MASON TILLMAN
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May 10, 2007

Ms. Deborah Lusk-Barnes
Manager, Contract Compliance and Employment Services
Office of the City Administrator
Contract Compliance and Employment Services Division
250 Frank Ogawa Plaza, Suite 3341
Oakland, CA 94612

Subject: City of Oakland and Redevelopment Agency, Fairness in Purchasing and Contracting Disparity Study - Volume I

Dear Ms. Barnes:

Enclosed please find Volume I of the Fairness in Purchasing and Contracting Disparity Study Report and an Executive Summary dated May 2007. The Volume I report contains the following 10 chapters: Legal Analysis Chapter, Contracting and Procurement Chapter, M/WBE Legislative History Chapter, Prime Contractor Utilization Chapter, Subcontractor Utilization Chapter, Market Area Analysis Chapter, Availability Analysis Chapter, Prime Contractor Disparity Analysis Chapter, Subcontractor Disparity Analysis Chapter, and Anecdotal Analysis Chapter.

Please contact me if you have any questions.

Sincerely,

Eleanor Ramsey

Eleanor Mason Ramsey, Ph.D.
President

cc: Lynn Reddrick, Senior Project Manager

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City of Oakland and Redevelopment Agency

Fairness in Purchasing and Contracting Disparity Study

Volume I

Submitted to:
City of Oakland and
Redevelopment Agency

Submitted by:
Mason Tillman Associates, Ltd.

May 2007

ACKNOWLEDGMENT

In September 2005, the City of Oakland and Redevelopment Agency (City) commissioned a Fairness in Purchasing and Contracting Disparity Study. Mason Tillman Associates, Ltd., of Oakland, California was selected by the City Council to perform the Study.

The purpose of the City's Fairness in Purchasing and Contracting Disparity Study was to determine if the City was actively or passively discriminating against minority and woman-owned business enterprises (M/WBEs). The Study was mandated by Section 808 (b) of the City Charter, which required the City to conduct such a disparity study. The prime utilization analysis included four industries: construction, architecture and engineering, professional services, and goods and other services. Contracts awarded between July 1, 2002 and June 30, 2005 were studied.

Morrison and Foerster, LLP, Watson Enterprises, Carl Chan, Melano and Associates, Jungle Communications, Law Offices of Paul Elizondo, and Christopher Edley, Jr. Esq., Dean of Boalt Hall School of Law, University of California assisted Mason Tillman in the performance of the Study. The subcontractor team performed legal analysis, data collection activities, design and translation services, and outreach to the business community.

The Study could not have been conducted without the cooperation of the local chambers of commerce and business organizations, and the many Oakland business owners who demonstrated their commitment to the Study by participating in interviews and community meetings. In addition, the City's staff played a critical role in assisting with the data collection by making available City personnel, contract records, and documents needed to perform the Study. The extraordinary effort of the City and the business community should be applauded.

Deborah Lusk-Barnes, Manager, Contract Compliance and Employment Services provided overall leadership and guidance for the Study. Ms. Barnes' staff facilitated Mason Tillman's effort to secure the needed resources to complete the Study.

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LEGAL ANALYSIS

I. INTRODUCTION

This section discusses the state of the law applicable to affirmative action programs in the area of public contracting. Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*[1] *(Croson)* and *Adarand v. Pena*[2] *(Adarand)*, raised the standard by which federal courts shall review such programs. In those decisions, the Court announced that the constitutionality of affirmative action programs that employ racial classifications would be subject to "strict scrutiny." An understanding of *Croson*, which applies to state and local governments, is necessary in developing sound Minority Owned Business Enterprise (MBE) and Woman-owned Business Enterprise (WBE) programs. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of the Equal Protection clause of the Constitution. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination, and this remedy must impose a minimal burden upon unprotected classes.

Adarand, which followed *Croson* in 1995, applied the strict scrutiny standard to federal programs. As a result, the U.S. Department of Transportation amended its regulations to focus on outreach to Disadvantaged Business Enterprises (DBEs). Although the Supreme Court heard argument in *Adarand* in the October 2001 term, it subsequently decided that it had improvidently granted *certiorari.* Thus, the amended DOT regulations continue to be in effect.

A caveat is appropriate here. The review under strict scrutiny is fact-specific. Nevertheless, three post-*Croson* Federal Court of Appeals opinions do provide guidelines for the evidence that should be adduced if race-conscious remedies are put in place. The Third, Eleventh,

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

2 *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995).

and Tenth Circuits assessed the disparity studies in question on the merits instead of disposing of the cases on procedural issues.[3]

The Disparity Study was commissioned in order to comply with the provisions in the City of Oakland and Redevelopment Agency's (City) Charter. Section 808 (b) of the Charter obligates the City to conduct "a race and gender disparity evaluation to determine if the City has been an active or passive participant in actual, identifiable discrimination within its relevant market place." "If such disparity evaluation evidences such discrimination the City Council, in order to remedy the discrimination, shall establish a narrowly tailored race and/or gender business participation program, as substantiated by the disparity evaluation, for the bidding and awarding of purchases and contracts. Any such program shall continue only until the discrimination has been remedied."

II. STANDARDS OF REVIEW

The standard of review represents the measure by which a court evaluates a particular legal issue. This section discusses the standard of review that the Supreme Court set for state and local programs in *Croson* and, potentially, federal programs in *Adarand.* It also discusses lower courts' interpretations of these two Supreme Court cases and evaluates the implications for program design that arise from these decisions.

A. Race-Conscious Programs

In *Croson*, the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local race-based programs is strict scrutiny.[4] Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.[5] The Court recognized that a state or local entity may take action, in the form of an MBE Program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.[6] Justice O'Connor, speaking for the majority,

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3 *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), on remand, 893 F. Supp. 419 (E.D. Penn. 1995), affd, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors of South Florida v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd, 122 F. 3d 895 (11th Cir. 1997); and *Concrete Works of Colorado v. City and County of Denver*, 823 F. Supp 821 (D. Colo 1993), rev'd 36 F.3d 1513 (10th Cir. 1994) ("*Concrete Works I*"), on remand, 86 F.Supp 2d 1042 (D. Colo. 2000), rev'd 321 F.3d 950 (10th Cir. 2003) ("*Concrete Works II*"). In the federal court system, there are primarily three levels of courts: the Supreme Court, appellate courts, and district courts. The Supreme Court is the highest ranking federal court, and its rulings are binding on all other federal courts. Appellate courts' rulings are binding on all district courts in their geographical area and are used for guidance in other circuits. District court rulings, while providing insight into an appropriate legal analysis, are not binding on other courts at the district, appellate, or Supreme Court levels.

