 2007-2011, the poverty rate for all persons in Minnesota was 11%, compared to 14.3% nationwide.<sup>12</sup> These positive distinctions help to make Minnesota one of the most desirable states in which to live. In the words of the Minnesota Department of Employment and Economic Development, Minnesota has: "Business. Economy. Wealth. Health. Culture. Nature. Happiness. Any way you look at us, Minnesota is the envy of the nation and the best place to live, work and do business."<sup>13</sup>

Unfortunately, this idyllic image is not a reality for many citizens of the state. While there are impressive statistics regarding life in Minnesota, there are also troubling ones, as there appears to be a stark racial disparity regarding income and quality of life between Whites and African Americans in the Twin Cities. For example, the median household income in 2010 for White families in Minnesota was \$55,459, which was above the national average for White families.<sup>14</sup> However, for African American families in the state, the average was near \$27,000, which was below the national average for African American families.<sup>15</sup>

This pattern of disparity is also apparent in poverty rates between Whites and African Americans. The poverty rate in the state for White families was 8.4%; again below the national average for White families.<sup>16</sup> However, for African American families in the state, the poverty rate was 37.2%, which is greater than 10% above the national average for African American families.<sup>17</sup>

Tied to both median family income and poverty rates are rates of home ownership. The overall home ownership rate in Minnesota from 2006 to 2010 was 74.2%, while

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<sup>11</sup> Minnesota QuickFacts from the U.S. Census Bureau, UNITED STATES CENSUS BUREAU (Jan. 10, 2013, 3:06PM), available at <http://quickfacts.census.gov/qfd/states/27000.html>. [Hereinafter *QuickFacts*.]

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

<sup>13</sup> Dept. of Emp't and Econ. Dev., *Explore Minnesota Living*, POSITIVELY MINNESOTA, [www.positivelyminnesota.com/.../Explore\\_Minnesota\\_Living.pdf](http://www.positivelyminnesota.com/.../Explore_Minnesota_Living.pdf). (last visited Feb. 10, 2013).

<sup>14</sup> Christina Wessel, Minnesota Budget Project, *Racial Disparities Grow in Minnesota as Poverty Increases, Household Income Declines*, MINNESOTA BUDGET BITES (Sept. 22, 2011), <http://minnesotabudgetbites.org/2011/09/22/racial-disparities-grow-in-minnesota-as-poverty-increases-household-income-declines/#.UUD0-DkZcc8>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

nationwide, this rate was 66.6%.<sup>18</sup> In 2010, Minnesota had the second highest home ownership rate in the nation, at 73%.<sup>19</sup> However, when the percentages are disaggregated by race, the racial disparity is more apparent. For White residents of Minnesota, the rate of home ownership was 77.5% in 2011, above the national average for Whites.<sup>20</sup> In 2010, the home ownership rate for African Americans in Minnesota was just 25.0%;<sup>21</sup> the lowest it had been in 20 years.<sup>22</sup>

In reviewing the data, there seems to be a direct correlation between the high unemployment rate for African Americans and the lower levels of quality of life they experience in comparison to their White counterparts. As the preceding statistics indicate, African Americans lag significantly behind Whites in employment rates, median household income levels, and home ownership rates in Minnesota.<sup>23</sup> Further, African Americans are also typically younger, have disproportionately lower levels of educational attainment, and higher rates of criminal justice contacts than their White counterparts. This is not to say that all African Americans are experiencing such outcomes, as there are highly educated, gainfully employed African Americans dispersed throughout the Twin Cities and the surrounding suburbs. The problem, however, is that the masses of African Americans are not enjoying similar levels of success and access to upward mobility. As the population in Minnesota ages and becomes more racially diverse and White Minnesotans begin retiring from workforce participation, African Americans must become poised to compete for employment opportunities through education and job training or they risk even greater levels of unemployment disparities in the future. Wider rates of disparity between African Americans and Whites threaten the future viability of the state as a whole. Reverend Charles Gill articulated the challenges in this way:

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<sup>18</sup> Dept. of Emp't and Econ. Dev., *Explore Minnesota Living*, POSITIVELY MINNESOTA, [www.positivelyminnesota.com/.../Explore\\_Minnesota\\_Living.pdf](http://www.positivelyminnesota.com/.../Explore_Minnesota_Living.pdf). (last visited Feb. 10, 2013).

<sup>19</sup> Christopher Mazur & Ellen Wilson, *Housing Characteristics: 2010*, U.S. CENSUS BUREAU 8 (Issue Brief #C2010BR-07, Oct. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf>.

<sup>20</sup> Alejandra Matos, *Housing Recovery in Minnesota Leaves Minorities Behind*, STAR TRIBUNE, May 9, 2013, available at <http://www.startribune.com/local/206703811.html>.

<sup>21</sup> Ed Nelson, *Homeownerships drops for Black Minnesotans*, FINANCE & COMMERCE (July 14, 2011), available at <http://finance-commerce.com/2011/07/homeownership-drops-for-black-minnesotans/>.

<sup>22</sup> Matos, *Housing Recovery*, <http://www.startribune.com/local/206703811.html>.

<sup>23</sup> Scott Gray, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 189 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights)(Stating that "I would be remiss if I didn't tell you that this economy has moved us all back. We all have faced challenges here. But I would have to say that if America has a cold, then Black Americans have pneumonia. And so we, you know, at the Urban League, when we look at the brutal realities, we see so many magazines and articles saying how great Minneapolis is or the Twin Cities is or Minnesota is, that it is a great place to live. But we've got to recognize the brutal realities. When we look at the numbers, they just don't lie.").

And so it's that kind of moral discord that we have going on that needs to be addressed, and there needs to be some swift resolve to it. And without that, this cycle that continues to go on of people working and people being pushed aside will continue to go on, and then we may say, well, I have my job now. And that may work well. But we know for certain that when we move from the workforce into the force of retirement, then there will be no one to support it, and then now we're in another decline.<sup>24</sup>

### Population Trends in Minnesota

In order to understand the impacts and trajectory of the current state of unemployment in Minnesota, and particularly the Twin Cities Metro Area, this section will set forth some primary demographic information about the state and population trends that if left unchecked could have a profound effect on future workforce participation levels.

#### The Age of Minnesota's Population

Minnesota's total population of approximately 5.3 million people is mostly between the ages of 18 and 65, which are the primary years of employment.<sup>25</sup> In Minneapolis—Minnesota's largest city, with a population of 382,578—72 percent of residents are between the ages of 18 and 64.<sup>26</sup> In comparison, 21 percent are under 18-years old and 7 percent are 65 or older.<sup>27</sup>

#### Age of Population – Minnesota

Age 0-17	18-24	25-44	45-64	65+
1,284,063 people	502,799	1,396,680	1,437,262	683,121
24.2%	9.5%	26.3%	27.1%	12.9%

#### Age of Population – Minneapolis (continued)

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<sup>24</sup> Reverend Charles Gill, Testimony before the Minnesota Advisory Committee to the U.S. Committee on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 184 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (transcript at 187).

<sup>25</sup> *State and County QuickFacts* for Minneapolis, <http://quickfacts.census.gov/qfd/states/27/2743000.html>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Age 0-17	18-64	65+
21%	72%	7%

Despite the majority of the population being of working age, the labor force participation rate in Minnesota is shrinking, particularly for men.<sup>28</sup> While this trend is occurring throughout the United States, it greatly affects Minnesota because of the age demographics of its population. One of the most common explanations for the shrinking labor force participation trend is that men with less education and fewer skills are voluntarily withdrawing from the labor force.<sup>29</sup> Since African Americans are more likely to have less education and experience higher rates of criminal justice impacts, withdrawal from the labor force leaves them especially vulnerable.<sup>30</sup>

Furthermore, a decline in labor force participation by men in their prime working years will have a negative effect on the entire state of Minnesota—now and in the future. According to former Minnesota State Demographer, Dr. Tom Gillaspay, “People aren’t talking as much about tight labor markets now that the economy is in a slump, but as soon as things get going it’s likely to become a big issue again. If participation rates stagnate and people stop moving into Minnesota, there could be a growing imbalance between supply and demand for labor.”<sup>31</sup>

The shrinking labor force participation rate is not the only trend contributing to the unemployment disparity in the Metro Area and creating future risk to Minnesota’s economy. As Minnesota’s age statistics show, there are more people in the 45 to 64 year old category than any other category in Minnesota.<sup>32</sup> An aging population in the state may result in shrinking labor force growth. According to Dr. Gillaspay, the labor force

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<sup>28</sup> Tom Gillaspay, Media Release, Dept. of Admin., Labor Force Participation for Men in their Prime Working Years is Falling in Minnesota and the Nation (Dec. 18, 2002), *available at* <http://www.demography.state.mn.us/resource.html?id=3306>.

<sup>29</sup> *Id.*

<sup>30</sup> See Minnesota Minority Education Partnership, *State of Student Debt of Color & American Indian Students Report 9* (2009)(Stating that the high school graduation rate for the 2009-2010 school year was 46.9% for African Americans); *see also Reducing Racial Disparity While Enhancing Public Safety*, COUNCIL ON CRIME AND JUSTICE 5 (2006), *available at* <http://www.racialdisparity.org/files/Final%20Report-Reducing%20Disparity%20%20Enhancing%20Safety.pdf> (Stating that African Americans are 10 times more likely to be arrested than whites).

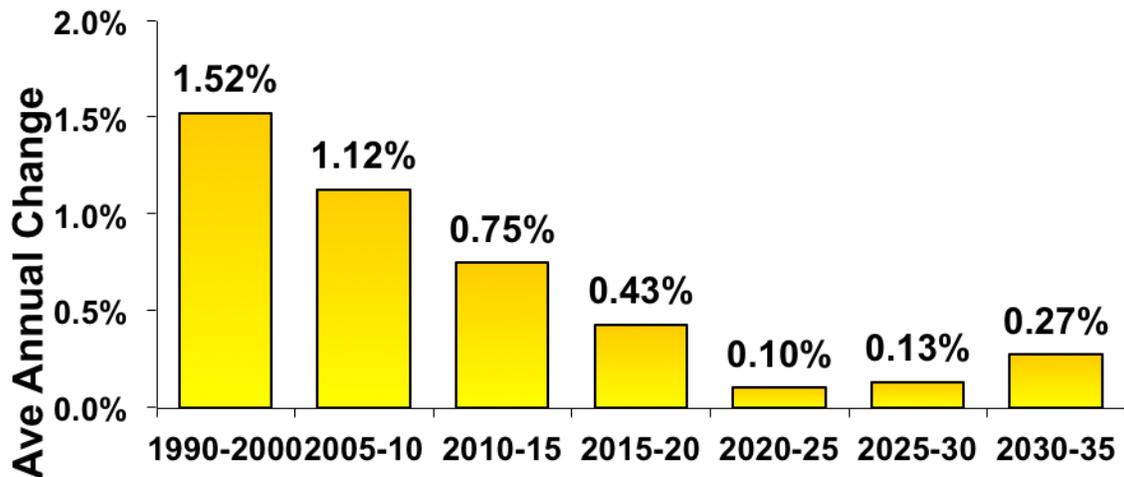
<sup>31</sup> Tom Gillaspay, Media Release, Dept. of Admin., Labor Force Participation for Men in their Prime Working Years is Falling in Minnesota and the Nation (Dec. 18, 2002), *available at* <http://www.demography.state.mn.us/resource.html?id=3306>.

<sup>32</sup> *Id.*

growth in Minnesota is about to drastically slow.<sup>33</sup> This trend will create a problem for all Minnesotans in the future because, like the shrinking labor force participation rate, there will likely be a higher demand for labor than what the labor force can supply.

Initially, this information may seem promising for job seekers and the availability of future employment opportunities in Minnesota—if there are more retirees than younger workers, there should be greater opportunities for employment. However, if the labor force participation rate continues to decrease, there will not be enough workers with the skills required to replace retirees. Furthermore, Dr. Gillaspay highlights that employers may respond differently to the shrinking labor force than expected. For example, employers may simply not fill all the jobs that are vacated by retirees. In an ever-advancing technological society, many positions and duties no longer require a human component but rather can be accomplished by a machine. Alternatively, during this ongoing economic downturn employers are finding cost-savings in attrition.<sup>34</sup>

**Labor Force Growth in Minnesota: Historical and Projected, 1990-2035<sup>35</sup>**



When retirees vacate positions, employers may also respond by moving vacant jobs to other, more favorable job markets or recruiting employees from markets outside of Minnesota.

Similarly, employers are using the same strategies to increase cost savings during the recession.<sup>36</sup> For example, a current construction project in Carver County, Minnesota, is

<sup>33</sup> *Id.*

<sup>34</sup> See Powerpoint: Dr. Tom Gillaspay, *Minnesota Unemployment Rate Disparities*, MINN. DEPT. OF ADMIN. (Sept. 2011).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

demonstrating how increased mobilization and the availability of workers outside of Minnesota willing to work for a lower wage may be contributing to a loss of job opportunities for Minnesotans. *Workday Minnesota*, an online communication partnership between the Labor Education Service and the University of Minnesota, reported in early November 2011 that Mills Fleet Farm was constructing an outlet and surrounding infrastructure in Carver County—a project valued at approximately \$20.5 million—with workers from Labor Ready, a national temp agency chain headquartered in Tacoma, Washington.<sup>37</sup> Labor Ready was engaged by the general contractor on the project, Breitbach Construction. It was reported that Breitbach Construction was paying Labor Ready employees \$7.25 per hour for their work performed on the project—a figure below the going local rate for skilled tradesmen.<sup>38</sup> Mills Fleet Farm has planned projects to expand its Lakeville, Minnesota location and to build a new outlet at an undisclosed site in the north metro area.<sup>39</sup> Large companies bringing in out-of-state workers to complete long-term, multi-million dollar projects could potentially have a widespread impact in employment opportunities throughout the state of Minnesota.<sup>40</sup>

However, even if Minnesota employers who experience increased job vacancies due to retirements intend to fill such positions with Minnesota residents, younger available workers may not possess the requisite skills to fill the positions vacated by retirees.<sup>41</sup> This skill gap is of particular concern. Due to the age demographics of Minnesota, overall job growth in Minnesota until 2019 is projected to consist of mostly replacement positions, rather than newly created positions.<sup>42</sup> This is true overall and across several industries. If younger workers do not have the requisite skills to fill the replacement positions, employers will be further encouraged to move jobs out of Minnesota or recruit employees from outside of Minnesota.

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<sup>37</sup> *Local Workers sit on Sidelines while Fleet Farm Builds with Out-of-State, Low-Wage Labor*, WORKDAY MINNESOTA.ORG (Nov. 9, 2011), [http://www.workdayminnesota.org\\_index\\_php?news\\_6\\_5050](http://www.workdayminnesota.org_index_php?news_6_5050).

<sup>38</sup> *Id.*

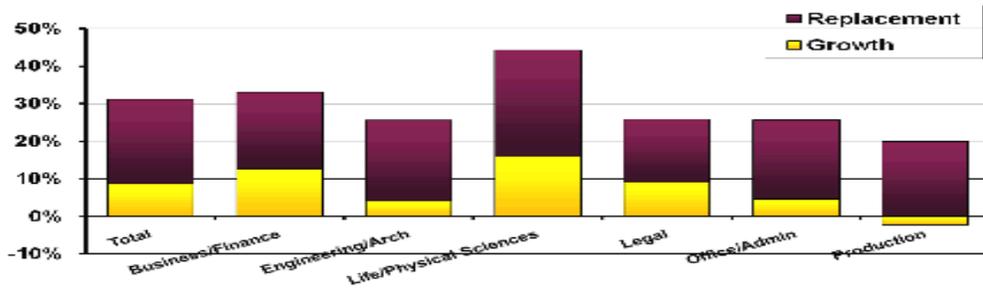
<sup>39</sup> *Id.*

<sup>40</sup> See Minimum Wage Laws in the States, United States Department of Labor (Jan. 1, 2013), *available at* <http://www.dol.gov/whd/minwage/america.htm>. (showing that although Minnesota does not have a high minimum wage (Minnesota's minimum wage, at \$6.15, is below the federal standard of \$7.25), several states have even lower minimum wages and in some cases have no official minimum wage at all. For example, Louisiana, Mississippi, Alabama, Tennessee, and South Carolina have no state minimum wage. In the same region, Georgia's \$5.15 per hour minimum wage is significantly below Minnesota's. A lower minimum wage may be attractive to Minnesota businesses looking for efficiency and cost-savings.)

<sup>41</sup> See Powerpoint: Dr. Tom Gillaspay, *Minnesota Unemployment Rate Disparities*, MINN. DEPT. OF ADMIN. (Sept. 2011).

<sup>42</sup> *Id.*

## Projected Openings in Minnesota Occupations 2009-19<sup>43</sup>



Labor unions have begun to recognize the potential risk to local employment opportunities that a growing skill gap creates. In Minnesota, union carpenters belong to the North Central States Regional Council of Carpenters (NCSRC), a regional council of the United Brotherhood of Carpenters (UBC).<sup>44</sup> The UBC has over 520,000 members nationwide and has been in existence since 1881. NCSRC is one regional council that represents 29 local unions and approximately 20,000 carpenters in Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, and the central and western half of Iowa. While the NCSRC is headquartered in St. Paul, the Minnesota Local Unions it represents are located throughout the state, including Anoka, Bemidji, Brainerd, Duluth, Grand Rapids, Mankato, Minneapolis, Rochester, St. Cloud, St. Paul, and Virginia.

In the NCSRC's Summer 2011 edition of its magazine, *North Country Carpenter*, Executive Secretary-Treasurer James E. Moore highlighted the trend in outsourcing, the risks it poses to the vitality of the Carpenters' Union and its hundreds of thousands of members, and the importance of skills training to maintain competitiveness in today's ultra-competitive global market.<sup>45</sup> To enhance skills training and to boost NCSRC's competitive advantage, NCSRC has invested in its training centers across the region. Part of these efforts includes expanding its training locations in St. Paul and Duluth.<sup>46</sup> Additionally, the NCSRC has constructed brand new training facilities in high growth potential locations, including Rochester, Minnesota. In the words of Mr. Moore, "[t]raining is our best defense and our best offense."<sup>47</sup>

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<sup>43</sup> *Id.*

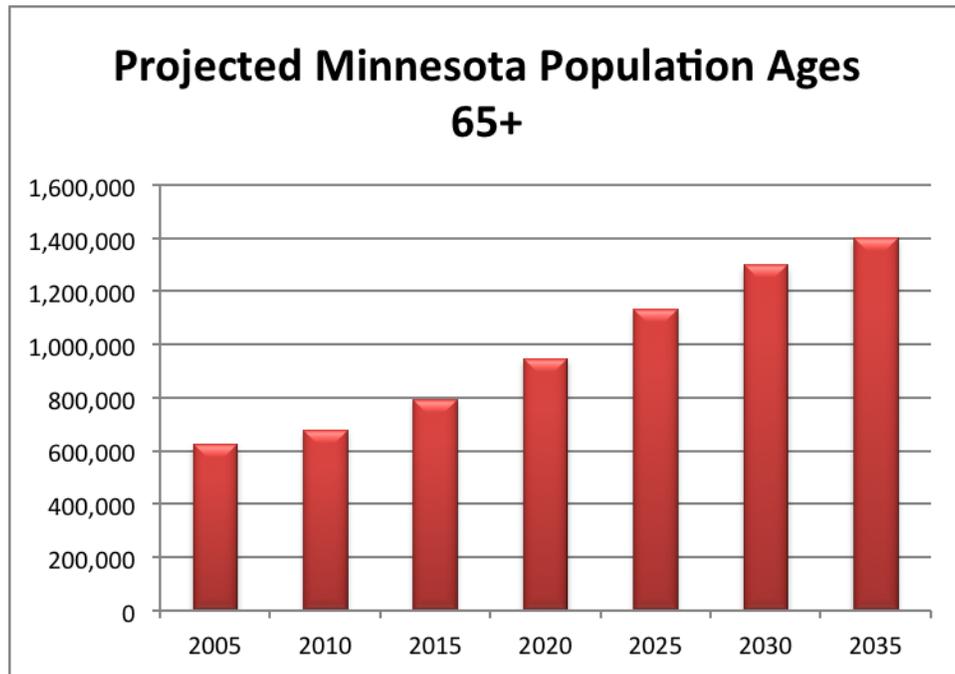
<sup>44</sup> See NORTH COUNTRY CARPENTER MAGAZINE, Summer 2011, available at <http://www.northcountrycarpenter.org>

<sup>45</sup> See James E. Moore, *Despite setbacks, your Union is working hard for you*, NORTH COUNTRY CARPENTER MAGAZINE 2 (Summer 2011), available at <http://www.northcountrycarpenter.org/magazines/summer%202011%20magazine.pdf>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Improving the skills of all union members, but particularly the young members that will continue to replace the baby boomer retirement contingent, is vital to combating unemployment in the region. Moreover, training young African Americans to become skilled tradesmen that could fill the vacant positions retirees are creating would increase their presence and competitiveness in the job market, thereby helping to narrow the racial unemployment disparity.



Minnesota State Demographic Center Projections, Adapted from Minnesota Population Projections, 2005-2035, Minnesota State Demographic Center, May 2007.

Dr. Tom Gillaspay predicted that “a giant aging wave will overtake Minnesota in the coming decade.”<sup>48</sup> The “giant aging wave” includes projections such as the following: The number of Minnesotans ages 55 to 69 will increase by approximately 239,000 by 2017.<sup>49</sup>

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<sup>48</sup> Media Release, Dept. of Admin., The Aging ‘Baby Boomers’ are Here (June 8, 2007), *available at* <http://www.demography.state.mn.us/resource.html?Id=19242>.

<sup>49</sup> *Id.* (This is a 2007 projection for the “coming decade”, which is about half of the total population growth expected, and between 2005 and 2035, Minnesota’s over-65 population will grow by approximately 770,000, while the under 65 group will grow by roughly 10 percent. It is projected that by 2035, the population that is over 65 years old will be approximately 22 percent; this is nearly double their current 12 percent representation.)

This giant aging wave is thus directly tied to unemployment. Due to this issue, Minnesota needs to ensure that its younger citizens are adequately prepared to fill the needs of employers that a rush of retirements will create. As Dr. Tom Gillaspay points out:

One of the things that we're beginning to see is what appears to be a growing mismatch between skill level that the labor market -- the labor force has to offer versus the skill level that employers are looking for. And that differential is driving some of the current unemployment rate. That is, in my opinion, likely to be exacerbated substantially throughout the decade. And the focus on ever increasing levels of education and skill development will be even greater as we move forward into the future. This is a rapidly changing situation and one, I think, that really merits watching closely.<sup>50</sup>

This statement shows the importance of ensuring that Minnesota's young African American population is strategically positioned—largely by skills training—so that they are able to step into those vacancies, thereby increasing their presence in the labor force and narrowing the racial disparity in unemployment.

### Increasing Diversity in Minnesota

In addition to a high aging population, Minnesota's population is becoming significantly more diverse. While based on the 2010 census, Minnesota's population is predominantly White, the populations of African Americans, Asians, and Hispanics grew significantly between 2000 and 2010.<sup>51</sup>

As of 2010, Whites made up the largest portion of the population in Minnesota at 85.3 percent.<sup>52</sup> African American was the next largest population at 5.2 percent, followed by Hispanic or Latino at 4.7 percent, Asian at 4.0 percent, Two or More Races at 2.0 percent, Some Other Race alone at 1.9 percent, and American Indian and Alaska Native at 1.1 percent.<sup>53</sup>

What is more interesting than the *current* racial make-up of Minnesota's population is the *changing* make-up of Minnesota's population. White alone, while the largest percentage of the population, is the smallest growing population by far. Between the years of 2000 to 2010, White alone grew by only 2.8 percent. In stark contrast to that

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<sup>50</sup> Tom Gillaspay, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 16, 17 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights)

<sup>51</sup> See Resource Record: Minnesota Population by Race and Hispanic Ethnicity, DEPT. OF ADMIN., <http://www.demography.state.mn.us/resource.html?Id=31946> (last updated Mar. 11, 2011).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

growth statistic, four racial groups grew by more than 50 percent between the same time period, with African Americans growing the most at 59.8 percent.<sup>54</sup>

**STATE POPULATION BY RACE MINNESOTA: 2010**

	<b>Percent Population</b>	<b>of</b>	<b>Change 2000-2010</b>
<b>White alone</b>	85.3%		2.8% ↑
<b>Black or African American alone</b>	5.2%		59.8% ↑
<b>American Indian and Alaska Native alone</b>	1.1%		10.8% ↑
<b>Asian alone</b>	4.0%		50.9% ↑
<b>Native Hawaiian and Other Pacific Islander alone</b>	--		8.9% ↑
<b>Some Other Race alone</b>	1.9%		56.5% ↑
<b>Two or More Races</b>	2.4%		51.2% ↑

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<sup>54</sup> *Id.* (Adapted from State Population by Race Minnesota: 2010 table)

**STATE POPULATION BY HISPANIC OR LATINO ORIGIN MINNESOTA: 2010**

	<b>Percent of Population</b>	<b>Change 2000-2010</b>
<b>Hispanic or Latino</b>	4.7%	74.5% ↑
<b>Not Hispanic or Latino</b>	95.3%	5.8% ↑

Source- Adapted from State Population by Race Minnesota: 2010 table

The trends in Minnesota’s population make-up are expected to continue. While the majority of Minnesota’s population currently falls into the “White alone” category, Martha McMurry, from the Minnesota State Demographic Center, projects that “the numbers of Latino, Black, and Asian Minnesotans [will] more than double over the next 30 years,” and “all regions of the state will become more racially and ethnically diverse than they are now.”<sup>55</sup> The African American population in particular is expected to experience significant growth—from 218,400 in 2005 to 454,400 in 2035. While all regions of Minnesota will see growth in the African American population, growth will be especially rapid and significant in the Twin Cities area; McMurry projects that approximately 83 percent of the state’s African American population will live in the Twin Cities region in 2035.<sup>56</sup>

Projections in the state’s racial and ethnic demographic make-up mean that the current racial disparity in unemployment and poverty is at risk of growing exponentially larger over the next couple of decades.<sup>57</sup>

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<sup>55</sup> Martha McMurry, *Minnesota Population Projections by Race and Hispanic Origins, 2005 to 2035*, MINNESOTA DEPARTMENT OF ADMINISTRATION (January 2009), available at <http://www.demography.state.mn.us/documents/MinnesotaPopulationProjectionsbyRaceandHispanicOrigins2005to2035.pdf> (providing detailed population projections and narrative on the expected changes in the make-up of Minnesota’s population. McMurry explains that the White alone population is older on average than other racial groups in Minnesota, has essentially no in-migration, and has a slightly lower fertility rate. These factors combined mean that the White alone segment of the population will see relatively little growth over the next 30 years—McMurry predicts a 9 percent increase. In contrast, the total minority population in Minnesota is expected to grow by approximately 112 percent over the next 30 years.).

<sup>56</sup> *Id.*

<sup>57</sup> Mark Brinda, Testimony before the Minnesota Advisory Committee to the U.S. Commission of Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 26 (Sept. 15, 2011)(transcript *(footnote continued)*)

Thus, if the root causes of the unemployment disparity are not immediately addressed, the state of Minnesota, and the Twin Cities Metro in particular,<sup>58</sup> will face multiple adverse conditions in the future—not just in unemployment, but also through increasing disparities in health, education and incarceration rates as well as increasing rates of poverty.<sup>59</sup>

## **DIFFERING RATES OF EDUCATIONAL ATTAINMENT PLAY A ROLE IN UNEMPLOYMENT DISPARITIES**

Ensuring access to equal education is an important aspect of closing the unemployment gap between African Americans and Whites. The general understanding is that increased education leads to increased employment opportunities and a higher standard of living, essentially creating a cycle of continuous improvement for families and communities. Unfortunately, for African American children in Minnesota, access to high-quality educational opportunities is often limited. This “opportunity gap” begins as early as elementary school and may impact high school graduation rates and college attendance. Without the benefit of a high-quality education, it is difficult to find employment opportunities that pay a living wage. This section will discuss educational inequity in Minnesota, how it contributes to the racial disparities in unemployment, and how institutional changes may help to reduce the racial disparities in unemployment in the state.

Evidence suggests that when compared to other parts of the country, Minnesota has an above average public education system. However, educational attainment for African American Minnesotans is below average.<sup>60</sup> In Minnesota, African American children lag

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available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “Symptomatic of and directly related to unemployment status is median household and individual earnings. The trend of these statistics offers a similar picture of disparities. White residents in Minneapolis have...three times the per capita income as Blacks, American Indians, Hispanic residents, and 2.5 times the household income of Blacks and American Indians. These low, yearly earnings per capita and household earnings point to important questions of what types of jobs are minority residents getting, how long are they attached to those jobs, are there better opportunities within these jobs. Further, it points to inequity within the large labor force where there is a lack of minority individuals in middle and high paying professions for our Twin Cities resulting in short-term financial instability for these minority residents as well as long-term wealth creation and family economic opportunity loss.”).

<sup>58</sup> *Id.* at 24,25 (contending that the City of Minneapolis is already experiencing tremendous disparities in unemployment amongst People of Color by stating “[w]ith a labor force of nearly 60,000 in Minneapolis, about 9,000 minority residents find themselves unemployed. This produced about a 15 percent unemployment rate. When compared to the White population, which has a similar 9,000 residents unemployed, it has a 3 times larger labor force within that 6 percent. So massive and staggering statistics in that case.”).

<sup>59</sup> *Id.* at 25,26 (stating that “simply put, a large part of our community is not engaged in the economy, which in turn contributes to and re-enforces other disparities which we see in the debate is talked about.”).

*(footnote continued)*

far behind White children in reading proficiency, math proficiency and high school graduation rates. The 2012 results of the Minnesota Comprehensive Assessment clearly demonstrate this difference. The data show that nearly 50 percent of all African American and Hispanic students are not reading at grade level.<sup>61</sup> In comparison, just over 80 percent of White students showed proficiency in reading.<sup>62</sup> Alarming, across all grade levels the disparity between African American and White reading scores increased from 28.2 percentage points in 2011 to 29.2 percentage points in 2012.<sup>63</sup> In mathematics, the disparity between African American and White student scores increased from 34.2 percent in 2011 to 35.8 percent in 2012.<sup>64</sup> The data also show that more than 60 percent of African American and Hispanic students were not proficient in mathematics.<sup>65</sup> On the other hand, just over 30 percent of White students were not proficient in mathematics. With such disparities in proficiency rates, it is not surprising that in 2010, the four-year graduation rate for White students was 83 percent and the graduation rate for African American students was just 47 percent.<sup>66</sup>

There are many theories about what causes the educational inequity in Minnesota. However, one major cause often discussed is the higher rate of poverty in African American communities. In 2010, 46 percent of African American children under the age of 18 lived in poverty, compared to 9 percent of White children.<sup>67</sup> On a national level, African American students are more likely than their White peers to attend a high-poverty school. In fact, an estimated one third of African American students attend a high-poverty school, in contrast to 14 percent of White students. Attending schools with a high poverty rate has implications for students' likelihood of graduating from high school on time; as approximately 68 percent of students attending a high-poverty school

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<sup>60</sup> *Minnesota's Future: World-Class Schools, World-Class Jobs*, ITASCA PROJECT 3, <http://www.theitascaproject.com/priorities.htm> (follow Minnesota's Future hyperlink) (last visited Feb. 12, 2013).

<sup>61</sup> *Minnesota Comprehensive Assessment 2012: A MinnCAN Report*, MINNCAN.ORG 3 (2012), <http://minncan.org/sites/minncan.org/files/2012MCA-Analysisi.pdf> (last visited Feb. 12, 2013).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Minn. Office of Higher Educ., *Minnesota Measures 2012 Report on Higher Education Performance* 7 (2011), <http://www.ohe.state.mn.us/pdf/MinnesotaMeasures2012.pdf>. [hereinafter *Minnesota Measures*].

<sup>67</sup> *Minnesota Kids Count 2012: Children Across Minnesota*, CHILDREN'S DEFENSE FUND 16 (2012), available at [http://www.cdf-mn.org/sites/2012\\_publications/kc/minnesota-kids-count-2012.pdf](http://www.cdf-mn.org/sites/2012_publications/kc/minnesota-kids-count-2012.pdf).

graduated in four years, whereas 91 percent of students attending a low-poverty school graduated in four years.<sup>68</sup>

Low graduation rates can have long-term effects on the lives of students. Youths who do not graduate from high school are at higher risk of unemployment, incarceration, and substance abuse.<sup>69</sup> Importantly, obtaining a high school degree also directly affects enrollment in post-secondary education. In Minneapolis specifically, 78 percent of Whites have some education beyond high school, while only 43 percent of African American residents of Minneapolis have some education beyond high school.<sup>70</sup> Thus, closing the disparity in dropout rates between Whites and African Americans is an important step in improving the disparity in unemployment rates in the Metro area.

In 2007-2011, 51 percent of White high school graduates enrolled in postsecondary institutions. During that same time period, 47 percent of African American high school graduates enrolled in postsecondary institutions.<sup>71</sup> These numbers seem encouraging; however, the majority of White students are enrolled full time in 4-year undergraduate institutions, whereas the majority of African American students are enrolled part-time in 2-year undergraduate institutions.<sup>72</sup> (See chart below.) These differences contribute to longer term disparities in economic opportunity and future employment prospects. Furthermore, they may help to better explain the unemployment disparity being experienced in Minnesota.

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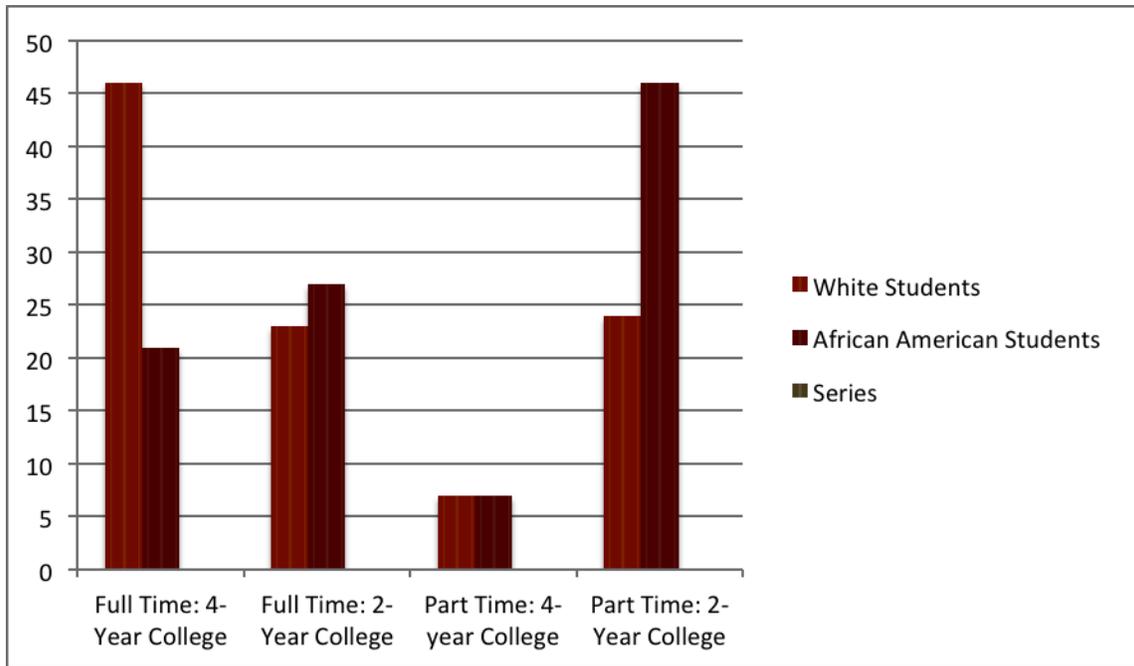
<sup>68</sup> Project Graduation: Latest Snapshot of High-Poverty U.S. Schools, NAT'L EDUC. ASS'N. (2010), [http://www.nea.org/assets/docs/HE/ProjectGraduation\\_Snapshot2010.pdf](http://www.nea.org/assets/docs/HE/ProjectGraduation_Snapshot2010.pdf) (last visited Feb. 13, 2013).

<sup>69</sup> Henry M. Levin & Cecilla E. Rouse, *The True Cost of High School Dropouts*, N.Y. TIMES, Jan. 25, 2012, available at <http://www.nytimes.com/2012/01/26/opinion/the-true-cost-of-high-school-dropouts.html>.

<sup>70</sup> Mark Brinda, Testimony before the Minnesota Advisory Committee to the U.S. Commission of Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 27-28 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>71</sup> Minn. Office of Higher Educ., Minnesota Measures 2012 Report on Higher Education Performance 11 (2011), <http://www.ohe.state.mn.us/pdf/MinnesotaMeasures2012.pdf>.

<sup>72</sup> *Id* at 26.



There is also a difference between Whites and African Americans when it comes to degrees of educational attainment. In 2011, 33 percent of White Minnesotans over 25 had attained a bachelor’s degree or higher and 44 percent had attained an associate’s degree or higher.<sup>73</sup> In contrast, 18 percent of African American Minnesotans over 25 had attained a bachelor’s degree or higher and 26 percent had attained an associate’s degree or higher.<sup>74</sup> These statistics seem to show that although White and African American Minnesotans are enrolling in postsecondary education at similar rates, these groups do not have a similar rate of completion.

In addition to affecting unemployment rates, educational attainment has serious impacts on one’s earning potential. In 2012, the U.S. Census Bureau published data reporting the median earnings for workers 25 years and over by educational attainment.<sup>75</sup> Data revealed that those with an associate’s degree earned over 170% more than those without a high school diploma.<sup>76</sup> In addition, those with a bachelor’s degree earned nearly 150% more than those with an associate’s degree.<sup>77</sup> This data further supports the

<sup>73</sup> *Id.* at 66.

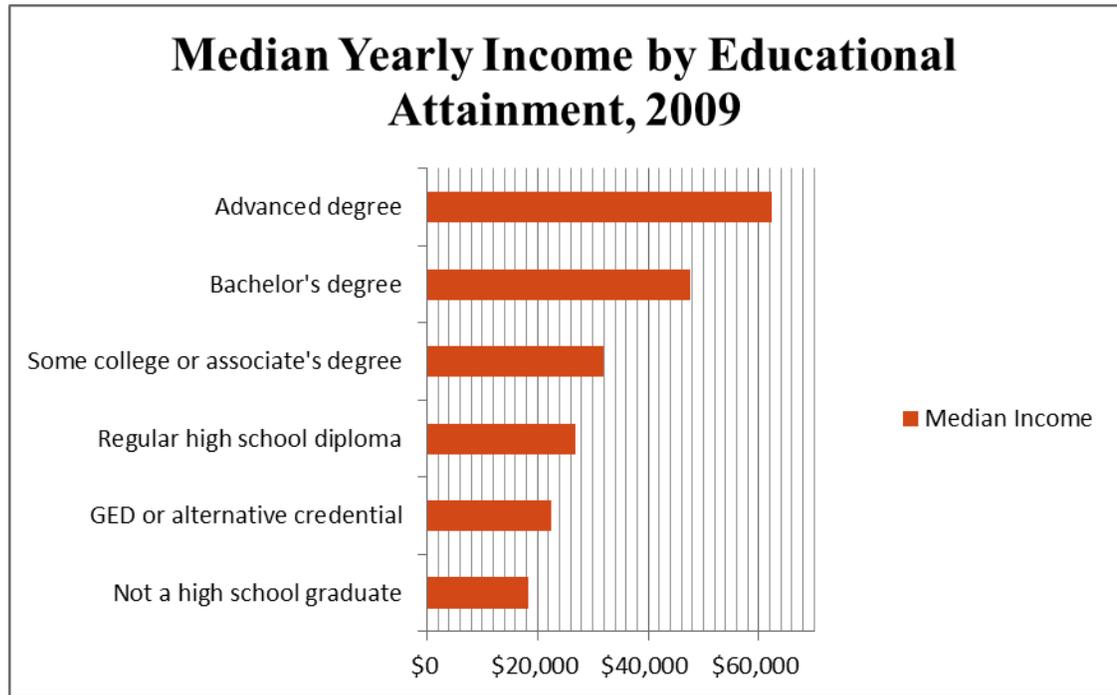
<sup>74</sup> *Id.*

<sup>75</sup> Camille L. Ryan & Julie Siebens, *Educational Attainment in the United States: 2009*, UNITED STATES CENSUS BUREAU 1 (February 2012), available at <http://www.census.gov/prod/2012pubs/p20-566.pdf>.

<sup>76</sup> *Id.* at 13.

<sup>77</sup> *Id.*

notion that limited access to higher levels of educational attainment can have serious effects on the socio-economic status of individuals, their future employability and their earning potential throughout their lives.<sup>78</sup>



Unemployment rate in 2011 (percent)	Education attained	Median weekly earnings in 2011 (dollars)
2.50%	Doctoral degree	\$ 1,551
2.40%	Professional degree	\$ 1,665
3.60%	Master's degree	\$ 1,263

<sup>78</sup> *Mind the Gap: Reducing Disparities to Improve Regional Competitiveness in the Twin Cities*, BROOKINGS 4 (2005), available at [http://www.brookings.edu/~media/research/files/reports/2005/10/cities%20sohmer/20051027\\_mindthegap.pdf](http://www.brookings.edu/~media/research/files/reports/2005/10/cities%20sohmer/20051027_mindthegap.pdf). (Stating that “Low-income adults have low levels of educational attainment, and educational levels, which in turn, affects incomes. In the Twin Cities region, of all adults who earn less than \$17,500, only 26 percent have a college degree or higher. Meanwhile, more than half—53 percent—of middle class adults earning between \$35,000 and \$79,999 are college educated.”).

4.90%	Bachelor's degree	\$	1,053
6.80%	Associate's degree	\$	768
8.70%	Some college, no degree	\$	719
9.40%	High-school diploma	\$	638
14.10%	Less than a high school diploma	\$	451

The fact that White Minnesotans generally experience higher levels of educational attainment and have a lower unemployment rate than African American Minnesotans suggests that increasing educational opportunities for African Americans in Minnesota would eliminate the unemployment disparity that exists. However, while increasing access to education does increase the likelihood that African Americans will obtain gainful employment, disparities still exist between these two races.<sup>79</sup> Recent data show that even when the level of education between Whites and African Americans is equal, African Americans are still significantly more likely to be unemployed than their White counterparts. Patricia Brady offers one perspective regarding this issue:

Unidentified and unexamined racial bias in companies that lead employers to not hire a credentialed candidate from ethnic and cultural communities, these have the obvious impact of limiting workforce diversity, preventing employers with access to a wide range of employees for innovation, skills and change. And the policies that employers have on their books that are probably very old that are around hiring and retention, who gets hired, who is retained, and who is promoted, probably need to be examined on a regular basis.<sup>80</sup>

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<sup>79</sup> See Lea Hargett, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 76 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “[m]any scholars have challenged conventional explanations and approaches for dealing with racial economic inequality as it relates to black unemployment, including the ambiguous relationship between social capital and, quote-unquote, ghetto underemployment, and the advocacy of education, as opposed to job creation, as the key to ameliorating black poverty. Various publications have explored the difficulty of college-educated African-Americans from getting hired and even garnering an interview in the professional world.”).

<sup>80</sup> Patricia Brady, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 132,133 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

For example, African Americans in Minnesota with a bachelor's degree have an unemployment rate of 5 percent, while White Minnesotans with a bachelor's degree have an unemployment rate of 2.5 percent.<sup>81</sup> This statistic demonstrates that while education does significantly improve access to gainful employment, it does not completely eliminate the racial disparity. Based on the data, one could infer that hidden biases and racial discrimination may be playing a role in the unemployment disparity that exists among African American and White Minnesotans in the upper echelon of educational attainment.<sup>82</sup> As Dr. Mark Brinda noted:

...[W]e are our nation's leader in disparities pointing to a structural bias within our hiring practices. I think it's important to note that the Twin Cities Metropolitan Area is only 50 years removed from being known as one of the most anti-Semitic cities within our business community and was closed to outsiders, i.e. Jews. And while this trend thankfully has changed for the Twin Cities Jewish communities and formal job discrimination has ended, it does not appear to be the same trend with this insider/outsider in the workforce when we look at blacks in our community, Asian-Americans and Hispanics. However, today it seems to be, from my perspective, much more systemic, structural and embedded within institutions making it harder to identify and more easily denied.<sup>83</sup>

### **Educational and Vocational Training Opportunities**

Nationwide, a variety of programs are in place that attempt to increase access to employment opportunities instead of only increasing access to education. Dr. Mark Brinda, Workforce Manager for the City of Minneapolis Employment and Training

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<sup>81</sup> See generally Powerpoint: Algernon Austin, “*Working Twice as Hard...*”: *African Americans and the American Labor Market* at the Program on Race, Ethnicity and the Economy (Sept. 1, 2010), available at [http://www.metrostability.org/efiles/Austin\\_MCF.pdf](http://www.metrostability.org/efiles/Austin_MCF.pdf).

<sup>82</sup> Patricia Brady, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 127,128 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “there are discriminatory hiring practices that are in the labor market. And some of those include racism. Probably, I think the first one is – I think that is a real reality in our labor market. There are environmental barriers in the labor market. Human resources policies that are across government and the private sector that also create -- or help to create some of the disparities and ability – or inability of people to get and keep good jobs, and limited or no access to networks that feed into good jobs by communities of color, public policy coupled with a lack of necessary social and political will to drive change [...]”).

<sup>83</sup> *Id.* at 132-133 (Stating that “Unidentified and unexamined racial bias in companies that lead employers to not hire a credentialed candidate from ethnic and cultural communities, these have the obvious impact of limiting workforce diversity, preventing employers with access to a wide range of employees for innovation, skills and change. And the policies that employers have on their books that are probably very old that are around hiring and retention, who gets hired, who is retained, and who is promoted, probably need to be examined on a regular basis.”); See also Mark Brinda, Testimony before the Minnesota Advisory Committee to the U.S. Commission of Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 29 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

Program, reports that, while no one model has been proven to be most effective, a variety of programs are effective in increasing employment.<sup>84</sup> In Minnesota, there are a number of organizations that are working to provide African American students access to high-quality education in hopes of closing the “opportunity gap” that currently exists. These programs include job training and education, industry-specific training, and youth programs. Two such organizations will be highlighted in this report.

The first of these is the Minneapolis Urban League (MUL). MUL has a number of programs which help students become ready for both college and careers.<sup>85</sup> The MUL also operates the Urban League Academy High School, a contracted alternative high school in the Minneapolis Public School system. Urban League Academy High School provides individualized attention and instruction to students who have fallen behind in the credits needed to graduate from high school. They also partner with local state and community colleges to help students with the transition from high school to college. MUL also has an equivalent school for grades K-8 called the Urban League Academy Elementary School, which focuses on providing a structured, standard-based education to underserved African American and other students of color. Because enrollments at both the high school and elementary school are limited, MUL also has Project Ready, an after-school program for grades 6-8 and 9-12. These programs are open to all students in the Twin Cities metropolitan area. For grades 6-8, the program focuses on academic achievement, college preparation, and cultural awareness. For grades 9-12, the program prepares students and their parents for college entry. Once a year, Project Ready also selects some students to go on a tour of historically Black colleges and universities.

MUL also has a number of programs focused on employment. MUL’s Workforce Solutions program focuses primarily on services for adults who are entering or re-entering the workforce. MUL’s Gateway to Opportunity Resource Center trains community members in computer skills, resume development, job applications and other skills important for gaining employment. Community members can also gain access to one-on-one job counseling, employment leads, resume preparation, and interview coaching. MUL’s Labor Education Advancement Program (LEAP) works to prepare people of color, women and young adults to become employed in building and construction trades.

In August 2010, MUL received a \$150K grant from the Minnesota Department of Transportation (MnDOT) to create a partnership with trade unions, prime contractors, and MnDOT.<sup>86</sup> This partnership is modeled after the national program BIGSTEP, which has been highly successful at increasing the number of people of color working in major industries. The grant was part of MnDOT’s larger strategy to enhance placement of

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<sup>84</sup> Id. at 14.

<sup>85</sup> See generally Minnesota Urban League, <http://mul.org/> (last visited Feb. 27, 2013).

<sup>86</sup> *An Unprecedented Partnership*, MINNEAPOLIS URBAN LEAGUE NEWSLETTER 4-1 (Fall 2010), at 4.

women, people of color, and veterans into existing training programs and other MnDOT-sponsored projects.

The second organization that will be discussed briefly is Summit Academy OIC in North Minneapolis. This is an organization that is focused on community based vocational training and job placement.<sup>87</sup> Through Summit Academy, community members can receive high-quality training in specialized areas of technology, construction, and healthcare, as well as supportive services such as career counseling and planning. Summit Academy also partners with local employers to fill job vacancies with qualified workers. One of their pre-apprentice programs, 100 Hard Hats, provides students with job readiness skills in the construction trade through both classroom time and hands-on experience. Their youth programs are designed to ensure that low-income children graduate from high school, have the opportunity to pursue post-secondary education, and are prepared for their future roles as leaders. Summit Academy also offers a program called Post-Secondary Enrollment Option (PSEO) for high school juniors and seniors. PSEO provides students with the opportunity to learn a trade at a post-secondary vocational school while also earning high school credit.

Both the Minneapolis Urban League and Summit Academy are examples of community initiatives working to address unemployment in the African American community. These vocational and skills training programs help bridge the gap created by unequal access to quality education.

The disparity in educational attainment between African Americans and Whites in Minnesota is a major issue that must be addressed to ensure that a well-educated population of African Americans is poised to compete for employment opportunities, both now and in the future. In addition, the African American community can use their education and skills to create job opportunities in their community through business ownership and social entrepreneurship.

## **SMALL, MINORITY-OWNED BUSINESSES AND BARRIERS TO GROWTH AND EXPANSION**

Yet a few interrelated issues remain under-discussed and under-examined when it comes to Black unemployment: The growing significance of small businesses as a source of employment and how the hiring practices of minority and immigrant-owned businesses may inform Black unemployment rates.

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<sup>87</sup> See generally Summit Academy OIC, <http://www.saoic.org/> (last visited Feb. 29, 2012).

-Dr. Tamara K. Nopper, Adjunct Assistant Professor at the University of Pennsylvania and Temple University<sup>88</sup>

In addition to increasing educational attainment for African Americans in Minnesota, another possible avenue for addressing the racial disparity in unemployment is to increase support for the growth and development of minority-owned small businesses.<sup>89</sup> If properly resourced, minority-owned small businesses could provide employment opportunities within the African American community, promote increased economic development, and serve as a tool for community revitalization. This means that given the chance, minority-owned small businesses could play a major role in helping to close the disparity in unemployment between White and African American Minnesotans.<sup>90</sup> However, even with all of the benefits these businesses bring, they often face barriers that make sustained growth and development a challenge. This section will explore the characteristics of small business entrepreneurship, the benefits of these businesses in local communities, and challenges faced by minority small business owners in Minnesota.

The most recent report of the Small Business Association Office of Advocacy showed that African Americans owned roughly 5.0 percent of all U.S. firms, 1.8 percent of employer firms, and 5.9 percent of sole proprietorships. In stark contrast, Whites owned 82.9 percent of all U.S. firms, 88.0 percent of employer firms, and 81.4 percent of sole

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<sup>88</sup> Tamara Nopper, *Black Unemployment in the Multiracial Small Business Industry*, BANDUNG 1955 (January 13, 2011), <http://tamaranopper.com/2011/01/13/black-unemployment-in-the-multiracial-small-business-industry>.

<sup>89</sup> See Lea Hargett, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 77,78 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “[...] small businesses, as reported by the SBA, create most of the nation's new jobs, employ about half of the nation's private sector workforce, and provide half of the nation's non-farm, private real gross domestic product. Thus, the recession's impact on small business owners also has implications for employment rates. There are, of course, different types of jobs available in small and micro firms. The growing significance of the small business market for job seekers means that we need to consider how patterns of this industry may relate to the crisis of black unemployment.”).

<sup>90</sup> See Dr. Samuel Myers, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 71, 72 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “One thing that we need to know is the role that self-employment and minority-owned businesses and entrepreneurship plays in being a buffer to unemployment. Typically, in higher skilled individuals, people who lose their jobs put up shingles and become entrepreneurs and self-employed. That helps to diminish the immediate impact on unemployment insurance. But if I'm trying to understand what needs to be done in order to narrow the gap between minorities and non-minorities, I need to look at what's going on in the formation of businesses and the opportunities to form sole proprietorships.”).

proprietorships.<sup>91</sup> Since African Americans make up 13.1% of the U.S. population they are underrepresented in business ownership.<sup>92</sup>

The number of minority-owned businesses has been on the rise – increasing 46 percent to 5.8 million between 2002 and 2007.<sup>93</sup> Although the number of minority-owned businesses is growing rapidly, there is still a great disparity in the size and earning potential of these businesses in comparison to businesses owned by Whites. According to the most recent survey conducted by the U.S. Census Bureau, the average gross receipts for a minority-owned business was \$179,000, whereas the average gross receipts for a White-owned business was \$490,000.<sup>94</sup> Importantly, minority-owned firms employ more than 5.9 million people.<sup>95</sup> Although generally smaller in scale than White-owned businesses, minority-owned businesses are clearly a large portion of our economy. Supporting the growth of minority-owned businesses could be an important part of aiding in the recovery of the U.S. economy on the whole while also ensuring economic competitiveness within the Twin Cities region.