4 *Croson*, 488 U.S. at 493-95.

5 *Id.* at 493.

6 *Croson*, 488 U.S. at 509.

articulated various methods of demonstrating discrimination and set forth guidelines for crafting MBE programs so that they are "narrowly tailored" to address systemic racial discrimination.[7] The specific evidentiary requirements are detailed in Section IV.

B. Woman-Owned Business Enterprise Programs

Since *Croson*, the Supreme Court has remained silent with respect to the appropriate standard of review for Women-Owned Business Enterprise (WBE) and Local Business Enterprise (LBE) programs. *Croson* was limited to the review of a race-conscious plan. In other contexts, however, the Supreme Court has ruled that gender classifications are not subject to the rigorous strict scrutiny standard applied to racial classifications. Instead, gender classifications are subject only to an "intermediate" level of review, regardless of which gender is favored.

Notwithstanding the Supreme Court's failure thus far to rule on a WBE program, the consensus among the Circuit Courts of Appeals is that these programs are subject only to intermediate scrutiny, rather than the more exacting strict scrutiny to which race-conscious programs are subject.[8] Intermediate review requires the governmental entity to demonstrate an "important governmental objective" and a method for achieving this objective which bears a fair and substantial relation to the goal.[9] The Court has also expressed the test as requiring an "exceedingly persuasive justification" for classifications based on gender.[10]

The Supreme Court acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists the members of that sex which are disproportionately burdened.[11]

The Third Circuit, in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia* (*Philadelphia*), ruled in 1993 that the standard of review that governs WBE

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7 *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to "compelling governmental interest" and "narrow tailoring" for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

8 *See e.g., Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Philadelphia*, 91 F.3d 586 (3d Cir. 1996); *Engineering Contractors Association of South Florida Inc., et al. v. Metropolitan Dade County et al.*, 122 F.3d 895 (11th Cir. 1997). *Concrete Works II*, 321 F.3d at 959, is in accord.

9 *Craig v. Boren*, 429 U.S. at 198-99 (1976).

10 *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *See also Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

11 *Id.* at 728.

programs is different than the standard imposed upon MBE programs.[12] The Third Circuit held that whereas MBE programs must be "narrowly tailored" to a "compelling state interest," WBE programs must be "substantially related" to "important governmental objectives."[13] An MBE program would only survive constitutional scrutiny by demonstrating a pattern and practice of systemic racial exclusion or discrimination in which a state or local government was an active or passive participant.[14]

The Ninth Circuit in *Associated General Contractors of California v. City and County of San Francisco (AGCC I)* held that classifications based on gender require an "exceedingly persuasive justification."[15] The justification is valid only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, and the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.[16]

The Eleventh Circuit also applies intermediate scrutiny.[17] The district court in *Engineering Contractors Association of South Florida. v. Metropolitan Dade County (Dade County),* which was affirmed by the Eleventh Circuit U.S. Court of Appeals, cited the Third Circuit's 1993 formulation in *Philadelphia:* "[T]his standard requires the [county] to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors."[18] Although the *Dade County* district court applied the intermediate scrutiny standard, it queried whether the Supreme Court decision in *United States v. Virginia,*[19] finding the all-male program at Virginia Military Institute unconstitutional, signaled a heightened level of scrutiny: parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.[20] The *Dade County* appellate court echoed that speculation but likewise concluded that "[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender

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12 *Philadelphia*, 6 F.3d at 1000-01.

13 *Id.* at 1009.

14 *Id.* at 1002.

15 *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987).

16 *Id.* at 940.

17 *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579-1580 (11th Cir. 1994).

18 *Dade County*, 122 F.3rd at 909, (citing *Philadelphia*, 6 F.3d at 1010 (3d Cir. 1993)).

19 *United States v. Virginia*, 116 S.Ct. 2264 (1996).

20 *Dade County*, 943 F.Supp. at 1556.

preference may be upheld so long as it is substantially related to an important governmental objective."[21]

The *Dade County* appellate court noted that, at the time, by articulating the "probative evidence" standard, the Third Circuit in *Philadelphia* was the only federal appellate court that explicitly attempted to clarify the evidentiary requirement applicable to gender-conscious programs.[22] It went on to interpret that standard to mean that "evidence offered in support of a gender preference must not only be 'probative' [but] must also be 'sufficient.'"[23] It also reiterated two principal guidelines of intermediate scrutiny evidentiary analysis: (1) under this test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself;[24] and (2) the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a "last resort"[25] but instead ensuring that the affirmative action is "a product of analysis rather than a stereotyped reaction based on habit."[26] This determination turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed.[27] The court also stated that "a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[28]

C. Disadvantaged Business Enterprise Programs

In response to the United States Supreme Court's decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the U. S. Department of Transportation (USDOT) revised provisions of its DBE rules. Effective March 1999, the USDOT replaced 49 CFR part 23 of its DBE Program rules, with 49 CFR part 26. The goal of promulgating the new rule was to modify the DBE program so that it would be consistent with the "narrow tailoring" requirement of *Adarand*. The new provisions apply only to the airport,

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21 *Dade County*, 122 F.3d at 908.

22 *Id.* at 909.

23 *Id.*

24 *Id.* at 910 (citing *Ensley Branch*, 31 F.3d at 1580).

25 *Id.* (citing *Hayes v. North State Law Enforcement Officers Ass'n.*, 10 F.3d 207, 217 (4th Cir. 1993), racial discrimination case).

26 *Id.* (citing *Philadelphia*, 6 F3d at 1010 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-583 (1990)).

27 *Id.* (citing *Ensley Branch*, 31 F.3d at 1581).

28 *Dade County*, 122 F.3d at 929. However, Judge Posner, in *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), questioned why there should be a lesser standard where the discrimination was against women rather than minorities.

transit, and highway financial assistance programs of the USDOT. See Appendix A for the main components of the Rules.