Minority-owned businesses have the potential to impact racial disparities in unemployment through their hiring practices.<sup>96</sup> Studies show that minority-owned businesses are more likely to hire workers from inner-city neighborhoods than non-minority businesses. Additionally, small, African American-owned businesses are more

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<sup>91</sup> Ying Lowrey, *Minorities in Business: A Demographic Review of Minority Business Ownership*, SBA OFFICE OF ADVOCACY 5 (April 10, 2007), <http://archive.sba.gov/advo/research/rs298tot.pdf>.

<sup>92</sup> Minnesota QuickFacts from the U.S. Census Bureau, UNITED STATES CENSUS BUREAU (Jan. 10, 2013, 3:06PM), available at <http://quickfacts.census.gov/qfd/states/27000.html>.

<sup>93</sup> *Survey of Business Owners*, U.S. CENSUS BUREAU (2007), available at <http://www.census.gov/econ/sbo/07menu.html>.

<sup>94</sup> *Id.*

<sup>95</sup> *Census Bureau Reports Number of Minority-Owned Firms Increased at More Than Double the Rate of All U.S. Businesses From 2002 to 2007*, UNITED STATES CENSUS BUREAU (June 7, 2011), [http://www.census.gov/newsroom/releases/archives/business\\_ownership/cb11-103.html](http://www.census.gov/newsroom/releases/archives/business_ownership/cb11-103.html).

<sup>96</sup> *But see* Dr. Samuel Myers, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 71, 72 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “I’ve heard the same statistics that minority firms produce large number of employees, of minority employees. And I’ve read there’s a mistake in the statistics. And it says that the right statistics are that minority firms have a large share of minority employees. They don’t actually produce the largest number of employees. The vast majority of minority firms have zero employees. Moreover, the failure rate of minority firms is considerably high compared to white firms. So we need to be really careful about the role that we want the --the responsibility that’s placed on the shoulders of minority firms regarding unemployment.”).

likely to hire other people of color than small, White-owned businesses.<sup>97</sup> Because of this phenomenon small, minority-owned businesses are uniquely positioned to help reduce the racial disparity in unemployment in Minnesota. Therefore, reducing barriers to establishing and growing minority-owned businesses is an important part of reducing or eliminating the racial disparity in unemployment in Minnesota.

### **Supporting the Growth and Sustainability of Minority Owned Businesses**

Although the existence of minority-owned businesses can result in growth and economic prosperity for communities of color, minority-owned businesses face some common challenges that hinder their growth and sustainability. According to Lea Hargett:

In relation to disparities and business ownership, minority-owned firms are smaller on average than non-minority owned firms with lower gross receipts, survival rates, employment and payrolls. The disparities are extremely large. For example, Hispanic-owned firms have an average annual gross receipts level that is one-third the non-minority level. The African-American owned firms have an average annual gross receipts level that is one-sixth the non-minority level. A growing number of studies indicate that limited financial, human and social capitals, as well as racial discrimination, are responsible for these disparities in business performance. Inadequate access to financial capital is a particularly important constraint limiting the growth of African-American-owned businesses.<sup>98</sup>

In addition, there are at least three areas in which increased support is needed to help reduce the effects these challenges have on minority-owned businesses. The proposed areas of support are: 1) increasing access to financial capital; 2) educating business owners about best practices; and 3) building the capacity for growth and expansion.<sup>99</sup>

### **Increasing Access to Financial Capital**

Access to financial capital is essential for building a successful business. Thus, it is one of the most important factors that may contribute to the growth and sustainability of minority-owned businesses.<sup>100</sup> However, minority-owned businesses are likely to face a multitude of challenges when seeking loans from traditional lending institutions. A recent study by the Minority Business Development Agency showed that minority-

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<sup>97</sup> See Lea Hargett, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 86 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>98</sup> *Id.* at 78-79.

<sup>99</sup> *Id.*

<sup>100</sup> *Disparities in Capital Access between Minority and Non-minority Owned Businesses*, MINORITY BUS. DEV. AGENCY 1 (Jan. 2010), <http://www.mbda.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf> [hereinafter *Disparities*].

owned firms are less likely to receive loans than non-minority firms,<sup>101</sup> minority-owned firms receive lower loan amounts than non-minority firms,<sup>102</sup> minority-owned firms are more likely to be denied loans,<sup>103</sup> minority-owned firms are more likely to not apply for loans due to rejection fears<sup>104</sup> and minority-owned firms pay higher interest rates on business loans.<sup>105</sup>

At the root of many of these challenges seems to be discriminatory lending practices. The Minority Business Development Agency collected data from numerous studies demonstrating that minority-owned business owners “experience higher loan denial probabilities and pay higher interest rates than White-owned businesses even after controlling for differences in credit-worthiness, and other factors.”<sup>106</sup>

This troubling data is a key insight into the limited access African American business owners have in obtaining financial capital. According to a 2010/2011 Minnesota Black Chamber of Commerce survey, financial capital was identified as the number one barrier for success of African American-owned businesses.<sup>107</sup> Nationally, access to funds and

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<sup>101</sup> *See id.* at 5 (Stating “Among firms with gross receipts under \$500,000, 23 percent of non-minority firms received loans compared to 17 percent of minority firms. Among high sales firms (firms with annual gross receipts of \$500,000 or more), 52 percent of non-minority firms received loans compared with 41 percent of minority firms according to 2003 data from the Survey of Small Business Finances.”).

<sup>102</sup> *See id.* (Stating, “The average loan amount for all high sales minority firms was \$149,000. The non-minority average was more than twice this amount at \$310,000. Conditioning on the percentage of firms receiving loans, the average loan received by high sales minority firms was \$363,000 compared with \$592,000 for non-minority firms.”).

<sup>103</sup> *See id.* (Stating, “Among firms with gross receipts under \$500,000, loan denial rates for minority firms were about three times higher, at 42 percent, compared to those of non-minority-owned firms, 16 percent. For high sales firms, the rate of loan denial was almost twice as high for minority firms as for non-minority firms.”).

<sup>104</sup> *See id.* (Stating, “Among firms with gross receipts under \$500,000, 33 percent of minority firms did not apply for loans because of fear of rejection compared to 17 percent of non-minority firms. For high sales firms, 19 percent of minority firms did not apply for loans because of a fear of rejection compared to 12 percent of non-minority firms.”).

<sup>105</sup> *See id.* (Stating, “For all firms, minority firms paid 7.8 percent on average for loans compared with 6.4 percent for non-minority firms. The difference was smaller, but still existed between minority and non-minority high sales firms.”).

<sup>106</sup> *Id.* at 21.

<sup>107</sup> *See* Lea Hargett, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 82 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

lending opportunities has been limited in the aftermath of the recession due to more stringent lending practices.<sup>108</sup>

Access to capital for minority-owned businesses is also limited by the stringent lending practices found across the nation. According to a report by the Kaufmann Foundation, “the Federal Reserve recently reported that 65 percent of domestic banks have tightened lending standards since July 2008. More than 70 percent said they were charging more interest for loans. This impacts cash flow and stunts the expansion of minority businesses, resulting in decreased growth and capacity and therefore, fewer jobs generated.”<sup>109</sup> Limited access to financial capital challenges a business owner’s ability to obtain the capital needed to grow and strengthen the business.

Additionally, gaining access to financial capital is a key determinative factor of whether a business can grow and create new jobs. A good illustration of this is TLC Precision Wafer, an African American-owned business in North Minneapolis. TLC Precision Wafer is a successful high-tech business that “develops, manufactures and tests high quality, III-V materials and Millimeter-Wave Monolithic Integrated Circuits...for commercial and government applications.”<sup>110</sup> Today, this company employs 15 full-time employees. However, it has the potential to create additional new jobs if adequate funding were made available. With additional funding, Hargett stated that TLC would create 10 new jobs immediately and employ up to 90 employees by the end of the first year.<sup>111</sup> This is just one example of the benefits that greater access to financial capital could have for African American-owned businesses.

### **Increasing Educational Opportunities**

According to the Minority Business Development Association, lower levels of educational attainment of African Americans are a limiting factor when it comes to business ownership.<sup>112</sup> At least six percent of the disparity between businesses owned by African Americans and those owned by Whites can be attributed to lower levels of

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<sup>108</sup> Joyce M. Rosenberg, *Still No Boom in Small Business Lending*, DAILYREPORTER.COM (April 6, 2002), <http://dailyreporter.com/2012/04/06/still-no-boom-in-small-business-lending/>.

<sup>109</sup> *Minority-Owned Business Face Difficult Challenges to Succeed in Global Business Environment*, KAUFMANN FOUNDATION (June 28, 2005), <http://kauffman.org/Details.aspx%5c?id=354> [hereinafter *Minority-Owned Business*].

<sup>110</sup> MMW MMIC Integrated Module Solutions, *About MMW MMIC*, TLC PRECISION WAFER TECHNOLOGY, <http://www.tlcprecision.com/about.html> (last visited Feb. 13, 2013).

<sup>111</sup> *Conversations with Al McFarlane: Positioning black businesses and workforce developers to maximize opportunity*, INSIGHT NEWS (Sept. 27, 2011), available at <http://www.insightnews.com/video/conversations-with-al-mcfarlane/8095-positioning-black-businesses-and-workforce-developers-to-maximize-opportunity>.

<sup>112</sup> *Disparities*, MINORITY BUS. DEV. AGENCY 22 (Jan. 2010), <http://www.mbda.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf>.

educational attainment amongst African Americans.<sup>113</sup> Studies have also found a strong correlation between educational attainment of the owner and the performance of the business. Studies show that “businesses with highly educated owners have higher sales, survival rates, and hire more employees.”<sup>114</sup> This could be because the business owner has acquired skills during his or her education that might be useful for running a successful business. It could also indicate that potential clients, lenders, and/or other business people see higher levels of educational attainment as a positive sign of future business success. In either case, educational attainment of the owners has a significant impact on the ability of minority-owned businesses to grow. As illustrated previously in this report, African Americans on average have lower levels of educational attainment than their White counterparts, which could play a role in the disparities that exist in business ownership and access to equal opportunity.

### **Increasing Family Business Background**

In another profound finding, the Minority Business Development Agency reported that the children of self-employed people are more likely to also become self-employed.<sup>115</sup> Unlike those without self-employed parents, their chance of becoming self-employed doubles or triples.<sup>116</sup> This puts African Americans at a significant disadvantage since they are less likely than Whites to have a self-employed parent and thereby less likely to be self-employed.<sup>117</sup>

Studies have also found that business outcomes are better if the owner has a family background in business.<sup>118</sup> In many cases, knowledge is passed through families from one generation to the next. Therefore, limited family business knowledge can create an additional barrier for starting and growing a successful business. Business development requires foresight, knowledge, and experience. For instance, the flux and change of the current markets require knowledge on the tools that necessitate diversification and expansion in growth industries. According to a recent study, “minority-owned businesses account for a larger percentage of low-growth businesses, such as personal

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<sup>113</sup> Robert W. Fairlie, *Entrepreneurship among Disadvantaged Groups: An Analysis of the Dynamics of Self-Employment by Gender, Race and Education* in Handbook of Entrepreneurship (Simon C. Parker et al. eds, Kluwer Academic Publishers, July 2005), available at <http://people.ucsc.edu/~rfairlie/papers/published> (then follow Springer 2006 hyperlink).

<sup>114</sup> *Disparities*, MINORITY BUS. DEV. AGENCY 22 (Jan. 2010), <http://www.mdba.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf>.

<sup>115</sup> *Id.* at 24.

<sup>116</sup> *Id.*

<sup>117</sup> Michael Hout and Harvey S. Rosen, *Self-Employment, Family Background, and Race* 35 (Nat'l Bureau of Econ. Research, Working Paper No. 7344), available at <http://www.nber.org/papers/w7344>.

<sup>118</sup> *Disparities*, MINORITY BUS. DEV. AGENCY 24 (Jan. 2010), <http://www.mdba.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf>.

services, food stores and restaurants than the general business community. These low-growth business sectors represent nearly 30 percent of all employment in minority-owned firms versus 17 percent in non-minority firms. Further, BCG estimates there are only 20-25 minority-owned businesses with revenues exceeding \$500 million. [African American entrepreneurs should] focus on opportunities in high-growth industries, such as information technology and pharmaceuticals.”<sup>119</sup> Thus, limited family business background may hinder individuals from navigating the terrain of market change and growth trends.

### **Building the Capacity for Growth and Expansion**

Despite the large representation of minority-owned businesses in the economic sector, most of these businesses are sole proprietorships.<sup>120</sup> According to the Economic Census, there were 12,454 African American businesses in Minnesota and only 617 have non-owner employees.<sup>121</sup> These businesses have yet to grow beyond the sole proprietorship business model. For example, 82 percent of minority-owned firms are sole proprietorships. In contrast, 71 percent for non-minority firms are sole proprietorships.<sup>122</sup> In order to shift from a sole proprietorship model in warranted circumstances, minority-owned firms need sufficient technical support and strong managers who will encourage growth.<sup>123</sup> This shift requires hiring the right employees and building the baseline of these firms.

### **Potential Solutions**

In addition to the challenges and the opportunities articulated above, Lea Hargett offers some additional salient ideas for consideration. Her ideas involve increasing access to entrepreneurial opportunities for minority-owned businesses to flourish and create jobs

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<sup>119</sup> *Minority-Owned Business*, KAUFMANN FOUNDATION (June 28, 2005), <http://kauffman.org/Details.aspx%5c?id=354>

<sup>120</sup> See Lea Hargett, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 80 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “Although racial disparities in business ownership are troubling, perhaps a more important concern is that businesses owned by disadvantaged minorities tend to be smaller and less successful than non-minority-owned businesses. In particular, Black and Latino-owned businesses have lower sales, hire fewer employees, and have smaller payrolls than White-owned businesses, on average. Firms owned by African-Americans also have lower profits and higher closure rates than those owned by whites.”).

<sup>121</sup> Rachel Vilsack, Dept. of Emp’t and Econ. Dev., *Open for Business: Characteristics of Minnesota Businesses in 2007*, POSITIVELY MINNESOTA (August 2010), [http://www.positivelyminnesota.com/Data\\_Publications/Employment\\_Review\\_Magazine/August\\_2010/Open\\_for\\_Business-Characteristics\\_of\\_Minnesota\\_Businesses\\_in\\_2007.aspx](http://www.positivelyminnesota.com/Data_Publications/Employment_Review_Magazine/August_2010/Open_for_Business-Characteristics_of_Minnesota_Businesses_in_2007.aspx).

<sup>122</sup> *Minority-Owned Business*, KAUFMANN FOUNDATION (June 28, 2005), <http://kauffman.org/Details.aspx%5c?id=354>

<sup>123</sup> *Id.*

that are accessible for low income community members. Below is an excerpt from her testimony at the MNSAC Fact finding meeting, held on Sept. 15, 2011:

It is [ ] critical that high growth entrepreneurship is encouraged and developed among entrepreneurs located in inner city locations, because these entrepreneurs have a disproportionately positive impact on inner city job creation. The Initiative for a Competitive Inner City, which is a research and strategy non-profit and national expert on inner-city economics, identified that high-growth inner city firms accounted for virtually all of the new inner city jobs created in the ten years prior to 2007. Perhaps more importantly, they created new jobs for inner city residents at twice the rate of other companies located in city limits and seven times the rate of companies located in the suburbs. And job creation in inner cities - jobs that, in turn, provide living wages and household income to inner city residents - is the first step in addressing many of the other challenges faced by inner cities communities, such as affordable housing, crime reduction, and poverty.

So, how can we encourage more high growth entrepreneurship among minority entrepreneurs, including those entrepreneurs located in the inner cities?

**One**, a new dialogue is the first step. A rise in minority entrepreneurship is worth a celebration, but it's not enough. All entrepreneurs need to be aware of and consider the opportunity to use a transformative technology or idea, apply it to a global market, raise funding to support it, and generate thousands of jobs and personal wealth as a result. Minority entrepreneurship must move rapidly into these higher growth markets and larger scale opportunities.

**Two**, engagement and outreach are the second steps. While there are many programs and initiatives across the country focused on emerging industries and technologies, the participation rate of minority entrepreneurs in these programs is disproportionately low. It takes a consistent, culturally sensitive and focused effort to engage and reach out to these culturally diverse citizens in order to truly develop a vibrant and inclusive entrepreneurial ecosystem.

**Three**, intensive preparation and facilitating key connections are the third steps. This isn't different than what any high-growth entrepreneur needs to ensure the articulation of an idea most successfully and the right audience of investors or customers to hear that articulation. But these specific services and key industry relationships must be expanded beyond their historical networks to ensure that all entrepreneurs have equitable access to higher growth opportunities. So while we absolutely celebrate the positive trends and entrepreneurship for African-Americans and other culturally diverse citizens, the country must now work to ensure that future Census reports reflect a much greater number of larger scale,

diverse firms that employ by the hundreds versus staff with one to four employees.<sup>124</sup>

It is clear that a targeted focus on increasing access to capital and business development opportunities for minority-owned businesses will provide a major boost in the opportunity for job creation and growth in the African American community. Significant resources should be allocated to ensure greater levels of investment in minority-owned businesses. This growth may also allow minority-owned businesses to effectively compete for and procure government contracts, further growing their businesses.

## **BARRIERS TO GOVERNMENT CONTRACTING FOR SMALL AND MINORITY-OWNED BUSINESSES**

### **Introduction**

Considering the size of the Minnesota government contracts industry, ensuring equity in government contracting may be a significant step towards reducing the unemployment disparity.<sup>125</sup> This section will first introduce professional and technical (“P/T”) services contracts and general barriers that minority-owned businesses face in the solicitation process. These barriers include: inadequate/lack of time between disclosure of opportunities and deadlines to submit proposals, lack of transparency, possible bias and favoritism, agency discretion and contract bundling. The second section will analyze similar barriers within the government construction contracts process that prevent minority-owned businesses from receiving these types of contracts. Finally, several solutions will be proffered from actions taken by state agencies towards maximizing opportunities for minority-owned businesses in the Minnesota government contracts marketplace in the hope of helping to reduce the unemployment disparity in the state.

### **Professional and Technical Services Contracts**

It is critical to provide minority-owned businesses ample opportunity to compete for government contracts, especially since the Minnesota legislature approved a total of \$361,384,964.08 in P/T services contracts for 2012.<sup>126</sup> Gaining access to government P/T services contracts may make a big difference in contributing to the success or failure

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<sup>124</sup> See Lea Hargett, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 90-92 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>125</sup> See 36 SR 576 (Nov. 14, 2011) (Stating that Minnesota spends \$2-3 billion on government contracts each year.).

<sup>126</sup> State of Minn., Dept. of Admin., *Professional/Technical Contracting Annual Report to the Legislature Fiscal Year 2012*, ADMIN. MINN. MATERIALS MGMT. DIV. 2 (Aug. 31, 2012), available at <http://www.mmd.admin.state.mn.us/pdf/clist-0-5k.pdf> [hereinafter *Under \$5000 Checklist*]

of small and minority-owned businesses in Minnesota. This section will provide an overview of the P/T services industry as well as the challenges and opportunities that exist for minority-owned businesses looking to contract with the government.

P/T services include: “consultation, analysis, evaluation, predication, planning, programming or recommendation and result in the production of a report or the completion of a task.”<sup>127</sup> Examples of P/T services and service providers include: accountants, appraisers, architects, attorneys, engineers, public relations, translators, and other occupations where a specific service is rendered. The P/T services contract process is essentially the way government secures consultants, businesses and independent contractors whose occupation is the rendering of a specific service of which the government has need.

The process for granting a P/T services contract is determined by the estimated cost of the project and is split into three different categories: 1) under \$5,000; 2) \$5,001-\$50,000; and 3) over \$50,000. When awarding P/T services, agencies use the “best value” approach. This approach involves looking at not only price but also such factors as environmental considerations, quality, and vendor performance.<sup>128</sup> For minority owned businesses, each cost category poses a set of challenges that can make acquiring a P/T services contract more difficult.

### **Professional and Technical Services Contracts Under \$5,000**

Prior to awarding a P/T services contract that is not expected to exceed \$5,000, a state agency must develop a scope of work and deliverables for the project.<sup>129</sup> The agency then sends the scope of work and deliverables to “selected contractor(s) for written proposal”; contracting agencies are not subject to publication or notification requirements for these contracts.<sup>130</sup> Although the Minnesota Department of Administration (“Admin”) encourages agencies to solicit proposals from multiple vendors, an agency may select a vendor without engaging in a competitive process.<sup>131</sup> If an agency does receive written proposals from multiple vendors, the agency must then select the contractor using the “best value” approach as defined under Minnesota law.<sup>132</sup>

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<sup>127</sup> State of Minnesota, Dept. of Admin., *Professional/Technical Services*, ADMIN. MINN. MATERIALS MGMT. DIV., <http://www.mmd.admin.state.mn.us/mn05000.htm> (last visited Feb. 15, 2013).

<sup>128</sup> MINN. STAT. §16C.06. subd. 6 (Matthew Bender & Company, LEXIS through 2012.).

<sup>129</sup> State of Minn., Dept. of Admin., *Professional and Technical Service Contract Checklist: Total Contract Value of \$0-\$5,000*, ADMIN. MINN. MATERIALS MGMT. DIV., <http://www.mmd.admin.state.mn.us/pdf/clist-0-5k.pdf> [hereinafter *Under \$5000 Checklist*]

<sup>130</sup> *Id.* (emphasis added).

<sup>131</sup> *Id.*

For these contracts, agencies are “encouraged” to use Targeted Group<sup>133</sup> (“TG”) vendors, but Admin does not set a specific goal or requirement.

There are several barriers at this level of contract awards. First, there is no requirement for disclosing contract opportunities. Once state agencies have made a decision on how to proceed with contracting for a particular project or group of projects, they have few constraints on how to disseminate notice of the contracting opportunity. Since there is no notice requirement, agencies simply send the opportunity to “selected contractors” for written proposals.<sup>134</sup> Given the level of discretion that exists for government agencies in deciding which companies will gain access to notice of these contracting opportunities, minority-owned businesses may face a distinct disadvantage within the current system. Ostensibly, companies that receive notice are privy to government contacts and relationships that may give them an advantage when competing for such government contracts. In order to level the playing field and ensure that there is equity in the process, contracts, even those under \$5,000, should have a greater level of transparency. Contracting agencies should be required to provide adequate notification and publication of such opportunities.

Second, agencies should be required to solicit proposals from multiple vendors. While Admin encourages this practice, agencies are allowed to select a vendor of its own choosing without engaging in a competitive process. This type of discretion does not encourage agencies to seek bids from multiple vendors and may reinforce the notion that certain selected businesses are routinely chosen for contracting opportunities. Finally, agencies are not required or provided a goal to use TG vendors but, again, are only encouraged to do so. Thus, in order to ensure equity within the system, there should be a strong preference for utilizing TG vendors at every level in order to maximize the

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<sup>132</sup> See MINN. STAT. §16C.06. subd. 4 (Matthew Bender & Company, LEXIS through 2012.(explaining that best value “describes a result intended in the acquisition of all goods and services. Price must be one of the evaluation criteria when acquiring goods and services. Other evaluation criteria may include, but are not limited to, environmental considerations, quality, and vendor performance. In achieving "best value" strategic sourcing tools, including but not limited to best and final offers, negotiations, contract consolidation, product standardization, and mandatory-use enterprise contracts shall be used at the commissioner's discretion.”).

<sup>133</sup> See The State of Minn., Dept. of Admin., *Targeted Group/Economically Disadvantaged (TG/ED) Small Business Program*, ADMIN. MINN. MATERIALS MGMT. DIV., available at <http://www.mmd.admin.state.mn.us/mn02001.htm>[hereinafter *Targeted Group*] (explaining that “to be certified as a Targeted Group small business, the business must be at least 51% owned by a woman, racial minority, or person with a substantial physical disability. In addition, the business must be operated and controlled on a day-to-day as well as long-term basis by the qualifying owner. In other words, ownership is not enough; operational control is also required.”)

<sup>134</sup> MINN. STAT. §16C.03. subd. 3 (Matthew Bender & Company, LEXIS through 2012.).

inclusion of minority owned businesses in the marketplace, even on small contracts such as these.

### **Professional and Technical Service Contracts \$5,001-\$50,000**

The contracting process of P/T services contracts under this category is somewhat similar to that of P/T services contracts under \$5,000. These projects require the contracting agency to draft an informal solicitation,<sup>135</sup> which means that a sealed response is not needed.<sup>136</sup> The solicitation process may or may not include a TG vendor.<sup>137</sup> After drafting the informal solicitation, Admin staff post the opportunity on the MMD web site or in the *State Register*.<sup>138</sup> Contracting agencies may also notify specific vendors of the opportunity or post the opportunity in other publications.<sup>139</sup> Once the contracting agency has received proposals, a selection team evaluates the proposals and selects the contractor using the “best value” approach.<sup>140</sup> If the solicitation document contained a TG vendor, the contracting agency must apply that preference in selecting the contractor.<sup>141</sup>

Since Admin provides notice of the opportunity on the MMD web site or *State Register*, there is a small upgrade at this level of contract awards. However, this process presents two overarching problems that could negatively impact minority-owned businesses. First, the notice requirement may not sufficiently allow small, minority-owned businesses to compete for such contracts since the notices are published within short windows of time. Admin only provides guidelines, rather than requirements, for the amount of time agencies must publish a contracting opportunity. Minority-owned P/T services contractors tend to be smaller and have less capacity than their non-minority counterparts.<sup>142</sup> Thus, when state agencies fail to give adequate notice of upcoming

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<sup>135</sup> State of Minn., Dept. of Admin., *Professional and Technical Service Contract Checklist: Total Contract Value Over \$5,000 and Under \$50,000*, ADMIN. MINN. MATERIALS MGMT. DIV., available at <http://www.mmd.admin.state.mn.us/pdf/14pt5000to50000.pdf> [hereinafter *\$5,001 to \$50,000 Checklist*].

<sup>136</sup> MINN. STAT. §16C.02 (Matthew Bender & Company, LEXIS through 2012.).

<sup>137</sup> *\$5,001 to \$50,000 Checklist 1*, ADMIN. MINN. MATERIALS MGMT. DIV., available at <http://www.mmd.admin.state.mn.us/pdf/14pt5000to50000.pdf>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See State of Minority- and Women-Owned Business Enterprise: Evidence from Minneapolis, NERA ECONOMIC CONSULTING 68 (Oct. 21, 2010), available at <http://www.ci.minneapolis.mn.us/civil-rights/docs/CR-CCU-Disparity-Study.pdf> [hereinafter *NERA Study*]; See also Office of Advocacy, *Minorities in Business: A Demographic Review of Minority Business Ownership*, U.S. SMALL BUS. ADMIN. 8 (April 10, 2007), available at <http://archive.sba.gov/advo/research/rs298tot.pdf>.

contracting opportunities, minority-owned P/T services contractors may have little opportunity to effectively compete for those contracts.

Second, after the agencies satisfy the notice requirement, they still have the ability to individually notify specific vendors of the contracting opportunity. This level of discretion is an obstacle to minority-owned businesses since it can give the impression that officials are engaging in favoritism of certain contractors to the exclusion of others. It is possible that contractors could be dissuaded from bidding on a contract after learning of the opportunity through a public notice when the contractor knows that others have learned of it through individual notification.

Anecdotal analysis in a 2009 disparity study conducted for the Department of Administration (“Admin Disparity Study”) corroborates the prevalence of individual solicitation and its deterrent effect. Undeniably, a consensus emerged out of the hundreds of stakeholders interviewed, with many believing that opportunities were being communicated through informal networks.<sup>143</sup> This practice gave those in these networks a distinct advantage. Participants in the study also “associated minimal outreach [from governmental agencies] with their inability to become aware of contracting opportunities. Minority and women-owned businesses felt they are not receiving enough information regarding the contracting process necessary to do business with the Governmental Units, and they would benefit if the process were better-defined.”<sup>144</sup> As is the case with P/T service contracts under \$5,000, agencies in this higher category of contract awards are “encouraged,” but not required, to provide notice to TG vendors.<sup>145</sup>

### **Professional and Technical Services Contracts Over \$50,000**

Contracts with a value expected to exceed \$50,000 follow a similar process to the previous two, except they require agencies to draft a formal request for proposal (“RFP”) and public notice for the *State Register*.<sup>146</sup> Admin has defined an RFP as follows:

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<sup>143</sup> See MGT of America, Inc., *State of Minnesota Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 5-34 (Oct. 22, 2009), available at <http://www.mmd.admin.state.mn.us/disparity/revised2009METCDisparityStudy.pdf> (last revised Jan. 11, 2010) [hereinafter *Joint Availability and Disparity Study*].

<sup>144</sup> *Id.*

<sup>145</sup> *\$5,001 to \$50,000 Checklist 1*, ADMIN. MINN. MATERIALS MGMT. DIV., available at <http://www.mmd.admin.state.mn.us/pdf/14pt5000to50000.pdf>.

<sup>146</sup> State of Minn., Dept. of Admin., *Professional and Technical Service Contract Checklist: Total Contract Value of Over \$50,000*, ADMIN. MINN. MATERIALS MGMT. DIV., available at [http://www.mmd.admin.state.mn.us /pdf/clist50kplus.pdf](http://www.mmd.admin.state.mn.us/pdf/clist50kplus.pdf) [hereinafter *Over \$50,000 Checklist*]

[An RFP] is a formal invitation to a potential contractor to submit a proposal to provide a solution to an agency identified problem or need. The RFP is also a procurement process where the state can judge if the contractor's experience, qualifications, and approach will provide the best solution to the state's problem.<sup>147</sup>

Admin requires formal solicitations to be posted in the *State Register* each week and encourages (but does not require) agencies to advertise contracts estimated at over \$50,000 for at least three weeks.<sup>148</sup> Contracting agencies may also send the RFP to specific vendors or post the RFP opportunity in other publications.<sup>149</sup> Again, agencies are encouraged, but not required, to provide notice to TG vendors.<sup>150</sup>

At this level, there is a slight improvement since agencies must submit their RFPs to the *State Register* for public notice. However, there is no requirement as to the time of disclosure of an RFP, only a suggestion that it be advertised for at least three weeks. The short window of disclosure may not allow enough time for small businesses to mobilize developmental resources and partnerships to compete with larger firms.<sup>151</sup> Anecdotal analysis in the 2009 Admin study confirmed that inadequate time to prepare RFPs was a barrier to contracting. For example, one minority-business owner said that the time to submit RFPs was insufficient, indicating that five days was not enough time to adequately prepare an RFP.<sup>152</sup> He felt that it was "as if the RFPs are designed for a specific company in mind."<sup>153</sup> Another owner of a small professional services firm said, "RFP response time interferes with her firms [sic] ability to bid on Governmental Units projects."<sup>154</sup>

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<sup>147</sup> State of Minn., Dept. of Admin., *Section 12: RFPs and Contract Section in Professional/Technical Services Contract Manual*, ADMIN. MINN. MATERIALS MGMT. DIV., <http://www.mmd.admin.state.mn.us/pdf/12rfpselction.pdf> [hereinafter *P/T Services Contract Manual*]

<sup>148</sup> See, e.g., 36 SR 576 (Nov. 14, 2011).

<sup>149</sup> State of Minn., Dept. of Admin., *Over \$50,000 Checklist*, ADMIN. MINN. MATERIALS MGMT. DIV., available at [http://www.mmd.admin.state.mn.us /pdf/clist50kplus.pdf](http://www.mmd.admin.state.mn.us/pdf/clist50kplus.pdf)

<sup>150</sup> *Id.*

<sup>151</sup> See Ravi Norman, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 106-108 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>152</sup> See MGT of America, Inc., *Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 5-15 (Oct. 22, 2009), available at [http://www.mmd.admin.state.mn.us/disparity /revised2009METCDisparityStudy.pdf](http://www.mmd.admin.state.mn.us/disparity/revised2009METCDisparityStudy.pdf) (last revised Jan. 11, 2010)

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 5-11.

As illustrated above, there are procedural concerns that could prevent the inclusion of minority-owned businesses in acquiring P/T services contracts. Similar themes prevail at all three levels of government contract awards: A lack of contract opportunity notification; disclosure of opportunities within a short window of time; a great deal of discretion provided to agencies; and the policy of only suggesting notice to TG vendors rather than requiring notice. Such procedural concerns should be reviewed and properly addressed, as the concerns strongly indicate that minority-owned businesses are prevented from effectively competing in the P/T services contracts marketplace.

## **Other Barriers Facing Minority-Owned Businesses in Government Contracting**

### **1. Contract Bundling**

#### ***(a) State Contracting***

When determining what services are needed and how best to acquire those services, state agencies often bundle smaller projects into one large contract in an effort to reduce costs and simplify the process.<sup>155</sup> The practice of contract bundling disproportionately impacts minority-owned businesses because they are unable to compete with large firms for major contracts given their smaller size and limited resources.<sup>156</sup> Although Minnesota law does not explicitly define contract bundling, the federal government has recognized the consequence that flows to small businesses and defined the “bundling of contract requirements” as follows:

The term “bundling of contract requirements” means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to--

- (A) the diversity, size, or specialized nature of the elements of the performance specified;
- (B) the aggregate dollar value of the anticipated award;
- (C) the geographical dispersion of the contract performance sites; or
- (D) any combination of the factors described in subparagraphs (A), (B), and (C).<sup>157</sup>

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<sup>155</sup> Letter from Governor Mark Dayton, *Response and Next Steps: Economic Summit*, STATE OF MINNESOTA, OFFICE OF THE GOVERNOR (Apr. 8, 2011), available at <http://mn.gov/governor/multimedia/pdf/tces-first-report.pdf> [hereinafter Letter from Governor Mark Dayton].

<sup>156</sup> *Id.*

<sup>157</sup> 15 U.S.C.S. § 632(o)(2) (Matthew Bender & Company, LEXIS through 2013.).

One concern with contract bundling in Minnesota is that the government has not explicitly recognized it as a process that creates barriers to minority-owned businesses. Although community stakeholders have presented contract bundling as a barrier and Governor Dayton has acknowledged it as such,<sup>158</sup> there has been little formal effort to reduce its impact. While the federal government has implemented a statutory scheme that places strict oversight to ensure that contract bundling is “necessary and justified,”<sup>159</sup> Minnesota has no such oversight.

In order to justify bundling a contract, the federal government must demonstrate that contract bundling produces “measurably substantial benefits,” including cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, or any other benefits.<sup>160</sup> To the contrary, state agencies are not required to show that contract bundling is “necessary and justified” for particular projects. Since Minnesota has not yet formally recognized the problems posed by contract bundling and its effect on minority and women-owned businesses, the state is unable to monitor or address improvements in this area.

**(b) City Contracting**

In addition to contract bundling at the state level, disparity studies performed in St. Paul and Minneapolis suggest that contract bundling also poses a significant barrier to minority-owned businesses at the city contracting level. In its program recommendations report for Minneapolis, the NERA Economic Consulting firm found that “[t]he size and complexity of the City’s contracts may be a major impediment to minority and women owned businesses and other small firms in obtaining work as prime contractors.”<sup>161</sup>

Anecdotal evidence in the St. Paul Disparity Study substantiated this problem with multiple stakeholders noting that bundled contracts were too large for small minority-owned firms to compete.<sup>162</sup> One minority engineer stated that “[contract bundling] is a big obstacle for minority and woman owned businesses to receiving contracts.”<sup>163</sup> A

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<sup>158</sup> Letter from Governor Mark Dayton, 11, STATE OF MINNESOTA, OFFICE OF THE GOVERNOR (Apr. 8, 2011), available at <http://mn.gov/governor/multimedia/pdf/tces-first-report.pdf>

<sup>159</sup> 15 U.S.C. § 644 (e)(2)(A) (Matthew Bender & Company, LEXIS through 2013.).

<sup>160</sup> 15 U.S.C. § 644 (e)(2)(B)(i)–(v) (Matthew Bender & Company, LEXIS through 2013.).

<sup>161</sup> *Program Recommendations, State of Minority- and Women-Owned Business Enterprise: Evidence from Minneapolis*, NERA ECONOMIC CONSULTING 9 (Oct. 22, 2010), available at [http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/convert\\_262182.pdf](http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/convert_262182.pdf).

<sup>162</sup> MGT of America, Inc., *A Disparity Study for the City of Saint Paul and the Saint Paul Housing and Redevelopment Authority* 7-23(Aug. 4, 2008), available at <http://www.stpaul.gov/DocumentCenter/Home/View/6384> [hereinafter *St. Paul Disparity Study*].

<sup>163</sup> *Id.*

woman-owned engineering firm owner stated they “receive a few small projects. With large projects [they] are included in the pre-proposal and receive bids, but the final award goes to a large business. Sometimes, the project is too large for [them] to handle.”<sup>164</sup> The consensus among the participants interviewed for this section of the St. Paul Disparity Study seems to be that the city “should de-bundle projects to give small contractors more opportunities to receive smaller awards.”<sup>165</sup>

Contract bundling occurs at all levels of government in Minnesota and prevents minority-owned businesses from competing for lucrative contracts. Since Minnesota has declined to adopt a uniform definition of contract bundling or to measure its impact, it is difficult to draw conclusions on the extent to which contract bundling acts as a barrier to minority-owned businesses. Yet given the encouragement of contract bundling in Minnesota, the prevalence of anecdotal accounts of the barriers it presents, and the conclusive studies showing that the practice generally acts as a barrier, it is safe to say that minority-owned businesses will continue to experience disparities if the contract bundling trend continues unmonitored.

## **2. Contract Award**

### ***(a) Subjectivity and the Best Values Approach***

Even if a minority-owned business is able to break through the procurement process barriers and submit a proposal, the likelihood of being awarded a contract remains remote. For P/T services contracts, state agencies award contracts based on “best value.”<sup>166</sup> This process allows decision makers to inject a large degree of subjectivity into the contract award, leaving “greater room for discrimination.”<sup>167</sup> Moreover, the Minnesota statute defining “best value” for P/T services contracts is vague and incomplete. While the statute defines some alternate considerations besides price for awarding a contract, it does not limit the criteria to the factors listed, does not provide guidance on when criteria other than price should be used, and does not require agencies to notify contractors of the weight given to non-price criteria.

### ***(b) Perception of Favoritism***

Subjectivity is not the only problem in the “best value” approach to awarding contracts, favoritism or the perception of favoritism can also play a role.<sup>168</sup> Agencies may be able

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<sup>164</sup> *Id.*

<sup>165</sup> *See Id.*

<sup>166</sup> MINN. STAT. §16C.06. subd. 6 (Matthew Bender & Company, LEXIS through 2012.).

<sup>167</sup> *See* Maria E. Enchautequi et al., *Do Minority-Owned Businesses get a Fair Share of Government Contracts?*, URBAN INSTITUTE 43 (Dec. 1, 1997), available at <http://www.urban.org/url.cfm?ID=307416> .

<sup>168</sup> *See Id.* at 43.

to “manipulate” the process to award the contract to a specific contractor.<sup>169</sup> “In practice, this manipulation often takes the form of rebidding or renegotiating contracts” in a way that favors a particular contractor—often a non-minority, large firm.<sup>170</sup> But favoritism is difficult to prove and even if it does not in fact contribute to the disparity in contract awards, the perception of favoritism is a disincentive for small minority-owned businesses to compete.

Participants in the St. Paul Disparity Study affirmed this general practice of favoritism or the perception thereof, which is “noted when firms have a perception that some firms are given advantages over other firms.”<sup>171</sup> For example, one minority business owner noted that although her firm has the appropriate qualifications, the same out-of-state contractor is continually awarded contracts.<sup>172</sup> A minority computer services business owner noted that an international technology company has consistently been awarded projects to the point where other firms are not even considered; it is a “sole source project.”<sup>173</sup> A professional services business owner supplemented the claim of perceived favoritism within the field: “There is the perception that there are companies the City and developers like to do business with; the Old Boys Network is still there.”<sup>174</sup>

One such anecdote of possible bias in the construction industry was supplied by Scott Gray, President and CEO of the Minneapolis Urban League:

And so we had a minority business that got a shot, got an opportunity that we introduced him to a prime contractor. The prime said, well, we'll work with him, send us your information. And so the prime never met with him, you know, took some time for them to get together. And basically, the minority contractor got a call on a Friday and was told that they need to report to a site on Monday to do a highway heavy contract. Now, this minority contractor was very versed in residential work pouring concrete. And so this minority contractor -- I have to give it to him -- had some courage. He showed up at that site on Monday on time with some people that he hired from the Urban League, seven people I might add, and they started at that site. But when he got to the site, the site wasn't even staged. You know, we're talking highway heavy construction. So there are cars running up and down the highway. And so he gets to the site. It's not even staged. You know, so he's trying to figure out how do I get to the point where I

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> MGT of America, Inc., *St. Paul Disparity Study* 7-27 (Aug. 4, 2008), available at <http://www.stpaul.gov/DocumentCenter/Home/View/6384> .

<sup>172</sup> *Id.* at 7-28.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 7-32.

can pour concrete and get my folks out here to work so we can get this done in a timely fashion.

The prime's employees had said to themselves they're just going to let him be out here by himself and figure it out. And so the foreman walks up and says, hey, you know, you got my crew mad at you right now and so don't expect any help from them. And so this contractor continued to move on, pour the concrete, did a wonderful job, came off the site, came back to us and said what was going on with the treatment. We went to the prime and said, is this the way you do business? Is this how you do business?

We thought that this was something out of the old days. Is this what your employees are about? And they said, we apologize for this, and we're going to make sure that this minority contractor gets all the opportunities. But I said, why did you put somebody out there like that to fail? Because if he would have failed, that would have been a mark on not only him but other contractors to come.<sup>175</sup>

### **(c) Procurement Participation Programs**

While state agencies contracting for construction projects largely utilize the federal Disadvantaged Business Enterprise program discussed below to encourage minority participation for federally funded projects, other government contracts tend to be smaller and funded by state and local resources. For the latter category, the state utilizes the Targeted Group and Economically Disadvantaged (“TG/ED”) business program to promote inclusion of minority-owned businesses. Once certified as a TG/ED business,<sup>176</sup> a contractor may receive up to a six percent preference in services to the state.<sup>177</sup> Admin may also set goals requiring contractors to subcontract a portion of the work to TG/ED businesses.<sup>178</sup>

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<sup>175</sup> Scott Gray, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 194-196 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>176</sup> See The State of Minn., Dept. of Admin., *Targeted Group/Economically Disadvantaged (TG/ED) Small Business Program*, ADMIN. MINN. MATERIALS MGMT. DIV. 34, available at <http://www.mmd.admin.state.mn.us/mn02001.htm>.(explaining how to become certified as a Targeted Group business, and that “to be certified as an Economically Disadvantaged small business, the business must be located (or the owner must reside) in an Economically Disadvantaged Area in Minnesota. These areas include labor surplus areas, as designated by the federal government and low income counties in Minnesota”).

<sup>177</sup> See *Id.*

<sup>178</sup> *Id.*

While Admin tracks annual spending on the TG/ED program, “the data is very limited...[and the] tracking of subcontracting information is not electronic.”<sup>179</sup> The limited amount of available data makes it difficult to determine the accuracy of the TG/ED program. Anecdotal evidence from the 2010 Admin study suggests that many minority-owned businesses do not believe they are reaping the benefits of the program and are being precluded from subcontracting with larger companies.<sup>180</sup> Enhanced tracking of the TG/ED program would be useful in determining its effectiveness and in ensuring racial equity in subcontracting. Tracking progress can also determine whether the program needs to be modified in order to ensure that minority and women-owned businesses are able to receive equitable treatment in the P/T services contracts marketplace. It is also important to ensure that these businesses are able to receive equitable treatment in other types of government contracting, such as construction contracts which will be discussed in the section below.

## **CONSTRUCTION CONTRACTS**

Along with P/T services contracts, Minnesota spends a significant amount of money each year on construction contracts.<sup>181</sup> The industry is significant in addressing racial disparities in government contracting.<sup>182</sup> Scholars have also suggested that the construction industry is a significant area for “minority development” given the industry’s propensity for internal, upward mobility as well as the historical presence of minorities as laborers, skilled workers, and contractors in the construction industry.<sup>183</sup> According to Dr. Samuel Myers, “Another thing we need to find out more about is the role of public procurement and contracting both at the state level as well as the county and local level, just between the procurement of contracting folks and small, private contractors.”<sup>184</sup> Considering the unique characteristics and substantial public dollars

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<sup>179</sup> See MGT of America, Inc., *Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 6 (Oct. 22, 2009), available at <http://www.mmd.admin.state.mn.us/disparity/revised2009METCDisparityStudy.pdf> (last revised Jan. 11, 2010).

<sup>180</sup> *Id.* at 5-16.

<sup>181</sup> See *id.* at 3-8-19 (Showing that construction contract spending was the highest out of four categories of state contract spending. The four categories are construction, architecture and engineering, professional services, and other services.)

<sup>182</sup> David C. Blanchflower, *Minority Self-Employment in the United States and the Impact of Affirmative Action Programs*, 5 ANN. FINANCE 361, 369 (2008).

<sup>183</sup> *Id.* at 367.

<sup>184</sup> See Dr. Samuel Myers’ testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, factfinding meeting on Racial Disparities in Unemployment 69-70 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “We’re not worried about the prime contractors. To the extent that there’s a disproportionate share of minority firms that are subcontractors as well as prime contractors, you need to worry about whether or not there’s an adverse impact upon those various policies that favor procurement for construction (footnote continued)

used to fund government construction contracts, it is important to address racial barriers to construction contracts separately from P/T services contracts.<sup>185</sup>

A study published in 2010 provides a snapshot of the disparity in construction contracts procured through the Minnesota Department of Transportation (“MnDOT”). Researchers found that from January 2002 to December 2007, minority-owned businesses received just 0.10% of all prime contract dollars and 0.20% of all subcontract dollars.<sup>186</sup> Compared to minority availability of 2.39% and 2.22% in these areas, the study determined that a substantial disparity exists.<sup>187</sup> In light of this study, it is necessary to address racial barrier in construction contracts and to ensure proper protocols are in place to address systemic issues since this could contribute to reducing the unemployment disparity within the state. Louis King offered a community-based perspective on some of the systemic challenges that pose barriers:

...[W]e found once we took a closer look at government was lacks protocols inside in terms of following up on their own processes. Also, in the case of MnDOT, for example, in 2011, you're just getting the automated database that will track how contractors are doing based on payrolls and allow them in real-time. This is phenomenal given that this used to be a computer that filled up this whole room. But one way you keep a policy from being implemented is to starve them for resource and never bring them up to speed while everything else is operating off a microchip. They were basically still operating off a stubby pencil

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activities, repair business, and so forth. Why is that important? It's important because any new money you're likely to get is going to be money that comes from federal expenditures, like, for example, for repair of infrastructure and so forth. But that money is not going to be allocated directly by the federal government. It's likely to be passed through state and local governments. And the state and local governments need to be very aware of the impacts that they are having on contracting opportunities.”)

<sup>185</sup> Louis King, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 211 (Sept. 15, 2011) (transcript available in the Midwestern Regional Office, U.S. Commission on Civil Rights) (President and CEO of Summit Academy OIC and founder of Hire, Inc., had this to say about the construction industry in Minnesota, “In the construction arena, there are three primary players at the table, contractors, labor, and government. It was a three-man game with no community involvement whatsoever. This game was characterized by contractors who basically built a workforce based on social networks. Even though there were goals that were established on projects, there was not serious effort in assuring that they were fulfilled. This led to paper trails which were facilitated by the second players table, the government agencies, offices of civil rights, the Department of Human Rights, et cetera. Their jobs were to process paper, not to prosecute, not to stop work. And they were subject also to political pressure.”).

<sup>186</sup> See *Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 43 (Oct. 22, 2009), available at <http://www.mmd.admin.state.mn.us/disparity/revised2009METCDisparityStudy.pdf> (last revised Jan. 11, 2010).

<sup>187</sup> See *id.*

and pieces of paper that you had to go through manually. And still today, they have not fully implemented the automated system.<sup>188</sup>

In order to gain access to construction contracts awarded by the state, small, minority-owned firms endure barriers which include a time-consuming and complex bidding process, the state's frequent delay in disclosing opportunities in a timely manner, and its practice of bundling contracts in an effort to reduce costs. As will be shown, however, later in this section, MnDOT and other state agencies have taken some initial promising steps to help mitigate these barriers.

### **The Contract Solicitation Process**

MnDOT advertises and solicits bids for highway construction and maintenance projects on its website.<sup>189</sup> MnDOT is mandated by state law to advertise all bids for a minimum of three weeks prior to the letting date. However, these advertisements are usually up for much longer.<sup>190</sup> Further, for construction contracts that are solicited under authority delegated by the Minnesota Material Management Division ("MMD"), a "Virtual Plan Room" has been created for announcing construction contract solicitations for MnDOT and the Departments of Military Affairs and Natural Resources.<sup>191</sup> The Virtual Plan Room is the official website for announcing construction contracts for the aforementioned agencies.<sup>192</sup> Other agencies are allowed to continue using the MMD website to advertise their construction contract solicitations until such time as they may transition to the Virtual Plan Room.<sup>193</sup>

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<sup>188</sup> Louis King, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 211 (Sept. 15, 2011) (transcript available in the Midwestern Regional Office, U.S. Commission on Civil Rights)

<sup>189</sup> See generally Minnesota Department of Transportation, *Mn/DOT – Bid Letting*, <http://www.dot.state.mn.us/bidlet/> (last visited Feb. 18, 2013).

<sup>190</sup> Minnesota Department of Transportation, *Guide to Bidding 9* (Oct. 2011), available at <http://www.dot.state.mn.us/bidlet/misfiles/pdf/bidguide.pdf> [hereinafter *Guide to Bidding*].

<sup>191</sup> Admin Minnesota Materials Management Division, *Solicitation Announcements*, <http://www.mmd.admin.state.mn.us/solicitations.htm> (last visited Feb. 20, 2013).

<sup>192</sup> Admin Minnesota Materials Management Division, *Contract Solicitations*, <http://www.mmd.admin.state.mn.us/process/admin/page2List.asp> (last visited Feb. 20, 2013).

<sup>193</sup> *Id.*

## Barriers to Competing for Government Construction Contracts

### 1. Disclosure of Opportunities

Since minority-owned contractors tend to be smaller, they often have fewer resources to allocate to contract bidding than large prime contractors.<sup>194</sup> When state agencies give notice of upcoming projects with little time before bids or request for proposals (“RFP”) are due, the size differential precludes many minority owned contractors from effectively competing for projects. Thus, when a state agency fails to disclose upcoming opportunities early enough, many minority-owned businesses might be unable to mobilize and respond in a meaningful way to win the contract.<sup>195</sup>

MnDOT advertises construction projects that are open for bids for at least three weeks before the scheduled letting date, but most projects are advertised for longer.<sup>196</sup> When projects are advertised on short notice, minority owned businesses have seemingly little time to mobilize, determine if they meet the project criteria and discern the “cogent standards” for that particular project.<sup>197</sup> They may also need time to consider creating alliances with other contractors to meet project criteria and present a compelling, cost-effective proposal.<sup>198</sup> Only after the minority-owned business assesses these factors can it begin putting a proposal together. But by then it is often too late. Three or four weeks are usually not enough time for a minority-owned business to respond in a meaningful way to earn the contract.<sup>199</sup>

Meanwhile, large contractors may have resources readily available to churn out proposals while continuing to work on revenue-generating projects. Thus, by disclosing opportunities to the marketplace with short lead times, state agencies may unwittingly

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<sup>194</sup> Maria E. Enchautequi et al., *Do Minority-Owned Businesses get a Fair Share of Government Contracts?*, URBAN INSTITUTE viii (Dec. 1, 1997), available at <http://www.urban.org/url.cfm?ID=307416>

<sup>195</sup> Ravi Norman, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 106 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). ;see also *Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 11 (Oct. 22, 2009), available at <http://www.mmd.admin.state.mn.us/disparity /revised2009METCDisparityStudy.pdf> (last revised Jan. 11, 2010).

<sup>196</sup> *Guide to Bidding* 9 (Oct. 2011), available at <http://www.dot.state.mn.us/bidlet/misfiles/pdf/bidguide.pdf>

<sup>197</sup> See Ravi Norman, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 106 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

perpetuate “elitism”<sup>200</sup> and ostracize small minority-owned contractors who might otherwise provide value but do not have the resources to complete a bid in the limited time given by the state contracting process. While most projects are advertised longer than the legally required three-week window, consideration should be given to more formally expand this window to allow smaller companies sufficient time to compete.

## 2. Contract Bundling

Similar to P/T services contracts, construction contracts are often “bundled” as a perceived way to reduce costs. Federal statute defines bundling as “consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern.”<sup>201</sup> The statute attributes the potential unsuitability to:

- (A) the diversity, size, or specialized nature of the elements of the performance specified;
- (B) the aggregate dollar value of the anticipated award;
- (C) the geographical dispersion of the contract performance sites; or
- (D) any combination of the factors described in subparagraphs (A), (B), and (C).<sup>202</sup>

Given the scope and scale, and the level of responsibilities and resources that are required to fill a bundled contract, contract bundling greatly reduces the potential for small minority-owned businesses to compete for government contracts. While Minnesota is beginning to recognize that contract bundling is a barrier for smaller firms, the state should consider going even further by modeling the federal government in implementing a statutory scheme that includes strict oversight to ensure that contract bundling is “necessary and justified.”<sup>203</sup> To justify contract bundling, agencies would need to demonstrate “measurably substantial benefits,” such as cost savings, quality improvements, reduction in acquisition cycle times, or better terms and conditions.<sup>204</sup>

One problem with the “necessary and justified” procedure is that the decision is often made unilaterally, meaning that small businesses have no ability to object to bundling

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<sup>200</sup> *Id.*

<sup>201</sup> 15 U.S.C. § 632(o)(2)(2013).