The Ninth Circuit decision in *Western States Paving v. Washington State DOT*[29] criticized WSDOT goals, even though they were derived from the DOT regulations, because the capacity of DBEs to perform contracts was not taken into account. In WSDOT's program, all ethnic groups were included without determining whether there had been discrimination against each one. Congress' findings that there was discrimination nationally were sufficient to meet the "compelling interest," justifying federal legislation. However, the majority held that for the State's program to be "narrowly tailored," those local determinations had to be made. The holding that a State had to make such findings is contrary to the consolidated Eighth Circuit Court of Appeals decision in *Sherbrooke Turf, Inc. v. MNDOT, Gross Seed v. Nebraska Dept. of Roads* 345 F.3d 715 (8th Cir. 2003) and the Seventh Circuit Court of Appeals decision in *Northern Contracting Inc., v. Illinois Department of Transportation (NCI)* 473 F.3d 715 (7th Cir. 2007). However, *Western States Paving*, being a Ninth Circuit decision, controls Oakland's DBE program. This operational challenge is not a daunting one because it can be overcome if the disparity study methodology option for determining goals is followed

D. Local Business Enterprise

The Ninth Circuit Court of Appeals applied the rational basis standard when evaluating LBE programs, holding that a local entity may give a preference to local businesses to address the economic disadvantages those businesses face in doing business within the city or county.[30] In *AGCC I*, a pre-*Croson* case, the City and County of San Francisco conducted a detailed study of the economic disadvantages faced by San Francisco-based businesses versus businesses located outside the City and County boundaries. The study showed a competitive disadvantage in public contracting for businesses located within the City versus businesses from other areas.

San Francisco-based businesses incurred higher administrative costs in doing business within the City. Such costs included higher taxes, rents, wages, insurance rates, and benefits for labor. In upholding the LBE Ordinance, the Ninth Circuit held that ". . . the city may rationally allocate its own funds to ameliorate disadvantages suffered by local business, particularly where the city itself creates some of the disadvantages."[31]

Federal constitutional issues do not end the inquiry, however. State statutes may impose their own restrictions.

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29 407 F.3d 983 (9th Cir. 2005).

30 *AGCC I*, 813 F.2d at 943.

31 *Id.* at 943.

California Statutory Law-Assembly Bill 1084

The changes in the California Public Contract Code allowed by Assembly Bill 1084 provide local governments a legal basis for extending preferences to local small businesses.

Assembly Bill 1084 became law in January 2002. Assembly Bill 1084 amended Sections 14836, 14837, 14838.5, 14839, 14839.1, 14840, 14842, and 14842.5 of the Government Code, and repealed and added Section 14838 of the Code. The Bill also amended Sections 2000 and 2001, and added Sections 2002 and 10116 to the Public Contracting Code relating to public contracts.

- Public Contracting Code Section 2002

The Public Contracting Code section 2002 identifies small business requirements and allowances:

- State agencies are required to give small businesses[32] a 5 percent preference in contracts for construction, the procurement of goods, or the delivery of services. This includes microbusinesses[33] and revises annual goals for the program.

- All State awarding departments must report to the Governor and the Legislature on the level of participation by business enterprises, by race, ethnicity, and gender of the owner, in specified contracts.

- Local agencies are authorized to provide for a small business preference in construction, the procurement of goods, or the delivery of services, and to establish a subcontracting participation goal for small and microbusinesses on contracts with a preference for those bidders who meet the goal.

- Good Faith Efforts are allowed to meet a subcontracting participation goal for small business contracts.

- The definition of a small business shall be determined by each local agency

In addition to this State program, some local entities have adopted their own local business program. Oakland is one municipality that has its own local and small business program.

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32 A small business is defined as "an independently owned and operated business, which is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with its affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees."

33 Microbusiness is defined as "a small business that, together with affiliates, has average annual gross receipts of two million five hundred thousand dollars or less over the previous three years, or is a manufacturer, as defined in subsection (c), with 25 or fewer employees."

III. BURDEN OF PROOF

The procedural protocol established by *Croson* imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government's factual predicate on any of the following grounds:[34]

- the disparity exists due to race-neutral reasons
- the methodology is flawed
- the data is statistically insignificant
- controverting data exists.

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.[35]

A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a "strong basis in evidence" that the objective of the challenged MBE program is to rectify the effects of discrimination.[36] The issue of whether or not the government has produced a strong basis in evidence is a question of law.[37] Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.[38]

The adequacy of the government's evidence is "evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction]."[39] The onus is upon the jurisdiction to provide a factual predicate which is sufficient in scope and precision to demonstrate that

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34 These were the issues on which the district court in Philadelphia reviewed the disparity study before it.

35 *Croson*, 488 U.S. 469.

36 *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 at 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986); *see Croson* 488 U.S. at 509 (1989)).

37 *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

38 *Concrete Works I*, 36 F.3d at 1522.

39 *Id.* (citing *Croson* 488 U.S. at 498).

contemporaneous discrimination necessitated the adoption of the MBE program. The various factors which must be considered in developing and demonstrating a strong factual predicate in support of MBE programs are discussed in Section IV.

B. Ultimate Burden of Proof

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation–despite the government's obligation to produce a strong factual predicate to support its program.[40] The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government's factual predicate for the program or by demonstrating that the program is overly broad.

Justice O'Connor explained the nature of the plaintiff's burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant)*.[41] She stated that following the production of the factual predicate supporting the program:

> [I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." [42]

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a "strong basis" in evidence.[43] That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.[44] If the plaintiff's theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.[45]

The situation differs if the plaintiff's theory is that an agency's conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, once the agency comes forward with evidence of facts alleged

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40 *Id.* (citing *Wygant*, 476 U.S. at 277-278).

41 *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).

42 *Id.*

43 *Philadelphia*, 91 F.3d at 597.

44 *Id.*

45 *Id.*

to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.[46]

Concrete Works II made clear that plaintiff's burden is an evidentiary one; it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater,* 228 F.3d 1147 (2000): "[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study is of little persuasive value."[47]

The Supreme Court's disposition of plaintiff's petition for *certiorari* strongly supports the conclusion that plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary, in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works* is not the typical instance. Justice Scalia concurred in *Croson* that strict scrutiny was required of race-conscious contracting programs. However, his antagonism there, and over the years, to the use of race is clear. Justice Scalia's view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court's November 17, 2003 decision not to grant *certiorari* in *Concrete Works.*[48]

Justice Scalia would place the burden of proof squarely on the defendant jurisdiction when a plaintiff pleads unequal treatment. For him, the Tenth Circuit was simply wrong because the defendant should have to *prove* that there was discrimination. He takes this position despite the case law in equal employment cases, from which *Croson* was derived, that the defendant has the burden of *production*. Once the defendant satisfies that, the burden of *proof* shifts to the plaintiff. Contrary to Scalia, the Tenth Circuit's position in *Concrete Works II* is once the defendant shows "a strong basis" for concluding that MBEs are being discriminated against, the plaintiff has to put in evidence that negates its validity.