<sup>202</sup> *Id.*

<sup>203</sup> 15 U.S.C. § 644 (e)(2)(B) (2013).

<sup>204</sup> *Id.*

decisions.<sup>205</sup> Thus, stricter oversight would ensure senior agency management is held accountable for eliminating unnecessary contract bundling and mitigating the effects of “necessary and justified” contract bundling. In order to ensure a higher level of accountability, agencies should also be required to report on a periodic basis on the status of agency efforts to mitigate contract bundling issues. There is a difficult trade-off between achieving greater economic efficiency in government operations and preserving contracting opportunities for all types of businesses. However, studies and statistics show small businesses are being negatively impacted by the great amount of contract bundling that occurs in Minnesota. The state and its cities should be willing to take a more proactive approach in eliminating unnecessary contract bundling to provide more opportunities for minority-owned businesses.

As evidence of the effect contract bundling has on small businesses, the 2010 MnDOT Disparity Study evaluated MnDOT construction subcontracts based on size of the subcontract payments. Between July 2004 and June 2007, minority-owned businesses accounted for 51.35% of subcontract payments under \$50,000 and 54.90% of subcontract payments in the \$50,001 to \$100,000.<sup>206</sup> While these are hopeful percentages, a steep drop occurred in payments beyond these amounts as minority-owned businesses received no subcontract payments for amounts over \$250,000.<sup>207</sup> This suggests that minority-owned businesses might have a higher rate of participation if projects were de-bundled into more manageable sizes. One proposal that has been made infers that shifting from a low cost approach to a best value approach may yield more tangible long-term benefits to the state.

One of the greatest barriers imposed by contract bundling is the government’s tendency to take a low cost approach in awarding construction contracts. State law generally requires government agencies to grant a contract award to the bidder who proposes the lowest cost.<sup>208</sup> This cost-driven model effectively precludes small businesses from competing for valuable public contracts.<sup>209</sup> According to Ravi Norman, CEO of Thor

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<sup>205</sup> Contract Bundling Oversight: Hearing before the Subcomm. on Econ. Opportunity of the Comm. On Veteran’s Affairs, 110<sup>th</sup> Cong. 5 (2007) (Statement by Anthony R. Jimenez, President & CEO of MircoTech).

<sup>206</sup> See *Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 3-11 (Oct. 22, 2009), available at <http://www.mmd.admin.state.mn.us/disparity /revised2009METCDisparityStudy.pdf> (last revised Jan. 11, 2010)

<sup>207</sup> *Id.*

<sup>208</sup> See, e.g., *Sayer v. Minn. Dept. of Transp.*, 790 N.W.2d 151, 156–57 (Minn. 2010) (“[Th]e lowest responsible bidder is still the preferred method for choosing a contractor . . .”).

<sup>209</sup> Ravi Norman, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 100 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights).

Construction, “It’s always a higher cost to small and micro businesses, because they always have a higher profile of risk. Whether it’s going to be their cost capitalization or whether it’s going to be a subcontractor tier,” minority small businesses are simply unable to put forth the lowest bid to compete in the government contracting market.<sup>210</sup> Unfortunately, “that’s where a large concentration of the emerging DBE contractors exist, at that micro and small business” level.<sup>211</sup>

In adhering to the low cost model, state agencies may fail to take into account long-term goals and the potential for value-added by including minority-owned businesses in the process. As an alternative to the low cost model, a “best value” type of approach that “include[s] the variable of community”<sup>212</sup> might be a fairer criterion in awarding contracts. This model has an investment approach that develop[s] “a calculation on more than just capital expenditure, but the true expenditure of the life cycle value.”<sup>213</sup> Along those lines, the authors of the MnDOT Disparity Study suggested using the RFP process as a flexible tool to consider nonfinancial criteria in awarding the contract.<sup>214</sup> As part of the nonfinancial criteria, the authors contemplated consideration of a potential contractor’s proposal for and history of DBE utilization and minority workforce participation.<sup>215</sup>

There is legislation that permits public agencies to award a limited number of construction projects on the basis of “best value” rather than low cost.<sup>216</sup> However, the legislatures’ conception of “best value” does not quite comport with the recommendations of the disparity study. The “best value” legislation is silent on

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<sup>210</sup> *Id.* at 100.

<sup>211</sup> *Id.* at 103–04.

<sup>212</sup> *Id.* at 104.

<sup>213</sup> Ravi Norman, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 123 (Sept. 15, 2011)(transcript available at the Midwestern Regional Office, U.S. Commission on Civil Rights). (Stating that “..if you could have that as a policy piece that starts to drive contract[s], you’re going to really change the environment.”).

<sup>214</sup> *Joint Availability and Disparity Study*, MINN. DEPT. OF ADMIN. 6-19 (Oct. 22, 2009), available at <http://www.mmd.admin.state.mn.us/disparity/revised2009METCDisparityStudy.pdf> (last revised Jan. 11, 2010).

<sup>215</sup> *See id.*

<sup>216</sup> MINN. STAT. § 16C.02, subd. 4a (Matthew Bender & Company, LEXIS through 2012.).

minority-owned businesses and community inclusion.<sup>217</sup> Instead, the “best value” approach under Minnesota statute considers such factors as quality and timeliness of the work. While the “best value” statute enumerates factors that are indeed likely indicators of added value, consideration should be given to the value-added through the participation of minority-owned businesses.

### **3. Disadvantaged Business Enterprise Program and “Good Faith”**

Minority participation programs may be intended to rectify some of the barriers mentioned above that result from the contracting process. Most large construction contracts granted by MnDOT are funded in part through federal dollars and are thus subject to the federal Disadvantaged Business Enterprise (“DBE”) program requirements.<sup>218</sup> The program is intended to ensure “equal opportunity in transportation contract markets, addresses the effects of discrimination in transportation contracting, and promotes increased participation in federally funded contracts by small, socially, and economically disadvantaged businesses, including minority and women owned enterprises.”<sup>219</sup> At least 10% of the amounts made available for any federal-aid highways, mass transit, and transportation research and technology program must be expended with certified DBEs.<sup>220</sup> In order to become a certified DBE, a firm must be 51% owned and controlled by a socially and economically disadvantaged individual.<sup>221</sup> Generally, socially and economically disadvantaged individuals mean women and specific minority groups.<sup>222</sup>

MnDOT is required to assign a DBE goal on all construction projects that are worth \$350,000 and over.<sup>223</sup> For federal fiscal years (FFY) 2010-2012, the DBE goal is

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<sup>217</sup> *Id.* at subd. 4(a) (1)–(9) (showing the “best value” approach under Minnesota statute *permits* agencies to consider the contractor’s quality, timeliness, and customer satisfaction on previous projects; ability to stay on budget, minimize overruns and change orders, and prepare project plans; technical capacities; individual personnel qualifications; and the ability to minimize and assess risks.)

<sup>218</sup> See Minnesota Department of Transportation, *Disadvantaged Business Enterprise (DBE) Special Provisions* (Apr. 2011), available at <http://www.dot.state.mn.us/pre-letting/prov/order/dbe-sp11.pdf> [hereinafter *DBE Special Provisions*].

<sup>219</sup> Federal Highway Administration, *TEA-21 – Transportation Equity Act for the 21<sup>st</sup> Century - Fact Sheet* (Sept. 14, 1998), available at <http://www.fhwa.dot.gov/tea21/factsheets/dbe.htm>.

<sup>220</sup> *Id.*

<sup>221</sup> Minnesota Department of Transportation, *DBE Certification Process*, <http://www.dot.state.mn.us/civilrights/certification.html> (last visited Feb. 20, 2013).

<sup>222</sup> See *id.*

<sup>223</sup> Powerpoint: *Office of Civil Rights Metro State Aid Construction Training*, at MnDOT, Office of Civil Rights (Mar. 2, 2011), available at <http://www.dot.state.mn.us/metro/stateaid/OCR.ppt> [hereinafter *Powerpoint Presentation*].

8.7%.<sup>224</sup> The goal submitted for FFY 2013-2015 is 10.3%.<sup>225</sup> MnDOT has regularly underperformed since the DBE program was established in 1980.<sup>226</sup> While the achievement rate more than doubled from 3.6% in 2009 to 7.6% in 2011, MnDOT has not met or exceeded its DBE goal since 2004.<sup>227</sup> One reason to explain why MnDOT may have fallen short of meeting its goals is the “good faith effort” evaluation it uses when bidders fail to satisfy the DBE goal.

Before MnDOT awards a contract, the bidder must demonstrate either (1) that it has in fact satisfied the DBE goal; or (2) that it has made a “good faith effort” to meet the goal.<sup>228</sup> If the bidder fails to satisfy the goal, it must show that it took “all necessary and reasonable steps to achieve the DBE goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.”<sup>229</sup> Compliance is determined on a case-by-case basis and MnDOT looks at a myriad of factors to determine whether the bidder has satisfied the “good faith effort” requirement.<sup>230</sup> If the director of MnDOT’s Office of Civil Rights determines that adequate good faith efforts have not been demonstrated, the bidder may ask for administrative reconsideration.<sup>231</sup>

Although the MnDOT Office of Civil Rights provides factors and criteria used in evaluating good faith effort compliance, critics contend that it is unclear which of the criteria carry the strongest weight or are most likely to show that the contractor has indeed complied with the good faith effort requirements.

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<sup>224</sup> *Id.*

<sup>225</sup> See Letter from Derrell E. Turner, Division Administration, U.S. Department of Transportation, to Thomas K. Sorel, Commissioner of Transportation, Department of Transportation, *Re: FY 2013-2015 MnDOT Disadvantaged Business Enterprise (DBE) Goal Methodology* (Oct. 1, 2012), available at <http://www.dot.state.mn.us/civilrights/pdf/fhwalettertomndot.pdf>.

<sup>226</sup> MnDot’s Disadvantaged Enterprise and Workforce Collaborative, *Report to the Legislature* 10 (Feb. 1, 2011), available at [http://www.metrostability.org/efiles/MnDOT\\_Collaborative\\_Legislative\\_Report\\_FINAL\\_E-version.pdf](http://www.metrostability.org/efiles/MnDOT_Collaborative_Legislative_Report_FINAL_E-version.pdf).

<sup>227</sup> Dan Olson, *MnDOT Admits it Hasn’t Met DBE Goals*, Minnesota Public Radio (Nov. 9, 2007), available at <http://minnesota.publicradio.org/display/web/2007/11/08/dbegoals/>; see also Minnesota Department of Transportation, *DBE Certification Process*, <http://www.dot.state.mn.us/civilrights/certification.html> (last visited Feb. 20, 2013)..

<sup>228</sup> *(DBE) Special Provisions 3* (Apr. 2011), available at <http://www.dot.state.mn.us/pre-letting/prov/order/dbe-sp11.pdf>

<sup>229</sup> *Id.* at 6.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 8.

#### 4. Other Concerns of MnDOT's Handling of the DBE Program

In addition to the problems with good faith effort evaluations, concerns have been expressed that MnDOT may have failed to monitor and enforce the DBE requirements where a contractor has established that it could meet DBE goals at the beginning of a project.<sup>232</sup> At the time of bidding, the proposals submitted in a contractor's bid are simply projections – this includes the contractor's ability to meet DBE goals. For example, if a manager has miscalculated workforce projections or failed to reforecast projections as the project moves along, a contractor can end up falling short of the original DBE target upon which the government agency awarded the contract.<sup>233</sup> One of the concerns seems to be that if the government declines to hold the contractor accountable for these failures, the integrity of the DBE program's purpose is jeopardized - leaving minority owned businesses excluded from the process.

Indeed, the integrity of the state's DBE program was questioned in 2007 when records on hiring minority businesses on two major construction projects led to a federal investigation. On both projects, two companies failed in meeting their goals for hiring minority-owned businesses. These companies were Minnesota-based C.S. McCrossan and California-based Granite Construction. An internal audit revealed the two companies hired some women and minority-owned companies as subcontractors who did not do the work that was claimed, or who were not actually qualified as a DBE.<sup>234</sup> In addition, it also alleged that some of the DBE subcontractors were simply serving as “fronts or pass-through companies for contracts worth millions of dollars.” McCrossan and Granite denied any wrongdoing and insisted that they performed the work in good faith.<sup>235</sup> Despite this, MnDot fined both companies for “missing the DBE hiring goals and for misrepresenting the numbers.”<sup>236</sup>

This situation sparked a great deal of criticism towards the DBE program and how MnDOT was handling the program. According to a former MnDot official, big contractors believe that the DBE rules are a “terrible nuisance” and thus routinely ignore them.<sup>237</sup> Diane Holte, owner of DBE-certified Holte Contracting, did work as a subcontractor on the two projects discussed above and she shared her view on the state of the DBE program at the time: “It has become accepted to not meet goals—with no

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<sup>232</sup> *Id.* at 12.

<sup>233</sup> *Id.*

<sup>234</sup> Dan Olson, *MnDot falls far short on goals for hiring women and minority contractors*, MPRNEWS (Nov. 9, 2007), <http://minnesota.publicradio.org/display/web/2007/11/08/mndotdbe>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

repercussions.”<sup>238</sup> It must be emphasized, however, that the McCrossan and Granite incident happened five years ago. The section below will discuss actions taken by MnDOT in recent years in an effort to help restore the integrity and relevance of the DBE program that was lost in the previous decade.

### Government Response to Reduce Barriers to DBE Participation

MnDOT (through the DBE program), and other state agencies, have taken initial steps to address the barriers described above. Specifically: (1) MnDOT is testing new approaches on how it awards contracts for the purpose of increasing DBE participation for federally-funded highway construction projects; (2) the state legislature and Governor Dayton passed a bill that reinstated MnDOT the ability to grant preferences under the Targeted Group/Economically Disadvantaged (“TG/ED”) program on state-funded construction projects; and (3) the state Commissioner of Human Rights revised goals that encourage contractors to drastically increase minority workforce participation in state funded contracts in the Twin Cities metro area. This section will provide greater detail on the government’s responses to the inequities and will also discuss a successful program other state and city agencies have used that Minnesota could potentially adopt.

### MnDOT Response to Reducing Barriers and Increase Equity

#### 1. I-694 Pilot Project

On September 19, 2011 construction began on the Snelling/I-694 pilot project. This pilot project is a complete reconstruction of I-694 just north of the Twin Cities and has provided opportunities to test new approaches to project delivery such as de-bundled contracts and mandatory subcontracting provisions.<sup>239</sup> According to the MnDOT, “the Pilot Project Team, one of eleven project teams of the DBE and Workforce Collaborative Group (further described below), is comprised of eight stakeholder groups including general contractors, DBE contractors, training organizations, unions, business/workforce advocates, nonunion contractors/workforce, the Federal Highway Administration (“FHWA”), and MnDOT.”<sup>240</sup> This team is working with those in the industry to “brainstorm, implement and evaluate sustainable solutions with a focus on building diverse participation” on MnDOT projects.<sup>241</sup>

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<sup>238</sup> *Id.*

<sup>239</sup> *Pilot Project Opportunities – Workforce and DBE: I-694/US-10/Snelling Interchange*, Minnesota Department of Transportation 1 (Nov. 2011), <http://www.dot.state.mn.us/civilrights/pdf/pilotproject/pilotprojectupdate-nov2011.pdf> [hereinafter *Pilot Project Opportunities*].

<sup>240</sup> *Id.* at 2.

<sup>241</sup> *Id.*

The multiyear Snelling/I-694 pilot project was awarded to Shafer Contracting Co. whose winning bid included a commitment to employ over 17% DBE participation.<sup>242</sup> As of July 23, 2012, 37% of the total contract has been paid with 16% of the work going to DBEs.<sup>243</sup> Furthermore, Ramsey County, where the project is located, set minority employment goals at 11%. As of September 28, 2012, Ramsey County had exceeded its goal with minority participation for the project is at 12.7%.<sup>244</sup>

As mentioned above, MnDOT, DBE owners and other citizens worked together to de-bundle several projects within the Snelling/I-694 construction project. This allowed for a more diverse workforce and increased participation by DBEs. The three de-bundled contracts range in value from around \$20,000 to \$225,000.<sup>245</sup> The first de-bundled subproject was awarded on January 27, 2012; the second subproject was awarded on October 26, 2012; and the third was awarded on February 22, 2013.<sup>246</sup> As the pilot project continues to progress, MnDOT needs to stay the course and continue to work on strategies that reverse the harmful effects contract bundling has had on minority-owned businesses over the years.

## **2. Holding Contractors Accountable for Failing to Meet DBE Goals**

As stated above, there is concern over whether MnDOT properly enforces the good faith effort requirement when a prime contractor fails to meet the project's DBE goals. This concern was addressed to Mary Prescott, the Director of the MnDOT Office of Civil Rights ("OCR"). Ms. Prescott believes the OCR has taken reasonable steps to ensure that contractors are held accountable if they fail to meet good faith requirements. She pointed to the federal regulation that allows a contractor who initially was determined to not make adequate good faith efforts towards meeting the DBE goal the opportunity for an administrative reconsideration.<sup>247</sup>

MnDOT explains the administrative reconsideration as "an informal hearing before a Reconsideration Panel which acts as the MnDOT official."<sup>248</sup> This panel is comprised of

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<sup>242</sup> *Id.* at 3.

<sup>243</sup> Minutes of DBE & Workforce Collaborative 1 (July 23, 2012), *available at* <http://themncollaborative.org/forum/topics/collaborative-meeting-minutes-july-2012>.

<sup>244</sup> *Pilot Projects*, Minnesota Department of Transportation (2012), <http://www.dot.state.mn.us/civilrights/pilotprojects.html>

<sup>245</sup> *Id.* at 6.

<sup>246</sup> *Id.*

<sup>247</sup> Meeting with Mary Prescott (Oct 19, 2012) [hereinafter *Meeting with Mary Prescott*]; See 49 C.F.R. §26.53 (D)(1)-(5), *available at* <http://www.dot.state.mn.us/civilrights/reconsiderationhearings.html>.

<sup>248</sup> Minnesota Department of Transportation, *DBE Reconsideration Hearings*, at <http://www.dot.state.mn.us/civilrights/reconsiderationhearings.html> (last visited Feb. 13, 2013).

individuals who, while involved with MnDot, were not involved in determining whether the contractor was a “non-responsible bidder.”<sup>249</sup> Ms. Prescott noted that within the last three years, 13 prime contractors were brought to administrative reconsideration hearings and MnDOT’s determination that good faith efforts were not satisfied was sustained in seven of those cases.<sup>250</sup> As a 53% sustainment rate is likely not enough to satisfy MnDOT’s critics, it is clear that increased efforts to monitor and enforce good faith effort requirements is imperative to ensuring accountability within the system.

### **3. MnDOT’s Mentor Protégé Program & Working Capital Loan Fund**

MnDOT has recently implemented a mentor protégé program that helps to establish business partnerships between prime contractors and DBEs.<sup>251</sup> The purpose of the program is to “further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE Program, via the provision of training and assistance from other firms.”<sup>252</sup> The focus of the program is “on increasing the volume of work emerging DBE’s are capable of winning and to broaden the base of their activity, increasing the number and long-term stability of certified DBE firms.”<sup>253</sup> In order for the program to work, an experienced company or individual (Mentor) needs to assist and train a DBE (Protégé).<sup>254</sup>

In addition to the assistance provided through a Mentor/Protégé relationship, MnDot has also established a mechanism for providing working capital to qualified DBEs. Under the Working Capital Loan Fund Program (WCLF), DBEs are provided with short-term gap financing<sup>255</sup> to enable them to successfully complete construction contracts “and/or

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<sup>249</sup> *Id.*

<sup>250</sup> *See* Meeting with Mary Prescott at note 248.

<sup>251</sup> *See* Minnesota Department of Transportation, *Mentor Protégé Program*, <http://www.dot.state.mn.us/civilrights/mentorprotege.html> (last visited Feb. 13, 2013) [hereinafter *Mentor Protégé Program*].

<sup>252</sup> *Id.* at 8. *See also* MN Best, *Clients*, <http://www.mnbestinc.com/Clients.html> (last visited Feb. 20, 2013) (An example of a successful mentor-protégé relationship is between MN Best, a minority owned DBE founded in 2005, and URS, a multinational engineering and construction corporation. Working with the expert staff of URS, MN Best has gained “invaluable experience and training in schedule analysis” within the construction management field. MN Best has not only been mentored by URS, but “has been given the opportunity to work on actual projects for URS.”)

<sup>253</sup> *See* Mentor Protégé Program, at note 252, at 8.

<sup>254</sup> *Id.* at 7.

<sup>255</sup> Gap financing provides financing for businesses that are financially healthy, but are unable to obtain adequate financing from private lending institutions.

provide construction-related materials, supplies or services for MnDOT projects.”<sup>256</sup> According to Jan Jordet, Director of Consulting and Financial Services at MEDA, “MnDOT recognized that smaller contractors might need working capital to attempt bidding on MnDOT projects so it created a separate fund, managed by MEDA, to provide up to \$60,000 per borrower, or up to \$25,000 per MnDOT project. This is open to any DBE that has a MnDOT contract.” The WCLF program is administered through MEDA.<sup>257</sup> Access to working capital is essential for building a successful business and as banks continue to have tight lending standards, The WCLF Program may make it easier for DBEs to overcome the barrier of being unable to acquire working capital.

#### **4. DBE and Workforce Collaborative**

MnDOT is also working to build a more inclusive transportation industry with the DBE and Workforce Collaborative (“D/WC”). The D/WC is made up of eight stakeholder groups, including MnDOT employees and the FHWA, committed to developing “interconnected strategies that address disparities in the state’s transportation construction industry.”<sup>258</sup> Its mission is to “have contractors and workforce participation within the Minnesota transportation industry reflect the demographics of the state...”<sup>259</sup> The D/WC is credited with, among other achievements, forming 13 Mentor/Protégé agreements with contractors. These new relationships led to an increased retention of DBEs on transportation projects.<sup>260</sup> It also played a major role in de-bundling I-694/Snelling Avenue pilot project contracts to allow higher DBE participation.<sup>261</sup> The most recent action taken by the D/WC was triggered by legislation further described in the section below.

#### **5. Reinstating MnDOT’s Ability to Grant TG/ED Preferences**

In 1998, a federal court found that the TG/ED program was not narrowly tailored and therefore could not withstand constitutional strict scrutiny analysis.<sup>262</sup> Due to the court’s

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<sup>256</sup> Powerpoint: Minnesota Department of Transportation, *Business Development Program Overview* at Metro State Aid Training (Mar. 2, 2011), available at <http://www.dot.state.mn.us/metro/stateaid/BDP.ppt>.

<sup>257</sup> Email from Jan Jordet of MEDA, February 22, 2013 (on file with the authors).

<sup>258</sup> Minnesota Department of Transportation, *The MnDOT DBE and Workforce Collaborative*, available at <http://www.dot.state.mn.us/civilrights/pdf/dbe/collaborativebrochure.pdf> (last visited Feb. 13, 2013).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1037 (D. Minn. 1998) (“While the Court has assumed for purposes of this motion that a compelling interest exists, defendants have been singularly unable to demonstrate the connection between those individuals upon whom DBE status has been conferred...and any present or past discrimination against the races or gender of those individuals.”).

holding, MnDOT suspended its preference for TG/ED businesses.<sup>263</sup> Accordingly, while Admin still gave preferences to TG/ED businesses, MnDOT—a department that grants some of the largest construction projects—did not do so under the state program.

In the spring of 2012, state legislation was passed that reinstated MnDOT’s ability to grant preferences under the TG/ED business program on state funded construction projects. In passing the legislation, the Minnesota legislature sought to modify the previous program to be more narrowly tailored to serve the compelling interest of remedying disparities in MnDOT contracts.<sup>264</sup> The legislation to reinstate the TG/ED business program is largely based on the conclusions and recommendations of the 2010 MnDOT Disparity Study, showing persistent disparities in minority-owned business participation in MnDOT construction projects since MnDOT abandoned the TG/ED preference allowances in 1999.<sup>265</sup> The study provided:

[E]vidence to support the establishment of a moderate program to promote [Minority or Women Owned Business Enterprise(s) (M/WBE)] utilization. This conclusion is based primarily on some statistical disparities in current M/WBE utilization, substantial disparities in the private marketplace, evidence of discrimination in business formation and revenue earned from self-employment, some evidence of passive participation in private sector disparities, and some anecdotal evidence of discrimination. MnDOT should tailor its M/WBE participation policy to remedy each of these specific disparities.<sup>266</sup>

The disparity study established that racial disparities existed in MnDOT contracts and that improved participation of minority-owned businesses was needed.<sup>267</sup> Accordingly, MnDOT is now able to resume granting TG/ED business program preferences under the 1998 decision’s “narrowly tailored” requirement by demonstrating the presence of present and past discrimination against those seeking preferences as a TG/ED business.<sup>268</sup>

Minnesota Statute §161.321 states that, the MnDOT commissioner “may set goals that require the prime contractor to subcontract portions of the contract to small, targeted

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<sup>263</sup> Joint Availability and Disparity Study, at note 143, at 6-5; *see also* In re Sherbrooke, at note 263, at 1037.

<sup>264</sup> MINN. STAT. §161.321 (Matthew Bender & Company, LEXIS through 2012.).

<sup>265</sup> *See* Minnesota Department of Transportation, *Disadvantaged Business Enterprise and Workforce Collaborative, Report to the Legislature* 35 (Feb. 1, 2011) [hereinafter *DBE/WC Report*].

<sup>266</sup> Joint Availability and Disparity Study, at note 143, at 6-8.

<sup>267</sup> *DBE/WC Report*, at note 266, at 35.

<sup>268</sup> *Id.* at 35-36.

group businesses”<sup>269</sup> (“TGB”).<sup>270</sup> If the commissioner sets such goals, the prime contractors must demonstrate a good faith effort in meeting these goals.<sup>271</sup> The commissioner may also establish financial incentives and sanctions. Financial incentives can be given to those prime contractors who achieve the goals; and sanctions may be placed on those that fail to make the required good faith efforts.<sup>272</sup> The MnDOT Commissioner must also cooperate with the Commissioner of Administration to periodically review the level of statistical disparity that exists between TGBs to determine if there is a disparity between the percentage of construction contracts awarded to businesses owned by targeted group members and the representation of businesses owned by TGB members among all businesses in the state in the construction category.<sup>273</sup>

The D/WC responded to the passing of Minn. Stat. § 161.321 by establishing a Targeted Group Business (“TGB”) program for MnDOT’s state-funded construction contracts. Beginning in January 2013, MnDOT will set TGB goals on state-funded projects that will require each bidder to provide information about the efforts it made to obtain TGB participation.<sup>274</sup> The bidder must demonstrate that it either met the subcontracting goal for TGB participation, or request a waiver of the goal.<sup>275</sup> The waiver request must show that TGB businesses are not reasonably available to perform on the project.<sup>276</sup>

Minn. Stat. § 161.321 and the TGB program could both be key factors in reducing disparities in state-funded government contracts. One critique of the legislation, however, is that it is not effective as one would hope. For example, the MnDOT commissioner is not required to set subcontractor goals; instead he or she is given the option to do so. If the commissioner ultimately decides to set subcontractor goals, then he or she is given the option—but, again, is not required—to establish financial incentives or disincentives for prime contractors who meet or exceed or fail to meet the project

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<sup>269</sup> See MINN. STAT. § 161.321 subd. 2(a) (Matthew Bender & Company, LEXIS through 2012.).