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46 At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the "compelling interest" required by strict scrutiny. That court said the inquiry was factual and would be reversed only if it was "clearly erroneous." However, the difference in formulation may have had to do with the angle from which the question is approached: If one starts with the disparity study – whether a compelling interest has been shown – factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.

47 *Concrete Works II*, 321 F.3d at 979.

48 *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, (U.S. Nov. 17, 2003) (No. 02-1673) ("*Concrete Works II*"). Chief Justice Robers has replaced Chief Justice Rehnquist. Presuming Roberts and Justice Alito -- who has replaced Justice O'Connor on the Supreme Court -- would have voted to grant *certiorari*, that would still make only three votes on the current Court..

IV. CROSON EVIDENTIARY FRAMEWORK

Government entities must construct a strong evidentiary framework to stave off legal challenges and ensure that the adopted MBE programs comport with the requirements of the Equal Protection clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence, and the race-conscious remedy must be "narrowly tailored," as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. Active or Passive Participation

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court's strict scrutiny review.[49]

An entity will be considered an "active" participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government's contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing contracting opportunities with that entity.[50]

An entity will be considered to be a "passive" participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.[51] The *Croson* Court emphasized a government's ability to passively participate in private sector discrimination with monetary involvement, stating, "[I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice."[52]

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I*, the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned

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49 *Croson*, 488 U.S. at 509.

50 *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 275 (1985).

51 *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

52 *Croson*, 488 U.S. at 492.

whether purely private sector discrimination is likely to be a fruitful line of inquiry.[53] On remand, the district court rejected the three disparity studies offered to support the continuation of Denver's M/WBE program because each focused on purely private sector discrimination. Indeed, Denver's focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity's contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted that in the City of Denver's disparity studies the chosen methodologies failed to address the following six questions:

1) whether there was pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)
2) were all designated groups equally affected
3) was such discrimination intentional
4) would Denver's use of such firms constitute "passive participation"
5) would the proposed remedy change industry practices
6) was the burden of compliance–which was on white male prime contractors in an intensely competitive, low profit margin business–a fair one.[54]

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.[55]

However, the Tenth Circuit on appeal of that decision completely rejected the district court's analysis. The district court's queries required Denver to *prove* the existence of discrimination. Moreover, the Tenth Circuit explicitly held that "passive" participation

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53 *Concrete Works I*, 36 F.3d at 1529. "What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that 'it had essentially become a "a passive participant" in a system of racial exclusion practiced by elements of the local construction industry' [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial."

54 *Concrete Works*, 86 F.Supp. 2d at 1042 (D. Colo 2000).

55 *Id.* at 61.

included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,[56] a post-*Croson* Supreme Court decision, wrote as follows:

> The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 910. The City can satisfy this condition by identifying the discrimination "public or private, with some specificity." *Id.* (quoting *Croson,* 488 U.S. at 504 (*emphasis* added)). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.*[57]

The Tenth Circuit therefore held that the City was correct in its attempt to show that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business."[58] The court emphasized that its reading of *Croson*[59] and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce controverting evidence and merely *argued* that the private sector was out of bounds and that Denver's data was flawed.[60]

The courts found that the disparities in MBE private sector participation, demonstrated with rate of business formation and lack of access to credit which effected MBEs' ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,[61] however, the court did not examine whether the consequent public sector remedy – i.e., one involving a goal requirement on the City of Denver's contracts – was "narrowly tailored." The court took this position despite the plaintiff's contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

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56 517 U.S. at 519.

57 *Concrete Works II*, 321 F.3d at 975-76.

58 Slip opinion, pg. 20.

59 *See also Shaw v. Hunt*, 517 U.S. 899 (1996), which it cited.

60 Whether Denver had the requisite strong basis to conclude that there was discrimination was a question of law; it was for the Tenth Circuit to decide. The standard by which the factual record before it was reviewed was "clearly erroneous."

61 Plaintiff had not preserved the issue on appeal; therefore, it was no longer part of the case.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,[62] the question of whether a public sector remedy is "narrowly tailored" when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago's subcontracting goal an appropriate remedy because it was not "narrowly tailored" to address the documented private discrimination due to lack of access to credit for MBEs. The court also criticized the remedy because it was a "rigid numerical quota," and there was no individualized review of MBE beneficiaries, citing Justice O'Connor's opinion in *Gratz v. Bollinger*.[63]

The question of whether evidence of private sector practices also arose in *Builders Ass'n of Greater Chicago v. County of Cook*.[64] In this case the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*[65] in throwing out a 1988 County ordinance under which at least 30 percent of the value of prime contracts were to go to minority subcontractors and at least 10 percent to woman-owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. However, the court pointed out that the program remedying discrimination in the private sector would necessarily address only private sector participation. In order to justify the public sector remedy, the County would have had to demonstrate that it had been at least a passive participant in the discrimination by showing that it had infused tax dollars into the discriminatory private industry.

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any

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62 298 F.Supp2d 725 (N.D.Ill. 2003).

63 123 S.Ct, 2411, 2431 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment's prohibitions are directed against "state action." The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

64 256 F.3d 642 (7th Cir. 2001).

65 214 F.3d 730 (6th Cir. 2000).

other illegitimate criteria (arguably gender).[66] Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.[67] Using appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.[68] Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity or by the entity's prime contractors, may support an inference of discriminatory exclusion.[69] In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone "may constitute prima facie proof of a pattern or practice of discrimination."[70]

The *Croson* Court made clear that both prime and subcontracting data was relevant. The Court observed that "[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."[71] Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the

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66 *Croson*, 488 U.S. 469. *See also Monterey Mechanical v. Pete Wilson*, 125 F.3d 702 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (1999), found that the City's MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). "Had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department's 15% DBE-participation goal."

In 1996, Houston Metro had adopted a study done for the City of Houston whose statistics were limited to aggregate figures that showed *income* disparity between groups, without making any connection between those statistics and City's contracting policies. The disadvantages cited that M/WBEs faced in contracting with the City also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied was even less availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled black wages to unskilled white wages established that the correlation between low rates of black self-employment was due to discrimination. Even assuming that nexus, there is nothing in *Croson* that accepts a low number of MBE business *formation* as a basis for a race-conscious remedy.

67 *Id.* at 509.

68 *Id.* at 506. As the Court said in *Croson*, "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." See *North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City's program, citing *Croson*.

69 *Id.* at 509.