<sup>270</sup> To be certified as a TGB, the business must be at least 51% owned by a woman, racial minority, or person with a substantial physical disability.

<sup>271</sup> See MINN. STAT. § 161.321 subd. 2(a) (Matthew Bender & Company, LEXIS through 2012.).

<sup>272</sup> *Id.*

<sup>273</sup> MINN. STAT. § 161.321 subd. 4a (Matthew Bender & Company, LEXIS through 2012.).

<sup>274</sup> Letter from Mary Prescott, Acting Director Office of Civil Rights, to Contractors ¶4 (Aug. 31, 2013), available at <http://themncollaborative.org/group.dbeattimeofletting/forum/topics/special-provision-letter-to> (follow mp letter-1.pdf hyperlink).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

goals.<sup>277</sup> While the TGB program ensures that MnDOT will set subcontractor goals, there is uncertainty over the effect the waiver request provision will have on the program. Nonetheless, the legislation and TGB program are steps in the right direction and will hopefully have an impact on reducing unemployment disparities in state-funded construction contracts.

## 6. Increasing Workforce Participation Goals

In addition to MnDOT and the state legislature taking action to increase the level of equity in government contract awards, the Minnesota Department of Human Rights (“MDHR”) has also taken steps to close the gap. On April 9, 2012, Kevin Lindsey, the State Commissioner of Human Rights, announced revised hiring goals for state-funded construction projects for all MnDOT projects that let on or after May 18, 2012.<sup>278</sup> The hope is that by setting the new hiring rate of minorities at 32%, minority participation will increase. This new goal, however, only applies to the Metro Area, which includes Hennepin and Ramsey counties and cities. Anoka, Carver, Dakota, Scott, and Washington counties will have a lower target of 22%.<sup>279</sup> These goals apply if one of the following conditions is met: (1) the construction contract is in excess of \$100,000 or (2) the contractor employs more than 40 full time employees.<sup>280</sup> It is important to note that meeting the new goals are not a requirement, but contractors are expected to make a good faith effort to meet the goals.

The tripling of minority workforce participation goals has been criticized by some contractors who say they can hardly meet the current goals. Tim Worke, transportation director for the Association of General Contractors of Minnesota, expressed such concern and disagreed with the process of setting the new minority participation goals.<sup>281</sup> Furthermore, agencies that disapprove of the new workforce participation goals may use the federal minority construction goal for Minnesota when the contract is supported by federal money. One reason why this is problematic is because the federal goal for Minnesota is only 2.9% per the 1970 census, which is outdated considering the

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<sup>277</sup> Arguably, requiring the commissioner to set goals and financial incentives or disincentives would have been risky considering that it may not survive a strict scrutiny analysis if challenged in court. “Strict Scrutiny” is the most stringent standard of judicial review. Statutes subjected to strict scrutiny often fail to meet it. {It may be worth explaining why strict scrutiny is the applicable standard – that race-based classifications are subject to strict scrutiny. Is it safe to assume the reader already knows this?}

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Pat Doyle, *Higher minority-hiring goal riles Minn. construction industry*, STAR TRIBUNE, March 27, 2012, available at <http://www.startribune.com/politics/statelocal/144482405.html>.

demographics in the state have changed considerably since that time.<sup>282</sup> Thus, when federal funds are involved, this loophole allows government entities to opt out of striving to meet the new goals set by Commissioner Lindsey and the MDHR. In a Star Tribune article dated March 27, 2012, Nick Thompson, an assistant commissioner at MnDOT, acknowledged that meeting the new goal will be “extremely difficult in the short term” stating that it was not known how long it would take.<sup>283</sup>

Commissioner Lindsey and the MDHR have defended the revised goals because they “more accurately reflect Minnesota’s increasing diversity and could result in hiring more female and minority employees.”<sup>284</sup> In a statement after the goals were announced, Commissioner Lindsey stated, “While unemployment remains a reality for 168,000 Minnesotans from all races and backgrounds, the jobless rate for minorities is disproportionately alarming...These updated hiring goals will ensure that all Minnesotans have a chance to compete for job opportunities as our economy continues to regain strength.”<sup>285</sup> In the same Star Tribune article, the Rev. Paul Slack, a community activist on transportation issues doubts the 32% target will be achieved anytime soon but said, “There needs to be a higher goal than 11 percent. This state is becoming more and more diverse all the time.”<sup>286</sup>

New census data on the minority workforce justifies the revised goals. This data reveals that 32.4% of workers available for construction in Hennepin and Ramsey counties are minorities.<sup>287</sup> According to Commissioner Lindsey, the new goals “simply reflect what is currently the reality.”<sup>288</sup> The concern these goals will be impossible to achieve is a bit of an overstatement. For example, the recently completed Minneapolis Public Schools headquarters building, a partially funded federal project, “brought millions of dollars worth of construction work to DBEs.” The project team, which included Mortenson and Thor Construction, exceeded their DBE participation goal of 25% on the \$36 million

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<sup>282</sup> A revised federal minority construction goal for Minnesota has been needed for a long time. Consideration should be given to update this inadequate goal.

<sup>283</sup> *Doyle*, at note 282.

<sup>284</sup> Brian Johnson, *Contractors question new minority hiring goals*, FINANCE & COMMERCE, March 21, 2012, available at <http://finance-commerce.com/2012/03/contractors-question-new-minority-hiring-goals/>.

<sup>285</sup> *Doyle*, at note 283.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

dollar project.<sup>289</sup> In fact, they nearly doubled it. Furthermore, Mortenson's minority workforce participation for the project was 27%, exceeding the 25% goal.<sup>290</sup> Of course, not all construction projects are the same and the success Mortenson and Thor have had in exceeding DBE and workforce participation goals has been the exception rather than the norm. However, these companies have shown that a 22% or even 32% participation goal is not insurmountable.<sup>291</sup> The revised hiring goals are a step in the right direction and will hopefully be a factor in reducing the state's unemployment disparity.

### ***Central Corridor and Other Transit Projects***

According to Carol Swenson of the District Council Collaborative (DCC), there continue to be challenges with ensuring workforce inclusion amongst low income resident of color along the Central Corridor Light Rail Construction Project. Carol had this to say about the project and concerns that exist:

The Central Corridor line as a transit project is 11 miles long, and it will cost \$957 million. And it will connect Downtown St. Paul with Downtown Minneapolis.... The Central Corridor light rail line is set to begin operation in 2014. It is the second of five plus lines that will be built in this region by 2030. The build out of these lines is part of a regional vision to redirect growth and development toward transit corridors to benefit residents, particularly those with low incomes or for communities of color, who will have more equitable access to jobs, housing and regional amenities.

It would also benefit businesses and industries of all sizes that will have affordable, commercial/industrial space and a workforce that arrives on time. It also will benefit the environment, which will be less impacted because we are reducing the size of the carbon footprint. Ultimately, the strategy is to help contribute to our region's long-term economic advantage and ensure all votes will rise as the economy recovers, grows and prospers here. But as others have no doubt pointed out today, without appropriate and intentional policies in place, the rising economic tide will lift some boats, but others will run aground. This is particularly true with regard to wealth building for communities of color, to full employment and family supporting wages.

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<sup>289</sup> Brian Johnson, *Mortenson, Thor exceed DBE goals on \$36M school headquarters*, FINANCE & COMMERCE, July 26, 2012, available at <http://finance-commerce.com/2012/07/mortenson-thor-exceed-dbe-goals-on-36m-school-headquarters/>.

<sup>290</sup> *Id.*

<sup>291</sup> *Racial Disparities*, at note 239, at 9. (Explaining that in order to meet or exceed the revised goals, an area of exploration to consider is apprenticeship programs that help prepare “minorities for employment in building and construction trades. Apprenticeship programs could “build the skills of those underrepresented groups so they could take advantage of the growing opportunities in the building and construction trades as electricians, contractors or carpenters.”).

With light rail construction beginning in less than a year, there was little opportunity to gain the skills and union standing to get your foot in the door for a job. Also, many of the training programs and jobs require a driver's license and sometimes a car in order to be selected. It is ironic that an infrastructure project whose primary purpose is to get people out of their cars into service and to serve those who are transit dependent depends on a construction system that requires those who build the line to have a driver's license and a car as an entry-level qualification. Many residents on the eastern end of University Avenue meet neither of these basic requirements. And it would take them months to acquire them, if not years. Add this time to the length of training and apprenticeship, and soon you are at a point where the project has been built, the train has passed you by.

The common response to this dilemma is that people need to figure out this problem and get in the game earlier. Here we find another glitch in the construction management that disadvantages those who need the jobs most. Contractors bidding on projects are not required to disclose what types of workers are needed for the project nor estimates of how many jobs by category will be available. Similarly, the project sponsor is not required to disclose their projections. Without this information, a community member seeking to prepare him or herself for a job has little to no information about the employment options available, what training is needed, and when they need to start.<sup>292</sup>

Given that the Central Corridor is one of several lines that will be built out in the Twin Cities region over the next several years, taking deliberate steps to ensure sufficient workforce participation of low income people of color is a critical step in closing the unemployment disparities that currently exist and rebuilding trust between government and economically-disadvantaged communities.

## **7. Bidder Rotation**

The barriers that were described above are significant, and the initial actions taken by state agencies within the last few years are certainly encouraging. Minnesota has begun to acknowledge that the unemployment disparity is inexcusable and will only become a far more serious problem in an increasingly diverse population. More work still needs to be done in order to break down the barriers that exist. This section will discuss a successful program that other states and cities have adopted that Minnesota could potentially utilize to continue its mission of increasing minority participation within the P/T services and construction contracts field.

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<sup>292</sup> Carol Swenson, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 199 (Sept. 15, 2011) (transcript available in the Midwestern Regional Office, U.S. Commission on Civil Rights) (Stating that “Although the project owner, the Metropolitan Council in this case, has the ability to execute some penalties for not achieving these goals, reporting requirements are so complex and filled with loopholes and qualifiers that governmental agencies are reluctant to use them. Thus, we are left with the good faith effort.”).

State and city agencies should consider the selective use of vendor and bidder rotation in order to expand the utilization of minority owned businesses.<sup>293</sup> According to a study by MGT of America, Inc., Vendor and bidder rotation is “used to limit habitual repetitive purchases from incumbent majority firms and to ensure that minority owned businesses have an opportunity to bid along with majority firms.”<sup>294</sup> Generally, a diverse team of firms is prequalified for work and then teams alternate undertaking projects.”<sup>295</sup> Vendor and bidding rotation has been used by a number of agencies including the city of Indianapolis, Fairfax County, Virginia, the Port Authority of New York and New Jersey, and Miami – Dade County.<sup>296</sup> These agencies hope this will encourage utilization of minority owned businesses.<sup>297</sup> Some examples of successful bidder rotation programs are discussed below:

#### ***Delaware River Port Authority (DRPA)***

Under the provision of this program the buyers query their vendor database to locate companies, which can supply a particular commodity or perform a service. To the extent possible, the program requires buyers to rotate vendors to ensure all companies are given an equal opportunity to compete for purchases.<sup>298</sup> DRPA has significantly increased the number of contracts that it has awarded to minority, women and disadvantaged businesses in recent years. In 2009, DRPA created opportunities for 86 certified women business enterprises totaling \$420,502.07.<sup>299</sup> Also in 2009, of the 75 million spent on contracts and purchases, more than \$15 million was paid to minority, women and disadvantaged businesses.<sup>300</sup>

#### ***Port Authority of New York and New Jersey and Miami-Dade County***

The Port Authority of New York and New Jersey has a Quick Bid rotation system for contracts less than \$500,000.<sup>301</sup> In this program, the agency solicits bids via telephone and fax from a minimum of six contractors on a rotating

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<sup>293</sup> See Joint Availability and Disparity Study, at note 143, at 6-3.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Delaware River Port Authority, *Office of Business Development and Equal Opportunity*, [http://www.drpa.org/obdeo/obdeo\\_dbe\\_program.html](http://www.drpa.org/obdeo/obdeo_dbe_program.html) (last visited Feb. 16, 2013).

<sup>299</sup> CNBnews.net, *DRPA Receives Done Deals Award*, <http://www.gloucestercitynews.net/clearysnotebook/2010/05/drpa-receives-done-deals-award.html> (last visited Feb. 16, 2013).

<sup>300</sup> *Id.*

<sup>301</sup> *St. Paul Disparity Study*, at note 163, at 10-20.

basis.<sup>302</sup> The period between bid, award and contract start is generally not more than six weeks.<sup>303</sup> Bidders are provided free construction documents with which to prepare their bids.<sup>304</sup> Miami-Dade County, Florida, uses small purchase orders for the Community Business Enterprise program and rotates on that basis.<sup>305</sup> Miami-Dade County also utilizes an Equitable Distribution Program, whereby a pool of qualified architecture and engineering (“A&E”) professionals are rotated awards of county miscellaneous A&E services as prime contractors and subcontractors.<sup>306</sup>

### **Dekalb County, Georgia**

Dekalb County, Georgia, has used a form of bidder rotation called Bidder Box system to promote minority owned business utilization.<sup>307</sup> This system selects a group of bidders from the list of county registered vendors to participate in open market procurements.<sup>308</sup> Under the bidder rotation system, the buyer identifies the commodity or service by entering an item box number. Using this item box, the computer selects five or six firms.<sup>309</sup> The lowest responsible bidder is awarded the contract.<sup>310</sup> Minority owned businesses are afforded an increased number of bid opportunities than would ordinarily be the case with a sequential selection of the process.<sup>311</sup>

## **8. Ensuring Equity**

Ensuring equity and parity in government contract awards are essential for minority-owned businesses in general and black-owned businesses in particular, to have the ability to hire additional employees and to funnel more resources into communities that are experiencing economic distress. Further, the positive effects of black-owned businesses having the power to create additional jobs can strengthen poor and middle income families.

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Port Authority of NY & NY, Engineering Department, “2002 Construction Program” at 9.

<sup>305</sup> *St. Paul Disparity Study*, at note 143, at 10-19.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

In addition to the gains that can be made by infusing equity and fairness into the government contracts arena, it is also important to ensure that outside barriers to employment opportunities are eliminated for African Americans and other communities of color. One such barrier involves the disproportionate rate of contact with the criminal justice system that African Americans in Minnesota face and the effect on employment opportunities for this segment of the population. The next section will explore this phenomenon and the ways in which it might contribute to the racial disparity in employment between Blacks and Whites in Minnesota.

## **IMPACT OF CRIMINAL RECORDS ON EMPLOYABILITY**

Although the issue of racial disparities in the criminal justice system is a problem nation-wide, it is arguably more prevalent in Minnesota. Here, “the disparity between Whites and African Americans with criminal records is four times higher than the national average.”<sup>312</sup>

From the first point of contact with law enforcement all the way through convictions and sentencing, African Americans are disproportionately represented at every stage of the criminal justice system. Standing alone, this fact is extremely troubling. What is more troubling, however, is that involvement in the criminal justice system does not just involve “doing time” or paying fines. Rather, a criminal record may haunt an individual for the rest of his or her life and make it very difficult to find housing and gainful employment.<sup>313</sup>

The succeeding analysis will address racial disparities involved in employer use of criminal background checks by dissecting the following: The basics of arrest records; the disparity regarding arrest records; employer reliance on arrest records; expungement of arrest records; and possible solutions to decrease the impacts of such records on employability.<sup>314</sup> This analysis will address arrest records in general, but will especially

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<sup>312</sup> Lucy Wieland, *Minnesota’s racial disparities: A judge’s view*, STAR TRIBUNE, Apr. 17, 2011, available at <http://www.startribune.com/opinion/119948639.html?refer=y>.

<sup>313</sup> Judge Pamela Alexander, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Factfinding meeting on Racial Disparities in Unemployment 199 (Sept. 15, 2011) (transcript available in the Midwestern Regional Office, U.S. Commission on Civil Rights) (Stating that “. . . in my 25 years as a district court judge, I did not hesitate to punish when it was appropriate. However, it was my understanding that in most cases the punishment had a clear end, a point where they paid their debt before given a chance to re-enter into society if they chose to do so, fully rejoin their community, rebuild their lives, and support their families. But as I became increasingly concerned when defendants would call me long after their sentences were complete and tell me about the difficulties that they had finding employment and housing, I became concerned, not just about the injustice of the situation but about the implications for public safety. Ex-offenders who find stable employment and housing are less likely to re-offend.”).

<sup>314</sup> It is also important to note that landlords often conduct background checks, making it even more difficult for individuals with criminal records to successfully reintegrate into society and create a stable living environment.

hone in on arrest records that do not result in convictions and the impact that these records have on employment opportunities.

## **Arrest Records**

In Minnesota, the use of an arrest record, even in cases where there has been no formal conviction, can have detrimental effects on individuals seeking employment opportunities. Given the prevalence of arrest records among African Americans in Minnesota, this segment of the population experiences disproportionate effects from such records. In order to gain an understanding of how employer use of arrest records affects individuals, this section will address the specifics of what an arrest record is, how it is compiled, and who can access these records.

### **1. What is an Arrest Record?**

“Arrest” is defined by Minnesota statute as “taking a person into custody [so] that the person may be held to answer for a public offense.”<sup>315</sup> This includes both restraining an individual, and taking an individual into custody who willingly submits.<sup>316</sup> Being arrested and being charged with a crime are two vastly different things. In order to distinguish between the two, a look at the arrest process is warranted. After an arrest is made, but before a person is charged with a crime, the police compile an arrest record. The record works to do two things. First, it summarizes the events leading up to the arrest and second, it gives specific details relating to the arrest, including dates, times, locations and witnesses.<sup>317</sup> More specifically, arrest records may include personal information about the arrested individual including name, addresses, age as well as detailed information regarding the arrest like the nature of the charge, time and place of the arrest, arresting agency, information as to whether the individual has been incarcerated, and location of incarceration.<sup>318</sup>

Once the arrest record is assembled, police typically send the record to the prosecutor who reviews it and decides whether criminal charges will be brought against the arrested individual. If the prosecutor concludes that the individual should be charged, there is a preliminary hearing before a judge to determine whether there is enough evidence to proceed. Alternatively, the prosecutor may conclude that the arrested individual should not be charged with a crime. However, it is essential to understand that the arrest record

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<sup>315</sup> MINN. STAT. § 629.30 subd. 1 (Matthew Bender & Company, LEXIS through 2012.).

<sup>316</sup> *Id.*

<sup>317</sup> *What Happens When You're Charged with a Crime*, FINDLAW, <http://criminal.findlaw.com/criminal-law-basics/what-happens-when-you-re-charged-with-a-crime.html> (last visited Feb. 16, 2013) [hereinafter *FindLaw*].

<sup>318</sup> Jon P. Erickson and Shawn D. Stuckey, *Collateral Effects of Arrests: What You Need to Know*, SUMMER 2007 BGS IN BRIEF NEWSLETTER (Jan. 25, 2010), available at <http://www.bgs.com/criminal-law/collateral-effects-of-arrests-what-you-need-to-know/>.

does not simply disappear when the prosecutor decides against bringing charges; an arrest record exists independently from a conviction record.<sup>319</sup> The arrest record is maintained at the arresting agency and is neither disposed of nor hidden.<sup>320</sup> Although an individual may petition for expungement of his or her criminal record (as will be discussed later in this section), the process is not always easy. As a result, irrespective of whether an individual is charged with a crime, absent obtaining an expungement, he will carry a blemish on his record that may directly or indirectly affect his future, especially in the area of employability.

## 2. Who Can Access Arrest Records?

In addition to the retaining of arrest records at the arresting agency, all juvenile felony and gross misdemeanor arrests, as well as adult felony, gross misdemeanor, and targeted misdemeanor arrests must be reported to the Bureau of Criminal Apprehension (BCA) by law enforcement agencies under state law.<sup>321</sup> Although law enforcement agencies are not required to report other misdemeanor arrests, they may report them to the BCA if they so choose.<sup>322</sup> Upon receipt of these records, the BCA provides free public access to the information contained within the arrest records.<sup>323</sup> With a signed consent form and a minimal fee, a prospective employer or landlord may access a person's private records. If an employer or other agency does not have a signed consent form then under the Minnesota Data Practices Act, when that agency requests private information that is protected by law from disclosure, the agency will be informed that, while the BCA retains this private information, the BCA is unable to disclose it. Should this occur, an employer or landlord may make an unfair assumption that an incriminating record exists.<sup>324</sup>

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<sup>319</sup> *FindLaw*, at note 318.

<sup>320</sup> Erickson, at note 319.

<sup>321</sup> Minnesota Public Criminal History, *Frequently Asked Questions*, <https://cch.state.mn.us/PcchOffenderFAQ.aspx> (last visited Feb. 16, 2013).

<sup>322</sup> *Id.*

<sup>323</sup> Erickson, at note 319.

<sup>324</sup> Dana Boraas, *Expungement in Minnesota: Room for Redemption*, LEGAL SCHOLARSHIP FOR EQUAL JUSTICE: A PROJECT OF THE MINNESOTA JUSTICE FOUNDATION (2010), available at [http://www.lsej.org/documents/478851Boraas\\_Expungement%202.pdf](http://www.lsej.org/documents/478851Boraas_Expungement%202.pdf); see also *Alexander*, at note 315 (transcript at 47-48) (Stating that “Minnesota has a record-sealing remedy through the expungement process, but recent case law has made it unclear if any record of a conviction can ever be sealed on an executive branch. Juvenile expungement procedures are also unclear. The types of expungements available under the current statute are very limited. And the expungement process can also be difficult and costly. You have to hire a lawyer, obviously. And it is nearly unavailable to the vast majority of individuals that would benefit most.”).

In addition, the Minnesota Judicial Branch now allows remote access to criminal records through the Minnesota Trial Court Public Access Remote View (“MPA”). MPA is a “public-view” version of the Minnesota Court Information System (MNCIS), the computerized case management system utilized by Minnesota District Courts to manage and track cases and calendars. All open or dismissed cases in Minnesota, petty misdemeanors included, may be accessed in the MNCIS system free of charge. MNCIS states on its website that: (1) the records contained are not official court records, (2) the records may be incomplete, and (3) the records *should not be used for background checks*.<sup>325</sup> Unfortunately, these warnings do not prohibit prospective employers from rejecting applicants for housing and jobs based on this potentially misleading or inaccurate information. According to Judge Pamela Alexander:

Research has also shown that the number of employers conducting criminal background checks has roughly doubled in the last ten years. And the records are much more accessible and inexpensive. This may be a good thing in some instances, but our public and private records collection in the dissemination system is often inaccurate. In some cases . . . , it reports things that should be of no relevance to employers and landlords that nevertheless cause fear and confusion. Access to juvenile records, once considered protected, has also increased, preventing the youngest members of our community from reaching their fullest potential. These barriers and issues will be easier to overcome if Minnesota provides some remedies for individuals with a criminal record. Unfortunately, we currently have little to offer.<sup>326</sup>

Although the publicly-accessible case records found on the MPA Courthouse service (located on the court public access computers) are not all remotely accessible through MPA Remote, criminal record information is commonly obtained by individuals known as “data harvesters” or “data verifiers.”<sup>327</sup> Data harvesters are people who travel to courthouses, law enforcement centers, or the BCA to gather information on individuals who have been arrested or convicted in any particular jurisdiction. Data harvesters then sell the information they have collected to individuals or companies who are willing to pay for it (often employers and landlords).<sup>328</sup>

### **3. Disparity Regarding Arrest Records**

As the availability of arrest records to employers increases, it becomes significantly more important to recognize the racial disparity inherent in the criminal justice system, specifically concerning arrests. Research shows that African Americans are more likely

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<sup>325</sup> Minnesota Judicial Branch, *Access Case Records*, <http://www.mncourts.gov/publicaccess> (last visited Feb. 16, 2013) [hereinafter *Access Case Records*].

<sup>326</sup> Alexander, at note 314 (transcript at 46-47).

<sup>327</sup> *Access Case Records*, at note 326.

<sup>328</sup> Dana Boraas, at note 325.

to obtain an arrest record than their white counterparts due to the disparities inherent in the criminal justice process. According to Minneapolis Council member Cam Gordon:

I think there [are] some subtle processes that go on basically to criminalize people based on the color of their skin as well. The problem is it's so subtle and so unintended; sometimes it's difficult to get a handle on. But the likelihood of certain individuals of predictability and the likelihood of certain individuals, depending on where they're born and who their parents are, to get in trouble with their teacher early on, to get in trouble with their school early on, to have negative interactions with law enforcement early on, to get an arrest record early on, and to be, you know, led in the pathway to a prison, to unemployment, to poverty, is too clear to say that something else is going on here. I mean, it's too -- I think it's time we acknowledge there's some institutional, structural basis on what's going on in our society, and we desperately need to address it and break that wherever we can.<sup>329</sup>

There seems to be a correlation between the prevalence of racial disparities and the amount of discretion given to officials at various level of the criminal justice system. A 2001 article from *Bench and Bar Magazine* of Minnesota, a publication of the Minnesota State Bar Association, revealed some of the disturbing statistics about racial disparity in regard to one such area of police discretion: Namely, traffic stops. In one study, the Minneapolis and St. Paul police departments voluntarily collected data regarding the race of the drivers they pulled over in traffic stops. The Minneapolis police department's first six months of data revealed that while people of color make up just 35 percent of the population in Minneapolis, they accounted for over half of the drivers stopped.<sup>330</sup> Additionally, African Americans comprise less than 20 percent of the population, but account for almost 40 percent of traffic stops.<sup>331</sup> The study also showed results indicating that officer discretion comes into play when determining who will be arrested for certain low-level offenses. For example, African Americans are 35 times more likely than Whites to be arrested for providing false information, 27 times more

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<sup>329</sup> Cam Gordon, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 147 (Sept. 15, 2011) (transcript available in the Midwestern Regional Office, U.S. Commission on Civil Rights).

<sup>330</sup> Thomas L. Johnson and Cheryl W. Heilman, *An Embarrassment to All Minnesotans: Racial Disparity in the Criminal Justice System*, BENCH AND BAR OF MINNESOTA (2001), available at <http://www.mnbar.org/benchandbar/2001/may-jun01/racial-disparity.htm>. (Contending that unfortunately, this type of disparity continues from the first point of contact with law enforcement through the subsequent stages of the criminal justice process. For example, African Americans are 2.5 times more likely than Whites to be arrested subsequent to a traffic stop. In Minnesota, the ratio of African American arrests to White arrests for "Part 1" crimes (murder, manslaughter, rape, robbery, assault, burglary, larceny, auto theft, and arson) was 14:1 in the year 2001. In the same year, the ratio for violent crimes was 21:1).

<sup>331</sup> *Id.*

likely for lurking, 19 times more likely for trespassing and 10 times more likely for disorderly conduct.<sup>332</sup>

Notably, prospective employees with arrest records experience disparate treatment in regard to employer use of arrest records. An arrest record, regardless of the offense alleged, can and often does disqualify an applicant from potential employment. Having an arrest record containing one of the low-level, non-violent offenses previously mentioned is generally not indicative of an individual's suitability for employment, yet African Americans are subject to arrest for these crimes at a much higher rate than Whites and, consequently, are more likely to be excluded from gainful employment as a result.<sup>333</sup>

## **Employer Reliance on Criminal Records**

### **1. Employer Use of Criminal Records**

The disparities surrounding arrests become all the more important when considering the fact that employers use these records to determine the employability of job applicants. As criminal records become more readily available, the use of criminal background checks by employers continues to increase. A 2010 survey by the Society for Human Resources Management found that "92 percent of employers conduct criminal background checks on some or all job applicants, this is up from 51 percent of employers who did so in 1996."<sup>334</sup> Of the over 80 percent of employers who use criminal history checks in the hiring process, over 60 percent indicate that they *probably* would not or *definitely* would not hire someone with a criminal record, including those with an arrest record containing no conviction.<sup>335</sup>

While employers may have legitimate concerns about hiring an individual with a criminal record related to safety, potential civil liability, and concerns about trustworthy employees, a blanket rejection of all applicants with criminal records eliminates opportunities for applicants who are attempting to reintegrate back into society. In regard to the employers who use arrest records as a disqualifying factor for applicants, these applicants may have never been charged or convicted of a crime and may be no more of a risk factor for criminal activity than those with no record at all. In addition, as

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<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> Matthew Schwarzfeld, *EEOC Updates Policy on Criminal Background Checks*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (Apr. 27, 2012), <http://www.nationalreentryresourcecenter.org/announcements/eoc-updates-policy-on-criminal-background-checks>.

<sup>335</sup> Shawn D. Stuckey, *Decreasing the Accessibility to Criminal History Records to Diminish the Devastating Impacts of Collateral Effects on African Americans in Minnesota*, 27 CHICANO-LATINO L. REV. 203, 217 (2008).

the disposition of a charge following an arrest often goes unreported, even when an individual informs a potential employer that his or her case was dismissed, the employer may question the truthfulness of that individual's statement. In the case of published arrest records, the general public (employers included) may assign guilt even where it is not warranted. As lawyer and author Shawn Stuckey puts it, "since most media outlets do not publish the disposition of the crimes, one is usually presumed guilty until they prove themselves innocent..."<sup>336</sup>

Not only does the use of criminal records disproportionately affect people of color in the application process, but employers' retrospective use of background checks for *current* employees is of serious concern. As an illustration of this phenomenon, Judge Pamela Alexander, President of the Council on Crime and Justice, shared the anecdote of a 45 year old man who had a felony conviction when he was 19 years old. He had been working at a job for 12 years when new management took over and conducted criminal background checks on employees. After learning of the conviction, management fired the man. When he objected and offered his positive work record as proof that the conviction did not affect his standing as an employee, management explained that it would not continue to employ anyone who has a felony conviction on his record.<sup>337</sup>

The above narrative illustrates the lack of job security that people with criminal records experience. Although this is just one example, it is unclear whether the use of retrospective criminal background checks on current employees is a process that will become widespread amongst employers. If so, in light of fierce competition within the workplace, retrospective background checks have the potential to disqualify individuals with criminal records, leaving them out of work and with limited options.

## **2. Legal Issues Surrounding Employer Use of Criminal Records**

As a matter of federal law, under Title VII of the Civil Rights Act of 1964, an employer must demonstrate that disqualification of a job applicant based upon a criminal background check is job-related and consistent with business necessity. According to the Equal Employment Opportunity Commission (EEOC), an employer conducting background checks must consider the following three factors to meet this burden: "(1) the nature and gravity of the offense(s), (2) the time that has passed since the conviction and/or completion of the sentence, and (3) the nature of the job held or sought."<sup>338</sup> Employers who fail to comply with these factors could be subject to litigation or other

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<sup>336</sup> Shawn D. Stuckey, *Collateral Effects of Arrests in Minnesota*, 5 U. ST. THOMAS L.J. 335 (2008), available at <http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1146&context=ustlj>.

<sup>337</sup> Alexander, at note 314 (transcript at 24).

<sup>338</sup> Grant T. Collins, *EEOC to Scrutinize Employers' Use of Criminal Background Checks*, MINNESOTA EMPLOYMENT LAW REPORT (Oct. 29, 2010), <http://www.minnesotaemploymentlawreport.com/discrimination/eec-to-scrutinize-employers-use-of-criminal-background-checks/>.

sanctions. For example, in a January 2012 press release, the EEOC announced a 3.13 million dollar settlement with Pepsi Beverages (Pepsi) regarding a racial discrimination charge filed in the Minneapolis Area Office of the EEOC. This settlement was arrived at after the EEOC investigated and found reasonable cause that Pepsi had discriminated against African Americans through a criminal background check policy. This discrimination was a direct violation of Title VII of the Civil Rights Act of 1964.<sup>339</sup>

Under Pepsi's former policy, employment was denied both to applicants who had been arrested, but were not convicted of an offense, and those who had been arrested and convicted of certain minor offenses. The EEOC asserted that employer use of arrest and conviction records to deny employment may be illegal under Title VII when the record is not relevant to the job because it may disproportionately limit the employment opportunities of applicants of color. In support of this theory, the EEOC's investigation concluded that more than 300 African Americans were adversely affected and disproportionately excluded when Pepsi applied its criminal background check policy. As a result, not only did Pepsi implement a new criminal background check policy, but the company will offer employment opportunities to those who were adversely affected by the former policy who are still interested in jobs at Pepsi. Pepsi will also report to the EEOC regularly with updates on its new background check policy, and will perform Title VII training for its hiring personnel and managers.<sup>340</sup>

The circumstances that Pepsi faced and the resulting actions to remedy the problems can serve as an example for other employers whose criminal background check processes may be unfairly impacting African Americans. Aside from the liability issues that employers may face when attempting to screen out candidates with criminal records, there are also tremendous impacts to the larger society when people with criminal records are not able to successfully reintegrate back into society.

There is a cycle surrounding crime and unemployment which was described by President George W. Bush in a State of the Union Address in 2004: "This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison..."<sup>341</sup> With the job market growing increasingly competitive and the influx of thousands of prisoners back into society each year, the use of background checks has a major impact on an individual's chance of becoming gainfully employed. Consequently, the result of having an arrest record

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<sup>339</sup> Press Release, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 11, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

<sup>340</sup> *Id.*

<sup>341</sup> United States Department of Justice, *Prisoners and Prisoner Re-Entry*, [http://www.justice.gov/archive/fbci/progmenu\\_reentry.html](http://www.justice.gov/archive/fbci/progmenu_reentry.html) (last visited Feb. 16, 2013).

accessible to a potential employer can be potentially devastating to an individual seeking rehabilitation and reintegration. Additionally, unemployment can thrust individuals back into engaging in criminal activities to financially support themselves and their families. The Pepsi case represents progress attained at the federal level; however, there is also work to be done at the state level to insure that employers are appropriately utilizing background checks in regard to potential employees. Minnesota legislation has made some progress in addressing this issue. For example, Minnesota Statute 364.03 states “no person shall be disqualified from public employment, nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.”<sup>342</sup> In addition, Minnesota Statute 364.021, more commonly known as “Ban the Box,” requires all public and private employers to wait for an individual to be selected for an interview before inquiring about criminal records (i.e. it prohibits the “box” individuals check on an application form indicating that the applicant has a criminal record).<sup>343</sup> The goal of “Ban the Box” is to prevent inquiries about criminal records prior to an interview, or if there is not an interview, before a conditional offer of employment is extended, so that individuals who have criminal records have an opportunity to be evaluated based on their skills and qualifications and not solely upon their record.

The statute seems to be a step in the right direction in limiting discrimination against those with criminal histories. However, it does not prohibit employers from disqualifying applicants based on their particular criminal history at subsequent points in the hiring process.<sup>344</sup>

### **3. Collateral Effects of Arrests on Employability**

Collateral effects are invisible civil punishments that result from interaction with the criminal justice system.<sup>345</sup> Minnesota Statute 609B defines a collateral sanction as “a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically when that person is convicted of or found to have committed a crime, even if the sanction is not included in the sentence.”<sup>346</sup> The statute lists hundreds of collateral sanctions related to employment and licensing in areas such as teaching, nursing and other health care licenses, transportation, elections, carriers, liquor,

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<sup>342</sup> MINN. STAT. § 364.03 subd. 1 (Matthew Bender & Company, LEXIS through 2012.)

<sup>343</sup> MINN. STAT. § 364.021 (Matthew Bender & Company, LEXIS through 2012).

<sup>344</sup> It is also important to note that the Department of Corrections Employees, Law Enforcement Agencies, Fire Protection Agencies, Department of Human Services Licensed Positions, and any position with a statutory background check requirement are exempt from Minn. Stat. 364.

<sup>345</sup> Stuckey, at note 338, at 348.

<sup>346</sup> MINN. STAT. § 609B.050 (Matthew Bender & Company, LEXIS through 2012).

gambling, fiduciary service and public office vacancies, local government, driving and motor vehicles, prison program eligibility, possession of firearms, services and benefits, property rights and more.<sup>347</sup> Depending on the crime committed, collateral consequences could prohibit individuals from obtaining jobs, or licensing for jobs, such as school bus drivers, pharmacists, human services workers, residential building managers, boiler inspectors and more.<sup>348</sup> Another important issue regarding collateral consequences relates to education. Individuals who are unaware of certain collateral consequences may invest time and money into postgraduate education in a field that, due to their criminal records, they will never be able to work.<sup>349</sup>

Across the board, individuals with arrest records will likely face challenges due to employer concerns about hiring individuals whom they feel may be unqualified for the job or may present liability concerns. However, there is evidence that not all criminal or arrest records are treated equally; especially when examining the use of arrest records of African Americans versus those of their White counterparts.

#### **4. Disparities Surrounding Employer Use of Arrest Records**

A study recently conducted by the Council on Crime and Justice examined the effects of a low-level arrest on employment opportunities. The conductors of the study sent out one set of White “testers” and one set of African American “testers” to interview for 600 entry-level jobs in Minnesota. All testers had the same low-level offense: a disorderly conduct conviction for getting into a fight at the City Center. The study examined the call-back rate of the testers after they had participated in an interview and disclosed their conviction. The outcome of the study resulted in the following findings: (1) 38 percent of White applicants who did not have a criminal conviction were called back, (2) 34 percent of Whites who had a criminal conviction were called back (3) just 27 percent of Blacks who did not have a criminal conviction were called back, and (4) only 20 percent of African Americans with a criminal conviction were called back.<sup>350</sup> This study demonstrated that employer use of arrest and other criminal records disparately affects African American applicants and makes it very difficult for applicants who have

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<sup>347</sup> *Id.*

<sup>348</sup> *Id.*; see also Stuckey, at note 338 (Stating that the Council on Crime and Justice proposed arrest record accessibility legislation to prevent the harmful effects of arrest records. The legislation would place an automatic seal on arrest data so that non-criminal justice agencies would be unable to access that individual’s data before a determination of guilt. It prescribes that all arrests not resulting in prosecution be automatically sealed within 180 days of the arrest. Further, this legislation would require an automatic seal on arrest records in cases with dispositions in favor of the arrestee and require the records to be strictly controlled and maintained only at the criminal justice agencies.).

<sup>349</sup> Stuckey, at note 338.

<sup>350</sup> Council on Crime and Justice, *The Effects of Low-Level Records and Race on Employability* (Mar. 2009); see also Devah Pager, *The Mark of a Criminal Record*, 108 *AJS* 5 (Mar. 2003), available at [http://www.princeton.edu/~pager/pager\\_ajs.pdf](http://www.princeton.edu/~pager/pager_ajs.pdf).

criminal records to successfully reintegrate into society. One possible remedy to reduce the harsh effects that the existence of an arrest record can produce is for an individual to seek an expungement of the record. Although this seems like a logical and plausible solution, obtaining an expungement is not always easy, or even possible.

## EXPUNGEMENT OF ARREST RECORDS

To prevent an arrest record from being publically exposed, or to mitigate the damage done to one's reputation and employability, an individual may seek an expungement if he or she meets certain requirements. In Minnesota, expungement is available by statute or through the inherent power of the court. According to a recent article on collateral effects, "a statutory expungement allows for all records to be expunged from public record while inherent power expungement is limited solely to the courts and not to executive agencies."<sup>351</sup>

If the individual was arrested but never charged with a crime, or if the case was dismissed prior to a criminal complaint being filed, the individual may request that the identifying parts of the arrest record be returned to him or her and that the arrest record be sealed at the law enforcement agency.<sup>352</sup> Minnesota Statute 609A.03 requires an individual seeking a criminal record expungement to file a petition that satisfies the requirements of the section and to pay a filing fee. However, under Minnesota Statute 299C.11, no petition under Chapter 609A is required if:

the person has not been convicted of any felony or gross misdemeanor, either within or outside of the state, within the period of ten years immediately preceding the determination of all pending criminal actions or proceedings in favor of the arrested person, *and either* of the following occurred:

- 1) all charges were dismissed prior to a determination of probable cause; *or*
- 2) the prosecuting authority declined to file any charges and a grand jury did not return an indictment.<sup>353</sup>

If the preceding conditions are met then, upon demand, the law enforcement agency must "destroy the arrested person's finger and thumb prints, photographs, distinctive physical mark identification data, information on known aliases and street names, and other identification data, and all copies and duplicates of them."<sup>354</sup>

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<sup>351</sup> Stuckey, at note 339, at 352.

<sup>352</sup> MINN. STAT. § 609A.03 (Matthew Bender & Company, LEXIS through 2012).

<sup>353</sup> MINN. STAT. § 299C.11 subd. 1(b) (Matthew Bender & Company, LEXIS through 2012) (emphasis added).

<sup>354</sup> *Id.*; *See also* Stuckey, at note 338 (discussing how to expunge criminal records).

As referenced above, in Minnesota, judges have discretion to determine, on a case-by-case basis, whether an individual's request for expungement should be granted by examining whether that individual's constitutional rights have been infringed upon by the publication of his or her criminal record.<sup>355</sup> If there is no constitutional violation, the court will weigh the interests of society and the benefits to accessibility of the individual's criminal record, against the interests of the individual and how accessibility may affect his or her efforts at rehabilitation.<sup>356</sup> It is important to note that, in *State v. Shultz*, the Minnesota Court of Appeals eradicated the court's right to expunge records retained at the BCA and limited the expungement power of the court to records retained in the court system.<sup>357</sup> The importance of this decision is that it renders the inherent power expungement virtually ineffective because nearly all employment agencies obtain their criminal background information from the BCA.<sup>358</sup> The difficulty in obtaining an expungement is one more reason that Minnesota agencies should work to formulate solutions to address the disparity regarding the use of criminal background checks and, in turn, high unemployment rates amongst African Americans.

### **Proposed Solutions**

The information contained in the preceding section demonstrates that Minnesota is urgently in need of solutions to reduce or eliminate racial disparities regarding unemployment. It is for the betterment of individuals who retain arrest records, and Minnesota's society at large, to help those who have been in contact with the system to become productive, successful members of society. There are many steps that can be taken to reduce disparities and reform the criminal background check processes in Minnesota, including educating employers and law enforcement as well as reforming legislation. Judge Pamela Alexander summed it up best when she stated:

We need to fund programs that help ex-offenders make the difficult transition back into society, especially those like help with employment, housing, substance abuse. I believe we need to work with the business community and property owners to pass legislation to help develop policies and procedures that would allow ex-offenders to be evaluated based on their skills and qualifications and character, not only on their past mistakes.

We need to provide a way for ex-offenders to have a conviction sealed when appropriate or perhaps in the case of some offenses allow them to receive a certificate of rehabilitation that will ensure others that they are not now a risk. We need to make the sealing of non-conviction records easier or, better yet, automatic.

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<sup>355</sup> Stuckey, at note 338.

<sup>356</sup> *Id.*

<sup>357</sup> *State v. Schultz*, 676 N.W.2d 337, 343-344 (Minn. Ct. App. 2004).

<sup>358</sup> Stuckey, at note 338.

We need to be more securely -- we need to securely protect the records of our children so that they can reach their fullest potential and make sure their juvenile records are not made public. And we need to make sure that they and their counselors know how the record will impact their future so that they do not waste their time preparing for jobs that they will not get, but, more importantly, we must eliminate irrational and inappropriate and severe barriers that keep them from pursuing their dream. And we must do whatever we can to show ex-offenders that they are fully welcome back into our communities, including valuing their voice in the democratic process.<sup>359</sup>

## 1. Educate Employers and Law Enforcement

The first step in reducing the use and impact of criminal background checks is to educate employers and law enforcement both about the disparity surrounding the criminal justice system in Minnesota, and the impact that such background checks have on individuals attempting to reintegrate back into society. The Council on Crime and Justice offers training to educate employers about this issue through a program called Gaining Access to Useful and Gainful Employment (GAUGE), which is “designed to encourage the private business sector to allow for a non-discriminatory and fair review of criminal backgrounds in the hiring process.”<sup>360</sup> Information provided by GAUGE includes state and federal laws that every employer should know, an overview of negligent hiring liability, an overview of the criminal justice system, how records are created and reported, new Minnesota legislation that will impact the hiring process, and model hiring practices.<sup>361</sup>

Additionally, in 2000, the Council launched the Racial Disparity Initiative (RDI), a comprehensive and widely-cited study looking at the causes and consequences of racial disparities in regard to Minnesota’s criminal justice system. Through collaboration with employers and law enforcement, the Council has made substantial progress on a number of different issues regarding racial disparity. For example, through the annual Minnesota Justice Forum, legislators, community members, government officials, businesses, employment attorneys and law enforcement have collectively pursued state policy reform and have encouraged private employers to “ban the box.”<sup>362</sup>

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<sup>359</sup> Alexander, at note 314, at 48-49).

<sup>360</sup> *Demystifying Criminal Backgrounds and Employment*, COUNCIL ON CRIME AND JUSTICE <http://www.crimeandjustice.org/project.cfm?prID=5> (last visited Feb. 16, 2013).

<sup>361</sup> *Id.*

<sup>362</sup> *See* Minnesota Justice Forum, Council on Crime and Justice, <http://www.crimeandjustice.org/councilinfo.cfm?pid=84>

In addition, the Council has collaborated with over fifty partnering organizations to organize the Minnesota Second Chance Coalition which engages thousands of individuals affected by unemployment disparity into the policy reform process. The annual Minnesota Second Chance Day on the Hill provides a platform for policy and community advocates to communicate with lawmakers about issues concerning long-term effects on crime reduction and a healthy re-entry system for those involved in the criminal justice system. In addition to the education and community activism, the Council also strongly advocates for legislative reform concerning employer criminal background check practices.<sup>363</sup>

## 2. Reform Legislation

The Minnesota legislature has increased the number and severity of statutory prohibitions of hiring persons with criminal histories, there are now over 350 statutory barriers.<sup>364</sup> One model that could aid in this goal is The Uniform Collateral Consequences of Conviction Act (UCCCA).<sup>365</sup> Published in 2009, the UCCCA has six key provisions including the collection and notification of collateral consequences at critical times in a criminal case. It requires that collateral sanctions be authorized by statute and that an individual convicted of a crime can be disqualified from the receipt of a benefit or opportunity, but only if it is closely related to the conviction(s). It further ensures that pardoned or overturned convictions may not be subject to collateral consequences and gives jurisdictions a choice about other types of relief based on rehabilitation or good behavior. Finally, it provides two mechanisms of relief which begin as early as sentencing and another after a period of law-abiding conduct, entitled An Order of Limited Relief and a Certificate of Restoration of Rights, respectively.

Though UCCCA has not been enacted in its entirety by any state, advocates are hopeful that the next legislative session will achieve this milestone. In fact, Minnesota House Bill 489/Senate Bill 1448 was introduced for the second time in 2012. It would have implemented the UCCCA and other laws regarding collateral consequences and the rehabilitation of criminal offenders, which conformed to the uniform act. If it had passed, it would have repealed all statutes in chapter 609B surrounding collateral sanctions.

As indicated, the racial disparity surrounding employer use of arrest records is a likely contributor to the unemployment gap in Minnesota. In order to help close this gap, Minnesota's employers, legislature, and general public have to take steps to ensure that

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<sup>363</sup> *Minnesota Becomes First State to "Ban the Box," Narrows Employer Liability for Criminal Records*, Council on Crime and Justice, <http://www.crimeandjustice.org/pdfFiles/bantheboxpassed.pdf>.

<sup>364</sup> Alexander, at note 314 (transcript at 44).

<sup>365</sup> The UCCCA was drafted by the National Conference of Commissioners on Uniform State Laws and recommended for enactment in all states. It was revised on July 16, 2010. See Uniform Collateral Consequences of Conviction Act, *available at* [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/uccca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf).

there is equity in the criminal justice system as well as in the criminal background check processes used by employers. By promoting proactive measures, Minnesota has the ability to create pathways for reintegration and productivity of those members of the community who, perhaps by no wrongdoing of their own, have become entangled in the criminal justice system.

## **CREDIT HISTORY BACKGROUND CHECKS AND EMPLOYABILITY**

Credit background checks are an increasing trend in the hiring process that may impact a prospective employee's opportunity for employment. In 1996, only 13 percent of employers reported checking an applicant's credit history.<sup>366</sup> In 2003, 35 percent of employers reported checking credit history and in 2010, 60 percent of employers checked applicant credit history.<sup>367</sup> Of the 60 percent of employers who conducted credit history checks in 2010, 13 percent reported conducting credit history checks on all of their job applicants.<sup>368</sup> This increase in credit history checks when making hiring decisions raises the potential for abuse. Not regulating the use of credit history checks will permit the use of credit history as a determinative factor in hiring decisions. This will negatively impact individuals with lower credit scores when employers use poor credit history to narrow their applicant pool.

Although the use of credit background checks in making hiring decisions is not outright discriminatory, the potential for abuse of this procedure has become a larger issue in recent years. Some legislation has dealt with this issue in a limited scope, leaving open the potential for abuse. At the federal level, the Fair Credit Reporting Act (FCRA) places some restrictions on employer use of credit background checks. These restrictions include requiring employers to obtain written authorization before performing a background check and providing a disclosure should the employer deny employment based on credit history.<sup>369</sup> There has been some attempt to amend the FCRA to prohibit the use of consumer credit checks against prospective and current employees, with limited exceptions for finance related employment.<sup>370</sup>

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<sup>366</sup> Minnesota Department of Human Rights, *Credit History: Is it Any of Your Employer's Business?*, Rights Stuff Newsletter (Winter 2011), available at [http://mn.gov/mdhr/education/articles/rs11\\_1credit.html](http://mn.gov/mdhr/education/articles/rs11_1credit.html).

<sup>367</sup> *Id.*; see also Society for Human Resource Management, *Background Checking: Conducting Background Checks*, Jan. 22, 2010, available at <http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckingimplications.aspx>.

<sup>368</sup> Minnesota Department of Human Rights, at note 366.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

At the state level, there has been an increasing trend to limit employer use of credit history in the hiring process. In 2007, only the state of Washington enacted legislation to combat employer use of credit history.<sup>371</sup> As of 2012, a total of eight states have passed some form of legislation to regulate or limit the use of credit background in employment decisions.<sup>372</sup> Nineteen states and the District of Columbia currently have a combined total of 40 bills introduced or pending in their legislatures to regulate or limit credit history checks.<sup>373</sup>

There is currently no bill pending before the Minnesota legislature nor is there current legislation enacted to prevent employer misuse of credit history in the employment process.<sup>374</sup> Attempts in Minnesota to combat this practice have been unsuccessful.<sup>375</sup> In 2011, bills were introduced that would have added credit history as a protected class under the Minnesota Human Rights Act; however none of them passed.<sup>376</sup> The employment disparity between Whites and African Americans in the Twin Cities compounds the issue. As African Americans and other people of color may have limited employment prospects or may lose jobs in the current recession, their credit scores may suffer a drop. Employers who make employment decisions based on credit history may deny employment to these individuals, which could result in a worsening credit score. Minnesota may be able to thwart this cycle by moving in the direction that other states have in recent years by passing some form of legislation to protect applicants and current employees from credit checks that are unrelated to the employment position.

## **GOVERNMENT RESPONSE TO UNEMPLOYMENT DISPARITIES**

In light of Minnesota's stark unemployment disparities between blacks and whites, government entities at the local, state and federal levels must be poised to respond with strategic, cost-effective approaches to close the gaps in employment.<sup>377</sup> From Commission Kevin Lindsey's perspective:

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<sup>371</sup> National Conference of State Legislature, *Use of Credit Information in Employment 2012 Legislation*, Nov. 16, 2012, <http://www.ncsl.org/issues-research/banking/use-of-credit-info-in-employ-2012-legis.aspx>.

<sup>372</sup> As of the publication of this report, California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont and Washington have legislation that limit employers' use of credit information. *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> Minnesota Department of Human Rights, at note 366.

<sup>376</sup> *Id.*

<sup>377</sup> See Commissioner Kevin Lindsey, Testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Fact finding meeting on Racial Disparities in Unemployment 211, 167 (Sept. 15, 2011) (transcript available in the Midwestern Regional Office, U.S. Commission on Civil Rights) (Stating "What can government do? One, government can listen to the needs of the people. Two, (footnote continued)

Government can be committed to the concept of continuous improvement of services. We can't be locked in a strategy because that is the way it has always been done in the past. We need to be open to new ideas, new solutions, and new ways of doing our work to bring greater value to everyone. I'm encouraged by the collaboration of the discussions between Ramsey County and Hennepin County and the two largest cities, the City of Minneapolis and the City of St. Paul. The State of Minnesota needs to be more involved in that conversation.<sup>378</sup>

In March of 2011, Governor Dayton held an economic summit in North Minneapolis that was focused specifically on the underlying causes and effects of the unemployment gaps between blacks and whites. During the economic summit, a total of six presenters representing various sectors presented data, statistics, analyses of data, anecdotes of discriminatory practices, and detailed recommendations for Governor Dayton on how to address underlying causes of the racial disparities in employment.