70 *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

71 *Croson*, 488 U.S. at 502-03.

awarding of prime and subcontracts, the remedies for discrimination identified at a prime versus subcontractor level might also be different.

Second, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[72] Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.[73] Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.[74] The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.[75]

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.[76] Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring "the cold numbers convincingly to life."[77]

1. Geographic Market

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that "an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction."[78] Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.[79]

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72 *Id.* at 509.

73 *Id.*

74 *Coral Construction*, 941 F.2d at 919.

75 *Id.*

76 *Id.*

77 *Id.* (quoting *International Brotherhood of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 339 (1977)).

78 *Coral Construction*, 941 F.2d at 925.

79 *Concrete Works*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev'd on other grounds, 36 F.3d 1513 (10th Cir. 1994).

Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. Since *Croson* and its progeny did not provide a bright line rule for local market area, that determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.[80] Extra-jurisdictional evidence may be permitted, where doing so is reasonably related to where the jurisdiction contracts.[81]

2. Current Versus Historical Evidence

In assessing the existence of identified discrimination through demonstration of a disparity between M/WBE utilization and availability, it may be important to examine disparity data both prior to and after the entity's current M/WBE program was enacted. This will be referred to as "pre-program" versus "post-program" data.

On the one hand, *Croson* requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.[82] Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity's utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity's marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity's utilization to assess current evidence of discrimination. In fact, *Croson* indicates that it may be legally fatal to justify an M/WBE program based upon outdated evidence.[83] Therefore, the most recent two or three years of an entity's utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.[84]

Pre-program data regarding an entity's utilization of M/WBEs prior to enacting the M/WBE program may be relevant to assessing the need for the agency to keep such a program intact.

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80 *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

81 There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.

82 *See Croson*, 488 U.S. at 509-10.

83 *Id.* at 499 (stating that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination").

84 *See AGCC II*, 950 F.2d 1401 at 1414 (consultant study looked at City's MBE utilization over a one year period).

A 1992 opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District (BART)*,[85] set forth the possible significance of statistical data during an entity's "pre-program" years. Judge Henderson opined that statistics that provide data on a period when no M/WBE goals were operative are often the most relevant data in evaluating the need for remedial action by an entity. Indeed, "to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted."[86] Judge Henderson noted that this is particularly so given the fact that M/WBEs report that they are seldom or never used by a majority prime contractor without M/WBE goals. That this may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in *Concrete Works II*. It is permissible for a study to examine programs where there were no goals.

Similarly, the Eleventh Circuit in *Dade County* cautions that using post-enactment evidence (post-program data) may mask discrimination that might otherwise be occurring in the relevant market. Still, the court agreed with the district court that it was not enough to speculate on what MBE utilization would have been in the absence of the program.[87]

Thus, an entity should look both at pre-program and post-program data in assessing whether discrimination exists currently and analyze whether it would exist in the absence of an M/WBE program.

3. Statistical Evidence

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the "disparity index," which consists of the percentage of minority (or women) contractor participation in local contracts divided by the percentage of minority (or women) contractor availability or composition in the population of available firms in the local market area.[88] Disparity indexes have been found highly probative

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85 *See* November 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

86 *Id.*

87 *Dade County*, 122 F.3d at 912.

88 Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County's contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County's Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County's Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).

evidence of discrimination where they ensure that the "relevant statistical pool" of minority (or women) contractors is being considered.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the "relevant statistical pool" includes those businesses that not only exist in the marketplace, but that are qualified and interested in performing the public agency's work. In that case, the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this particular statistical disparity did not satisfy *Croson*.[89]

Statistical evidence demonstrating a disparity between the utilization and availability of M/WBEs can be shown in more than one way. First, the number of M/WBEs utilized by an entity can be compared to the number of available M/WBEs. This is a strict *Croson* "disparity" formula. A significant statistical disparity between the number of MBEs that an entity utilizes in a given product/service category and the number of available MBEs in the relevant market area specializing in the specified product/service category would give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II*, an independent consultant's study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.[90]

Whether a disparity index supports an inference that there is discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant. In *Croson*, Justice O'Connor opined, "[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination."[91] However, the Court has not assessed nor attempted to cast

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89 *Philadelphia*, 91 F.3d 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the "availability" of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.

90 *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.

91 *Croson*, 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)).

bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case-by-case basis.[92]

Following the dictates of *Croson*, courts may carefully examine whether there is data that shows that M/WBEs are ready, willing, and able to perform.[93] *Concrete Works I* made the same point: capacity–i.e., whether the firm is "able to perform"–is a ripe issue when a disparity study is examined on the merits:

> [Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the market place overstates "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority owned firms." In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.[94]

Notwithstanding that appellate concern, the disparity studies before the district court on remand did not examine the issue of M/WBE capacity to perform Denver's public sector contracts. As mentioned above, they were focused on the private sector, using census-based data and Dun & Bradstreet statistical extrapolations.

The Sixth Circuit Court of Appeals, in *Drabik*, concluded that for statistical evidence to meet the legal standard of *Croson,* it must consider the issue of capacity.[95] The State's factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.[96] The court reasoned as follows:

> Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to

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92 *Concrete Works*, 36 F.3d at 1522.

93 The *Philadelphia* study was vulnerable on this issue.

94 *Concrete Works*, 36 F.3d at 1528.

95 *See Drabik*, 214 F.3d 730. The Court reviewed Ohio's 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass'n v. Keip*, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

96 *Id.*

> perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.[97]

Further, *Drabik* also pointed out that the State not only relied upon the *wrong type of statistical data* but that the data was more than twenty years old.

The appellate opinions in *Philadelphia*[98] and *Dade County*,[99] regarding disparity studies involving public sector contracting, are particularly instructive in defining availability.

First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.[100] The Third Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that race-based discrimination existed to justify a race-based program, and that the program was not narrowly tailored to address past discrimination by the City.[101]

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether it is strong enough to infer discrimination is a "close call" which the court "chose not to make."[102] It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects over $30,000. The consultant reviewer determined that no MBEs were used during the study period based upon the consultant's recollection regarding whether the owners of the utilized firms were MBEs. The court found this

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97 *Id.* at 736.

98 *Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3rd Cir. 1996).

99 *Dade County*, 943 F.Supp. 1546.

100 *Philadelphia*, 91 F.3d 586.

101 *Id.*

102 *Id.* at 605.

evidence insufficient as a basis for finding that prime contractors in the market were discriminating against subcontractors.[103]

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE"; and it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.[104] Although theoretically it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of "willingness" and stated, "[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work."[105]

In addition, the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.[106] In order to qualify for certification, the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, "the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects."[107] The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the availability of MBE firms.[108] Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

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103 Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City's contracts. The court noted, however, that "we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides." The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race neutral alternatives.