At the conclusion of the economic summit, Governor Dayton promised a written response within nine days from his administration. Nine days later, the Governor issued a written response that provided descriptions of current state government policies, programs, and procedures that are currently in place or in process that have the potential to reduce the unemployment gap in Minnesota.<sup>379</sup>

While some lauded the Governor for keeping his promise to respond in a timely manner, others felt that the report did not go far enough in introducing sweeping reforms to address systemic inequities that may create or in some ways contribute to the disparities in unemployment.<sup>380</sup> Given that the Economic Summit occurred approximately two years ago, it is unclear to what extent and within what timeframe the Governor's initiatives will be effective in closing or drastically reducing the unemployment disparities in Minnesota.

Following are highlights from Governor Dayton's 17 page response to the Economic Summit as well as proposed initiatives that his administration plans to implement or are already in process:

- a) On January 31, 2011 the Dayton Administration proposed a \$1 billion Bonding Bill, which, if passed, would create an estimated 28,000 jobs.

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government can be committed to the concept of continuous improvement of services and better collaboration among all governmental entities. Three, government can be more flexible in short-term and long-term strategies given the reality of the present moment, which address facing the future and current employee issues as well as future and current business owner issues. Four, government can remove barriers in the marketplace.”).

<sup>378</sup> *Id.* at 169.

<sup>379</sup> *Letter from Governor Mark Dayton*, at note 155.

<sup>380</sup> *Id.*

Dayton pledged that his administration “will work with the community to ensure that African-American individuals and businesses have meaningful access to jobs, contracts and construction projects created by the bill.”

- b) Create opportunities for Youth Employment: Through the MN DOT Seeds program, high school seniors as well as college, university, trade, business and technical school students can get jobs and paid internships. 75 percent of Seeds students are placed into full-time state jobs.
  
- c) The Phoenix program provides jobs and paid internships for students enrolled in pre-engineering classes at Project Lead The Way (PLTW) high schools. MnDOT currently partners with six high schools: Patrick Henry, North, South and Washburn High Schools in Minneapolis; Johnson High School in St. Paul; and Bemidji High.
  
- d) The EMERGE-StreetWorks initiative is a partnership between MnDOT and the City of Minneapolis. It is a 13-week summer education and employment program for inner-city youth. Students are provided jobs at MnDOT and are actively encouraged to attend college or trade schools.
  
- e) The Minnesota Department of Employment and Economic Development (DEED) funds several youth programs. The Minneapolis Summer Youth program, known as STEP-UP, provides over 2,300 Minneapolis youth, ages 14-21, with paid work experience during the summer. The summer youth employment program serves a wide spectrum of youth.
  
- f) Improve state education funding, increase resources for and raise the profile of early childhood education and narrow the achievement gap. Other components of the plan are to improve literacy statewide, offer support for high quality teaching and create better testing to improve student learning.
  
- g) In addition, the Dayton Administration has advanced Alternative Pathways to Licensure, an important reform that expands opportunities for talented people to become teachers. After significant effort and compromise, Governor Dayton signed this bill into law on March 7, 2011.
  
- h) The Work Opportunity Tax Credit (WOTe) is a federal program to provide tax credits to employers who hire individuals from targeted groups, including ex-felons within one year after their conviction or release. State legislation would be required to provide state tax credits and wage subsidies to employers who hire people from these targeted groups.

The Dayton Administration will consider legislation regarding tax credits and wage subsidies.

- i) The Dayton Administration brings a strong ethic of inclusion and opportunity to the issue of state contracting. The Administration is taking the following steps to follow through on this obligation: The Minnesota Department of Administration operates a Targeted Group Business Program (TGB) for state procurement and construction contracts. Under Minn. Stat. 16(C) the Department of Administration may award preferences in state procurement and construction contracts to businesses owned by minorities, women and disabled persons.
- j) The Commissioner of Administration has the responsibility to ensure that purchases from TGBs reflect a fair and equitable representation of all the state's purchasing. To that end, the Commissioner awards up to a 6 percent preference in state construction and procurement contracts to TGBs and sets goals that require-prime contractors to subcontract a portion of their contracts to small businesses or small TGBs. 25 State statute states that the Commissioner of Administration may set aside purchases for bidding only by TGBs if the department believes that it will receive three competitive responses from TGBs.
- k) On April 4, 2011, Governor Dayton extended Executive Order 91-14, which provides for a State Affirmative Action Council. As a member of the council, Commissioner Cronk, along with the Commissioners of DEED and Human Rights will monitor the state's affirmative action programs and advise the Governor on equal opportunity.
- l) In the past, TGBs were awarded up to a six percent preference in MnDOT's state funded contracts. In 2003, MnDOT discontinued its TGB preference program due to a lawsuit and court decision. In 2010, MnDOT completed a disparity study, which demonstrated that the department was underutilizing businesses owned by minorities and by women in their contracts. As a result of the disparity study, MnDOT has drafted legislation to reinstate the TGB program. The Administration has prioritized MnDOT's legislation, elevating it to an agency bill. We will work to pass the legislation so that the TGB Program can be reinstated.
- m) **UNBUNDLING CONTRACTS TO CREATE OPPORTUNITIES FOR SMALL BUSINESS:** MnDOT, Administration and other state agencies often bundle projects into one contract in an attempt to get favorable pricing and to simplify purchasing. Although bundling is often cost-efficient, small businesses may face difficulties competing with larger companies when bidding on large projects. State agencies should balance their strategic mission to achieve cost savings in purchasing and

contracting with the goal to include small businesses and minority-owned businesses.

- n) MnDOT is exploring a non-traditional approach on the 1-694/US 10/Snelling Avenue Interchange pilot project, to be let in May 2011. MnDOT will prepare three separate contracts, ranging in size from \$15,000 to \$800,000, to be let separately from the main project. The contracts are for areas of work where there is identified DBE capacity. The Minnesota Department of Human Services is working with its community group to examine opportunities for unbundling of its contracts.
- o) At present, the Dayton Administration is taking several steps to expand minority-owned business opportunities through participation in state and federal contracts.
- p) **WORKING CAPITAL OPPORTUNITIES FOR SMALL BUSINESSES**  
MnDOT recently re-established a working capital fund to provide loans to Disadvantaged Business Enterprises (DBEs) that work on MnDOT construction projects. The Metropolitan Economic Development Association (MEDA) was recently chosen as the fund administrator and a loan certification committee has been identified. Eligible DBEs that are working on MnDOT construction projects will receive loans up to \$15,000, with maximum interest rates of 8 percent.
- q) The Dayton Administration has re-launched the Urban Initiatives Board (UIB) to create jobs and strengthen minority enterprise development. The UIB will be modeled on the Regional Initiative Funds and will work to encourage private investment, job creation and economic development in low-income areas of the metro area. The Urban Initiatives Board will focus on technologically innovative industries, value-added manufacturing and information industries. The UIB will also administer the Urban Initiative Loan Program, a working capital fund that issues loans to provide jobs for minority and other persons in low-income areas, to create and strengthen minority business enterprises, and to promote economic development in low-income areas.<sup>381</sup>
- r) DEED also awarded \$200,000 to the Northside Economic Opportunity Network to promote the business development in North Minneapolis. N.E.O.N. will use this money to generate business opportunities for entrepreneurs, counseling, business marketing, and access to capital cash flow management.<sup>382</sup>

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<sup>381</sup> *Id.*

<sup>382</sup> Lindsey, at note 380 (transcript at 172-173).

In addition to the efforts that are being undertaken at the state level to close the gaps in unemployment, some government entities at the city and county levels where the disparities are pervasive have determined to study the issue, offer recommendations for change and implement strategies leading to the elimination of racial employment disparities. For example, in 2011, the Ramsey County Blue Ribbon Commission was formed to examine the causes and effects of the unemployment disparities in Ramsey County and the twin cities' metro area.<sup>383</sup> In order to close the gaps in unemployment, the Commission, in its report entitled, “Everybody In: A Report to Reduce Racial Employment Disparities in the Ramsey County Metropolitan Area,” identified three issue areas and made recommendations as illustrated below:

### **Issue Area 1: Policy, Outreach, and Collaboration**

Strategy 1: Raise public awareness among employers and the greater community about racial employment disparities (i.e., the severe consequences of not bringing more members of racial, ethnic and cultural communities into the workforce).

Strategy 2: Create a broad-based regional collaboration of employers, including business, government, nonprofit organizations, educational institutions and service providers to concentrate efforts on decreasing racial employment disparities.

Strategy 3: Implement specific, targeted policy changes that directly support racial employment equity.

### **Issue Area 2: Education and Work Preparedness**

Strategy 4: Strengthen the transparency of workforce development outcomes related to racial employment disparities.

Strategy 5: Promote opportunities that increase postsecondary attainment and training for job readiness (e.g., degree, certificate, trade certification, stackable credentials, on-the-job training, youth employment/internships) that will help eliminate racial employment disparities.

### **Issue Area 3: Racial, Ethnic and Cultural Businesses**

Strategy 6: Foster business and entrepreneurial opportunities that result in job creation and identify practices to help enlarge the customer base for businesses owned by members of racial, ethnic and cultural communities.

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<sup>383</sup> See generally, *Everybody In Report: A Report to Reduce Racial Employment Disparities in the Ramsey County Metropolitan Area*, RAMSEY COUNTY WORKFORCE INVESTMENT BOARD (Sept. 2011) available at <http://www.rcwib.org/aboutus/brc.htm>.

The six strategies will be implemented over a five year period with the ultimate goal of eliminating racial employment disparities in the Twin Cities region. The Blue Ribbon Commission determined that a 20% reduction each year, from 2011/12 through 2015/16, in the unemployment rates for racial, ethnic and cultural communities, specifically African Americans and American Indians, is a reasonable success measure. As called for in the report, a regional implementation team has been established comprised of 33 members from local and state government, business, nonprofit, the faith community, foundations and community based organizations. The implementation team will develop and execute an implementation plan to address the six strategies.<sup>384</sup>

### **Initiatives in the City of Minneapolis**

On August 31, 2012, The Minneapolis City Council approved resolution 2012R-456 supporting equity in employment along with a series of actions to eliminate racial and ethnic disparities in employment in Minneapolis and the entire region.<sup>385</sup> According to Minneapolis City Council member Cam Gordon, these changes have been a long time in the making:

When I first was elected in 2005, we weren't really as a city tracking employment and even poverty very well as a city council based on race and seeing what disparity was. I think we've made enormous progress since that time even as a city. In 2008, we established an equity in employment task force to look at the problem. And we developed it to target some sustainability indicators, recognizing then that there definitely was a national problem and a national disparity. There's a problem in the State of Minnesota, and there's a problem -- St. Paul even had some issues. But in Minneapolis it was worse. So as the studies we looked at show that the metropolitan area here has the biggest gap, Minneapolis is probably leading the gap we have in terms of employment in race and disparity. So recognizing that and acknowledging that, I think, is vitally important.<sup>386</sup>

The approved actions to eliminate disparities in employment in Minneapolis and the region include:

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<sup>384</sup> *Id.*

<sup>385</sup> See Official Website of the City of Minneapolis, Employment Equity Division, <http://www.minneapolismn.gov/civilrights/one/>.

<sup>386</sup> Gordon, at note 331 (transcript at 145).

- Developing an equity assessment toolkit that can be used to inform decision-making– from budget and policy development to program prioritization and implementation.
- Recommending fair hiring provisions to be added to the Minneapolis Code of Ordinances.
- Joining the Ramsey County Blue Ribbon Commissions regional collaboration, Everybody In, to reduce racial employment disparities; appointing a Council Member to serve on the Everybody In steering committee; selecting staff to serve on the Everybody In implementation team and leveraging funding to support the team's implementation plan.

The City of Minneapolis is also training young people to join the workforce. Since the STEP-UP program started in 2004, almost 16,000 Minneapolis young people have been placed in good-paying summer jobs with most of the city's best companies and nonprofits. More than 85 percent of STEP-UP participants have been kids of color.

In May 2012, the city began a new program called Urban Scholars that prepares college students from diverse backgrounds – some of whom have been STEP-UP interns for careers in the public sector. A leadership development program, Urban Scholars provides participants with meaningful work experiences as paid summer interns strategically placed to interact with the Mayor, City Council and department heads. The access to leadership helps Urban Scholars develop professional networks not traditionally available to minority students but critical to obtaining good jobs after graduation. The program creates a pipeline of experienced professionals for the public sector and is well-timed to take advantage of impending baby boomer retirements to create a more diverse city government workforce. Currently, the city's workforce is 23% nonwhite and 77% white and yet the population is 40% nonwhite and 60% white. By 2016, 20% of the city government workforce will be in a position to retire; 40% by 2020.

In light of the short timeframe since the release of the aforementioned reports, it will take time to ensure that the recommendations are fully implemented and ultimately result in significant change within the Twin Cities' metro area. If there is any chance that the gap in unemployment will be closed between African Americans and Whites, then it is evident that drastic action will need to occur to address both the current deleterious impacts of the racial disparities and to prevent future harmful consequences from occurring in the state.

## **Conclusion**

As illustrated above, there are significant racial disparities between African Americans and Whites in Minnesota in the areas of unemployment, vocational and skills training, education, business ownership and expansion rates, opportunities to procure government contracts and criminal justice impacts. The quality of life for White Minnesotans is in stark contrast to the quality of life for African American Minnesotans. Immediate action is needed to close the unemployment disparity between African Americans and Whites

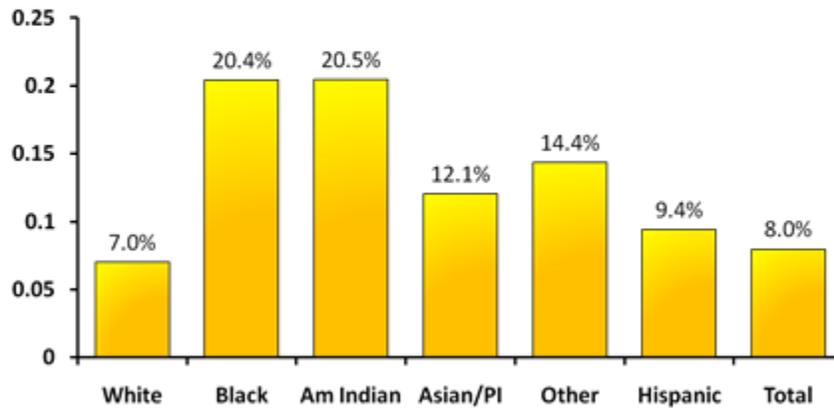
in Minnesota by taking a targeted approach and ensuring equity in various aspects of the system. Thus, the MNSAC is requesting that the U.S. Commission on Civil Rights work collaboratively with us to address these concerns for Minnesota.

## Appendix A

### Minnesota Unemployment Rate Disparities

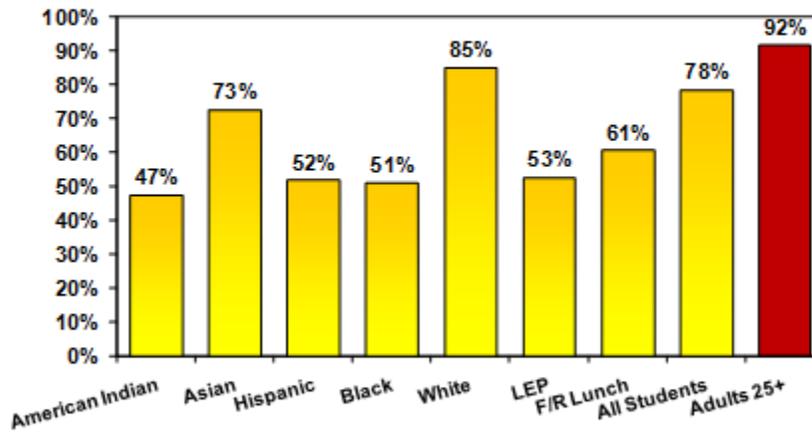
Tom Gillaspy, State Demographer  
Mn Dept of Administration  
September 2011

### Unemployment Rates Of Minnesota Labor Force By Race/Ethnicity 2009



2009 ACS

## Education Achievement Gaps Are Large Minnesota High School Graduation Ratio



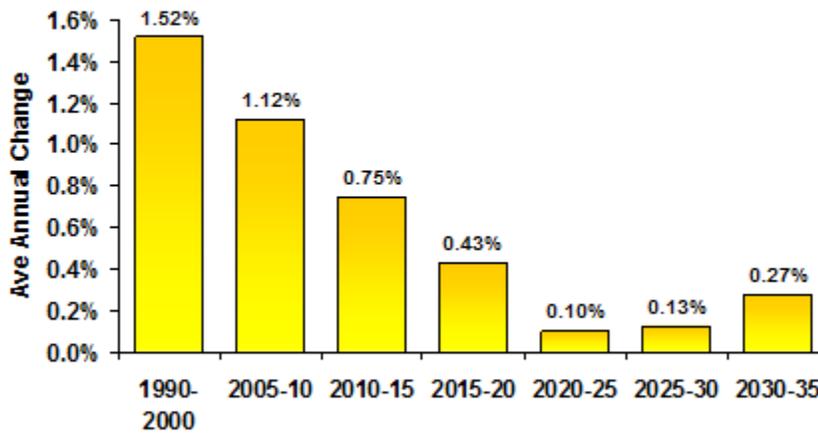
2009-10 Mn Dept of Education 5 year graduation rate.  
Percent of 9<sup>th</sup> graders who graduate within 5 years. ACS 2009

## Unemployment Rate Of Minnesotan's Under Age 35 In 2009

	LTHS	HS/GED	Some College	Bach+
White	22%	13%	7%	5%
Black	<i>59%</i>	20%	15%	6%
Am Indian	<u>53%</u>	<u>15%</u>	<u>23%</u>	<u>4%</u>
Asian/PI	21%	18%	14%	4%
Other	<u>34%</u>	<u>21%</u>	<i>22%</i>	<u>4%</u>
Hispanic	14%	14%	6%	3%
Total	25%	14%	8%	6%

2009 ACS. Underlined numbers represent cells where total labor force is less than 5,000. Cells in red italic are those with labor force greater than 5,000 and unemployment rate more than twice the total for the group

## Labor Force Growth Is About To Slow Sharply

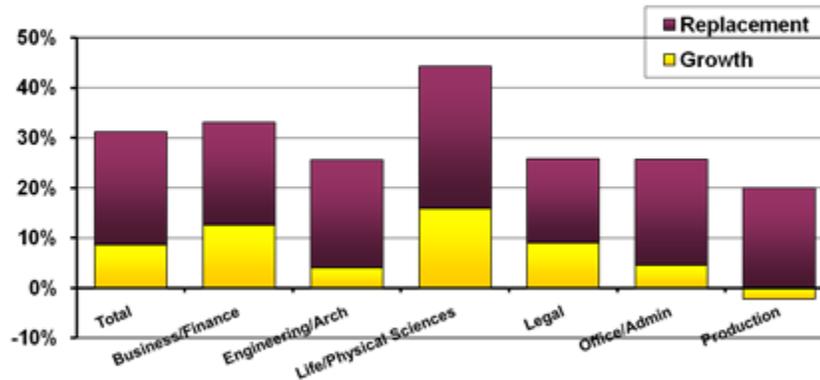


## Some Other Considerations In The Labor Market

- More retirees and fewer younger workers should improve opportunities for job seekers
- But employers may respond in other ways
  1. Increase focus on productivity gains, filling jobs on less than a one-for-one basis
  2. Relocate jobs to other, more favorable labor markets
  3. Recruit workers from other markets
- Alternative responses may be heightened with a growing skills mismatch.

## For Many Occupations, Replacements Will Outnumber New Job Growth

Projected Openings In Minnesota Occupations 2009-19



DEED projections. Percent of 2009 level

## There Are Three Types of Activities In The Workplace

- **Transformational**—changing things from one form to another.
- **Transactional**—service activities that are easily scripted.
- **Tacit**—services or production that require independent judgment and are not easily scripted.

## **Appendix B**

### **Description of the Metropolitan Airports Commission's Successful Disadvantaged Business Enterprise Program**

The Metropolitan Airports Commission (MAC) owns and operates the Minneapolis-St. Paul International Airport (MSP). The MAC has an Airport Concession Disadvantaged Business Enterprise (ACDBE) Program. The MAC sees the need for a disadvantaged business enterprise (DBE) program because it desires to have its businesses reflect the diversity of its customers, including women and minorities. ACDBE businesses provide specialty retail, food, beverages, news and gifts throughout both terminals of MSP.

Success of the ACDBE program begins with the release of bid documents. Meetings are held prior to bid openings to facilitate networking among business owners. All partners of the MAC are aware of the expectation to include DBEs in their proposals. These expectations have spread throughout MSP to become part of its culture.

ACDBEs play a large role in the success of the MAC's concessions program which generates approximately \$160 million a year, including \$18 million generated by 12 ACDBEs. Recently the MAC opened five new concepts in Terminal 2-Humphrey; four of these concepts were awarded to ACDBEs. The MAC's ACDBE program has been a wild success demonstrated by the fact that not one minority or woman owned business has financial failed at MSP in more than 20 years.

Despite varying origins or experience, all ACDBE owners have strong business skills. These skills are essential for success due to location costs of \$350 per square foot or more. These inherent business skills are sometimes easy to spot; Subway owner, Manny Perez, always knows how to draw a crowd by pumping the smell of fresh cooked breads throughout the terminal.

## Appendix C

### Leading by Example: Minneapolis Acts on Employment Equity

Minneapolis recently became the first city in the nation to adopt a [resolution](#) promoting racial equity in employment. The resolution declares that institutional racism "is a primary reason for unemployment disparities" and requires the city to take action to make sure that people of color have a fair shot at government jobs, promotions, and contracts.

Council members Cam Gordon and Don Samuels authored the resolution, which passed unanimously on August 8, 2012.

"We heard from the community that the city better have its own house in order," Gordon explains. "If we can develop some tools that make a difference within the city itself, that's going to be more powerful than if we try to tell others what they should be doing."

The council has set a high bar for itself, establishing three targets:

- Reduce racial disparities in employment by 25 percent by the year 2016.
- Decrease poverty rates for residents of color by 25 percent by the year 2016.
- Increase the share of people of color hired on city-funded projects from [11 to 32 percent](#).

### *Growth requires inclusion*

The Twin Cities region has the worst racial employment gap in the nation, according to an [analysis](#) by Algernon Austin at the Economic Policy Institute. African American residents are more than three times as likely as whites to be out of work, and Native American residents are four times more likely to be jobless.

In the city of Minneapolis, 40 percent of residents are people of color, but they hold only 17 percent of the jobs. Within the city's own workforce, 23 percent of jobs are held by people of color. Officials and advocates agree such inequities are potentially disastrous for the region's future.

"If you want a region to be viable and growing, you need to draw from all sectors of society, especially those that will be dominant in decades to come," said Shawn Lewis,

an urban planner and advocate who played a major role in promoting the ordinance. "If you don't, the region will decline. This is not only a moral argument, it's economic."

The city took the first steps toward adopting the resolution in 2008, when it established an Equity in Employment Task Force to explore solutions to racial disparities in employment. It hired a full-time Director of Employment Equity in January 2012.

### ***Guided by the community***

Years of advocacy and grassroots organizing to promote fair hiring and contracting in the Twin Cities preceded the council's efforts.

HIRE Minnesota, a coalition of 70 diverse organizations and 2,000 residents, began its campaign to bring the state "from worst to first" on employment equity in 2008. Responding to the coalition's advocacy, the Minnesota Department of Transportation has increased its hiring of people of color on road, bridges, and transit projects by 138 percent since 2009.

HIRE actively participated in the Minneapolis City Council process, sitting on the task force and filling council chambers with its members who spoke in support of the resolution.

Other community groups have also been involved. Metro Talking Circle, a group of volunteers working to advance economic equity for African American and Native American communities, developed recommendations for the task force. Its report laid out three goals for the city: lead by example, strengthen workforce development, and support efforts by business to hire, retain, and promote more people of color.

### ***Moving toward implementation***

As a first step toward implementation, the city is developing an equity and assessment toolkit that it will use to guide its budget, policy, and program decisions. The tool developed by King County, Washington (see article below) is one model they are looking at.

The resolution also acknowledged the need for action at the regional level, and officially joined the city with the Ramsey County Blue Ribbon Commission's regionwide ["Everybody In"](#) effort to reduce racial employment disparities throughout the Twin Cities metro.

HIRE plans to hold the city accountable. "We will be in the room, reading the reports, raising questions if there are any," says organizer Avi Viswanathan. He is hopeful that the city's commitment to leading by example will not only be successful, but will have a ripple effect that reaches private employers as well.

## Appendix D

February 25, 2013

For the reasons described below, the undersigned are unable to approve the report of the Minnesota Advisory Committee to the U.S. Commission on Human Rights, titled: “Unemployment Disparity in Minnesota.”

Conclusions Lacking Sufficient Support. On page 22 (Section II), the report states that “[b]ased on the data, one could infer that hidden biases and racial discrimination may be playing a role in the unemployment disparity that exists among Black and White Minnesotans in the upper echelon of educational attainment.” On page 27 (Section III), regarding the challenges that minority-owned businesses face regarding access to financial capital, the report states that “[t]he root of these challenges seems to be discriminatory lending practices.”

Without discounting or attempting to minimize the existence of any individual examples of race-based discrimination in either hiring or lending—any example of which is entirely deplorable—the report does not provide sufficient support, and nor was such support received during testimony, to support these generalized conclusions regarding discriminatory hiring or lending practices. Given the weight that may be accorded this report, and the work of this Committee, the undersigned believe that significantly greater rigor and analysis would be required before either of these conclusions should be endorsed by the Committee.

Race-Based Contracting Preferences. On page 34 (Section IV.A), the report states that “in order to ensure equity within the system [of awarding State professional and technical service contracts], there should be a requirement [that the State of Minnesota use] TG vendors at every level in order to maximize the inclusion of minority owned businesses in the marketplace . . . .” (This statement directly concerns contracts of less than \$5,000 in value, but the report appears to imply that this proposal should also be applied to State contracts in excess of \$5,000. Section V.D.5 of the report advocates that the State should legislatively enact contracting preferences in favor of “Target Group” and “Economically Disadvantaged” vendors, which would include race-based contracting preferences. Finally, Section V.D.7 of the report advocates the installment of a bidder-rotation process that would or could involve race-based preferences regarding quantity or frequency of bidding opportunities for certain minority-owned businesses.

The undersigned reject any endorsement of race-based preferences regarding the bidding for or awarding of governmental contracts. In addition to personal objections to these policies, the undersigned believe that such preferences are likely in violation of the Fourteenth Amendment of the United States Constitution, which prohibits any state from enacting any law that would “deny to any person within its jurisdiction the equal protection of the laws.”

Conclusion. While the undersigned do not object to the majority of the report’s description of the Committee’s fact-finding efforts, or the identification of various issues within the report, the conclusions and proposals described above are of a nature that the undersigned can neither approve nor endorse. For this reason, the undersigned members of the Committee have voted not to approve the report in the form presented to the Committee on February 4, 2013.

Sincerely,

Ryan M. Check

Kirk Kolbo