104 *Philadelphia*, 91 F.3d at 603.

105 *Id*

106 *Id.*

107 *Id.*

108 *Id.*

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.[109] The *Dade County* district court accepted the Disparity Study's limiting of "available" prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, then the results of the bidding process will be biased.[110] In addition, a comprehensive count of bidders is dependent on the adequacy of the agencies' record keeping.[111]

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in evidence to justify race-conscious affirmative action. The appellate court did *not* prescribe the district court's analysis or any other specific analysis for future cases.

4. Bidding

In *Dade County*, the district court held that the County had not shown the compelling interest required to institute a race-conscious program because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs were taken into account.[112] The *Dade County* district court accepted the disparity study's limiting of "available" prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. The results will be biased if the solicitation of bidders is biased, or if the perception of potential bidders is that selection is biased.[113] In addition, the source is dependent on the diligence of the agencies' record keeping.[114]

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109 *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).

110 Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), aff'd, 702 F.2d 221 (D.C. Cir. 1981). (Involving the analysis of available applicants in the employment context).

111 Cf. *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), *cert. denied*, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

112 Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County, 943 F. Supp. 1546 (S.D. Florida 1996).

113 Cf. League of United Latin American Citizens v. Santa Ana, 410 F.Supp. 873, 897 (C.D. Cal. 1976); Reynolds v. Sheet Metal Workers, Local 102, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), aff'd, 702 F.2d 221 (D.C. Cir. 1981). (Involving the analysis of available applicants in the employment context).

114 Cf. EEOC v. American Nat'l Bank, 652 F.2d 1176, 1196-1197 (4th Cir.), cert. denied, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

In any case, whether *Dade County* stands for the proposition that bidding is a mandatory measure of availability in *all* procurements must be judged in light of the program that was the subject of the litigation. The case involved construction contracts where competitive bidding was the method of selection for prime contractors. Consequently, it was not unreasonable to limit availability in those instances to firms that had bid. Indeed, given the comments of the Eleventh Circuit in upholding the district court decision in *Dade County,*[115] it would be difficult to assert that the lower court opinion established substantive bright line rules in reviewing affirmative action programs:

> Both the Supreme Court and this Court have held that a district court makes a *factual* determination when it determines whether there exists a sufficient evidentiary basis justifying affirmative action on the basis of race or ethnicity (emphasis added) . . . We review a district court's factual findings only for clear error.[116]
>
> The Supreme Court has explained with unmistakable clarity our duty in evaluating the district court's factfinding in this case. That duty most emphatically is *not* to decide whether we agree with the district court's view of the evidence. Instead, we must determine only whether the district court's view of the evidence, as reflected in its fact findings, is a permissible one, i.e., a plausible one in light of the entire record.[117]

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program: it merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in evidence to justify race-conscious affirmative action. The appellate court did *not* prescribe the district court's analysis or any other specific analysis for future cases.

In *Dade County*, subcontractors were identified as M/WBEs that had filed a subcontractors' release of lien on at least one Dade County contract during the study period. The number of such firms was compared to the sales and receipts claimed by such firms. That district court rejected the comparison as inappropriate because the income received was not limited to Dade County subcontractors.

For the Tenth Circuit in *Concrete Works II,* the issue of bidding is clear: it is not required. "[W]e do not read *Croson* to require disparity studies that measure whether construction firms are able to perform a particular contract. The studies must only determine whether

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[115] Dade County, 122 F.3d 895 (1997).

[116] Dade County, 122 F.3d at 903.

[117] Id. at 904.

the firms are capable of 'undertak[ing] prime or subcontracting work in public construction projects' *Croson*, 488 at 502."[118]

5. Capacity

The Third Circuit has recognized that the issue of qualifications can be approached at different levels of specificity, and some consideration of the practicality of various approaches is required. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE," and it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.[119] An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.

Furthermore, the Court discussed whether bidding was required in prime construction contracts as the measure of "willingness," and stated, "[P]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work."[120]

In addition, the Court found that a program certifying MBEs for federal construction programs satisfied the determination of capability of MBE firms included in the study.[121] The certification program required potential firms to detail their bonding capacity, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned before being qualified to bid on federally funded city contracts as an MBE. The Court stated that "the process by which the firms were certified appears to suggest that, as a general proposition, those firms were both qualified and willing to participate in public work projects."[122] Moreover, the Court not only found the process to be adequate, but may have been on the conservative side, possibly even "underinclusive in terms of firms capable of performing some portion of City projects."[123]

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118 Pg. 24,

119 Philadelphia, 91 F.3d at 603.

120 Philadelphia, 91 F.3d 586.

121 Id.

122 Id.

123 Id.

C. Anecdotal Evidence

In *Croson*, Justice O'Connor opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[124] Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," the second prong of a *Croson* study.

The following types of anecdotal evidence have been presented and relied upon by the Ninth Circuit, in both *Coral Construction* and *AGCC II*, to justify the existence of an M/WBE program:

- M/WBEs denied contracts despite being the low bidders – *Philadelphia*[125]
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs – *Cone Corporation v. Hillsborough County*[126]
- M/WBEs' inability to obtain contracts for private sector work – *Coral Construction*[127]
- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties – *AGCC* [128]
- Attempts to circumvent M/WBE project goals – *Concrete Works I*[129]

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124 *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

125 *Philadelphia*, 6 F.3d at 1002.

126 *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

127 For instance, where a small percentage of an MBE or WBE's business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Construction*, 941 F.2d 910 at 933 (WBE's affidavit indicated that less than 7 percent of the firm's business came from private contracts and that most of its business resulted from gender-based set-asides).

128 *AGCC II*, 950 F.2d at 1415.

129 *Concrete Works*, 36 F.3d at 1530.

- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts – *AGCC*[130]

Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community. Set-asides are at the other end of the spectrum. Race-neutral measures, by definition, are accessible to all segments of the business community regardless of race. They are not intrusive, and in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a larger amount of evidence.[131]

Courts must assess the extent to which relief measures disrupt settled "rights and expectations" when determining the appropriate corrective measures.[132] Presumably, courts would look more favorably upon anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example, if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, in *Croson*, the Supreme Court found that Richmond's MBE program was unconstitutional, because the City lacked proof that race-conscious remedies were justified. However, the Court opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[133]

In part, it was the absence of such evidence that proved lethal to the program. The Supreme Court stated that "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[134]

This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate record contained the affidavits of "at least 57 minority or women

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130 *AGCC II*, 950 F.2d at 1415.

131 Cf. *AGCC II*, 950 F.2D at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that "the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]").

132 *Wygant*, 476 U.S. at 283.

133 *Croson*, 488 U.S. at 509, citing *Teamsters*, 431 U.S. at 338.

134 *Id.* at 480.

contractors, each of whom complains in varying degree of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community."[135]

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County's MBE program since "[n]otably absent from the record, however, is *any* statistical data in support of the County's MBE program."[136] After noting the Supreme Court's reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

> Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.[137]

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that "rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."[138]

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Contractors Ass'n*, the Third Circuit Court of Appeals noted that the Philadelphia City Council had "received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination," which the district court had "discounted" because it deemed this evidence to be "impermissible" for consideration under *Croson*.[139] The circuit court disapproved of the district court's actions because in its view the court's rejection of this evidence betrayed the court's role in disposing of a motion for summary judgment.[140] "Yet," the circuit court stated:

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135 *Coral Construction*, 941 F.2d at 917-18.

136 *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court and the case was remanded to the lower court for an examination of the factual predicate).

137 *Id.* at 919.

138 *Id.*

139 *Philadelphia*, 6 F.3d at 1002.

140 *Id.* at 1003.

> given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, supra]. Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.[141]

The D.C. Circuit Court echoed the Ninth Circuit's acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O'Donnell Construction v. District of Columbia.*[142] The court found that in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

> It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is most useful as a supplement to strong statistical evidence–which the Council did not produce in this case.[143]

The Eleventh Circuit is also in accord. In applying the "clearly erroneous" standard to its review of the district court's decision in *Dade County*, it commented that "[t]he picture painted by the anecdotal evidence is not a good one."[144] However, it held that this was not the "exceptional case" where, unreinforced by statistics, the anecdotal evidence was enough.[145]

In *Concrete Works I*, the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that "[w]hile a factfinder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carries more weight due to the systemic impact that such institutional

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141 *Id.*

142 963 F.2d at 427 (D.C. Cir.1992).

143 *Id.*

144 *Engineering Conctractors Ass'n of South Florida v. Metropolitan Dade County*, 943 F.Supp 1546 (S.D. Fla. 1996), aff'd, 122 F.3d 895 (11th Cir. 1997).

145 *Id.* at 926.

practices have on market conditions."[146] The court noted that the City had provided such systemic evidence.

The Ninth Circuit Court of Appeals has articulated what it deems to be permissible anecdotal evidence in *AGCC II*.[147] There, the court approved a "vast number of individual accounts of discrimination" which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the city's procurement processes; an "old boy's network" still exists; and racial discrimination is still prevalent within the San Francisco construction industry.[148] Based on *AGCC II*, it would appear that the Ninth Circuit's standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that, to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.[149] These requirements are that the accounts:

- are gathered from minority contractors, preferably those that are "qualified"[150]
- concern specific, verifiable instances of discrimination[151]
- involve the actions of governmental officials[152]
- involve events within the relevant jurisdiction's market area[153]

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146 *Concrete Works I*, 36 F.3d at 1530.

147 *AGCC II*, 950 F.2d 1401.

148 *Id.* at 1415.

149 *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be "dominant or pervasive."

150 *Philadelphia*, 91 F.3d at 603.

151 *Coral Construction*, 941 F.2d at 917-18. *But see Concrete Works II*, 321 F.3d at 989. "There is no merit to [plaintiff's] argument that the witnesses accounts must be verified to provide support for Denver's burden."

152 *Croson*, 488 U.S. at 509.

153 *Coral Construction*, 941 F.2d at 925.

- discuss the harm that the improper conduct has inflicted on the businesses in question[154] and

- collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic[155]

Given that neither *Croson* nor its progeny identify the circumstances under which anecdotal evidence alone will carry the day, it is not surprising that none of these cases explicate bright line rules specifying the quantity of anecdotal evidence needed to support a race-conscious remedy. However, the foregoing cases, and others, provide some guidance by implication.

Philadelphia makes clear that 14 anecdotal accounts will not suffice.[156] While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type called for above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver's M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.[157] It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

In addition, as noted above, the quantum of anecdotal evidence that a court would likely find acceptable may depend on the remedy in question. The remedies that are least burdensome to non-targeted groups would likely require a lesser degree of evidence. Those remedies that are more burdensome on the non-targeted groups would require a stronger factual basis likely extending to verification.

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154 *O'Donnell*, 963 F.2d at 427.

155 *Coral Construction*, 941 F.2d at 919.

156 *Philadelphia*, 6 F.3d. at 1002-03.

157 The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. *See Concrete Works of Colorado v. Denver*, 823 F.Supp. 821, 833-34. The disparity study consultant examined all of this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (*see id.* at 833), the number might have been even greater.

V. CALIFORNIA'S PROPOSITION 209

A public entity in California seeking to adopt an MBE Program must comply with Proposition 209 requirements.

In *Croson,* the Supreme Court held that the Fourteenth Amendment authorized state and local governments to employ race-conscious remedies when they are based on a properly conducted disparity study. Proposition 209's strictures against racial preferences aside, in *Monterey Mechanical v. Wilson,* the Ninth Circuit made clear that findings of discrimination and a narrowly tailored remedy are essential.[158]

Proposition 209 prohibits the State from discriminating "against, or grant[ing] preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." However, Proposition 209 also states that "if any parts [of Proposition 209] are found to be in conflict with federal law or the U.S. Constitution, the section shall be implemented to the maximum extent that federal law and the U.S. Constitution permit."

As for the reach of Proposition 209, the leading California cases are *Hi-Voltage v. City of San Jose*[159] and *Ward Connerly v. State Personnel Board.*[160] In *Hi-Voltage,* the California Supreme Court held that Proposition 209 prohibited the City from requiring construction contractors to document their efforts to solicit M/WBEs as subcontractors. The court noted two fatal flaws: (1) Contractors were required to request bids from at least four M/WBEs, which the court considered a preference in favor of M/WBEs; (2) The program also failed because the extent to which M/WBEs were chosen would be measured against the City's statistical expectation. *Ward Connerly*, a subsequent appellate court opinion, determined that Proposition 209 applied to the five California statutory programs before that court.[161] However, neither *Hi-Voltage* nor *Ward Connerly* speak directly to what would happen should the findings of the City of Oakland's disparity study point to a race-conscious remedy.

In *Ward Connerly*, the California Court of Appeal stated the following:

> Under equal protection principles all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which

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158 125 F. 3d 702, 713-14 (9th Cir. 1997). Plaintiff had not complied with a state statutory requirement that it meet specified MBE and WBE goals, or show Good Faith Efforts to do so. The court agreed that its low bid could not be rejected.

159 24 Cal. 4th 537 (Cal. 2000).

160 92 Cal. App. 4th 16 (Cal. 2001).

161 State Lottery, Professional Bond Services, State Civil Service, Community Colleges, State Contracting (reporting requirements).

> can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.
>
> In this respect the distinction between what the federal Constitution permits and what it requires becomes particularly relevant. To the extent that the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action. In fact, Proposition 209 contains no compelling interest exception.[162]

Proposition 209 does not include a "compelling interest" exception. Had there been such an exception, there would have been no conflict between Proposition 209 and use of race, which is permissible under the Fourteenth Amendment. However, the *Croson* test has a second prong: the remedy has to be "narrowly tailored." Note then the following language in *Ward Connerly*:

> The statutory scheme [re: professional bond services] does not arguably withstand strict scrutiny. No justification has been shown. There was no specific finding of identified prior discrimination in the contracting for professional bond services. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered. The scheme is unlimited in duration. And, except for its limitation to citizens and lawfully admitted aliens, the scheme is unlimited in reach.[163]

Hi-Voltage also refers to the impact of a remedy based on a disparity study. The California Supreme Court wrote: ". . .if it were determined the City had violated federal constitutional or statutory law, the supremacy clause as well as the express terms of Proposition 209 would dictate federal law prevails . . . "[164] Crucially, it went on: "The disparity study is not part of the record in this case. Without it, the court has no basis for measuring the fit between the Program and the goal of eliminating a disparity in the amount of contract dollars awarded MBEs in comparison to non-MBEs."[165] Therefore, it was unclear whether the inclusion of a disparity study in this case may have permitted a race-conscious remedy despite Proposition 209.

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[162] *Ward Connerly*, 92 Cal. App. 4th at 42.

[163] *Ward Connerly*, 92 Cal. App. 4th at 54.

[164] *Hi-Voltage*, 24 Cal. 4th 537 at 569.

[165] *Id.*

By implication, this issue was involved in Coral Construction v. San Francisco, [166] where the California Superior Court determined that Proposition 209 barred San Francisco's race-conscious program.[167] On April 18, 2007, the First District Court of Appeal affirmed that judgment but remanded the case for a determination of whether the defendant's evidence met the majority opinion's test that the discrimination was **intentional**. Disparity studies, however, have a lower standard; which is whether there is statistically significant underutilization of available MBEs. If there is, an inference that there is actionable discrimination may be drawn.

Even so, federal courts still need to decide whether Proposition 209, as applied, conflicts with the Equal Protection Clause of the Fourteenth Amendment. Croson stated that such race-conscious contracting remedies are appropriate. In accordance with the Supreme Court's 1803 decision, *Marbury v. Madison*,[168] the federal courts are granted the power to determine whether a remedy growing out of a disparity study process sanctioned by the Court in *Croson* is narrowly tailored. This question cannot be finally answered by the state of California.

Title VI of the Civil Rights Act of 1964 established nondiscrimination requirements in association with federal funds.[169] The recent opinion in *Coral Construction* also held that Title VI was permissive and, therefore, did not trump Proposition 209.

The application of Title VI was also raised in *C&C Construction v. Sacramento Municipal Utility District (SMUD).*[170] The 2004 majority Court of Appeals opinion began with the point that race-neutral programs are the only ones Proposition 209 permits in California, but also acknowledged that its provisions were subject to federal law. It viewed the regulations of the Departments of Energy, Defense, and Transportation as not *requiring* recipients of federal funds to use race-conscious remedial programs for identified discrimination. Moreover, its reading of the regulations themselves was that SMUD's actions had to be consistent with Proposition 209.[171] Also, SMUD's 1998 update of its 1993 disparity study, both of which found *Croson*-level discrimination against MBEs, did not look at whether

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166 See 116 Cal. App. 4th 6

167 It is also challenging the procedural of the court granting plaintiff summary judgment because of the factual record did not support one.

168 5 U.S. 137 (1803).

169 The 1987 Civil Rights Restoration Act reversed court decisions that restricted its reach.

170 122 Cal. App. 4th 284 (Cal. App. 2004).

171 "SMUD offers no argument or authority that the Department of Energy requires race-based discrimination [a violation of Proposition 209], either in general or specifically, in SMUD's case, as an 'appropriate remedial step.' It would appear that the Department of Energy, by using the general term 'appropriate,' meant for the funding recipient to consider the state laws and regulations relevant to that recipient when determining what action to take. In SMUD's case, such consideration includes the limitations of [Proposition 209]."

race-neutral remedies would suffice to meet its federal nondiscrimination obligations.[172] Indeed, the majority observed that the update consultant was specifically instructed not to consider this factor. Finally, under its reading of the regulations, the burden was on SMUD to show that it would *lose* funds if it did not put in place the race-conscious program that it had implemented.

Citing *S.J. Groves & Sons v. Fulton County,*[173] the dissent's view of the regulations was that, properly read, a race-conscious program is not an *option* where a race-neutral one will not suffice. The required "affirmative action" did not refer only to race-neutral programs, it also included race-conscious programs.[174] The Department Secretary determined whether SMUD was in compliance. What the majority did in affirming the trial court decision to enjoin the use of race interfered with that authority and SMUD's obligation to comply with the regulations. As such, SMUD violated the Supremacy Clause. However, the majority held that what could be seen as a cogent argument was raised too late to be considered during the appeal.

The dissent summarized its position as follows:

> Since the requirement of 'affirmative action' includes both race-neutral and race-conscious action and the undisputed evidence establishes that SMUD has attempted to use race-neutral outreach and other methods and concluded in good faith that they were not sufficient to remedy the statistical underutilization reflected in the disparity studies, SMUD was left with no other alternative but to adopt a race-conscious remedial plan to eliminate the effects of its own discriminatory practices.[175]

In light of this decision, the City of Oakland must carefully consider whether its race-neutral programs have proved ineffective. If this is the case, and there is statistically significant MBE underutilization, there may be grounds - adopting the dissent's analysis --to implement a race-conscious remedy.

Given the state of the law, it would seem that the better course is to proceed where the facts take it. Indeed, based on the decisions in the University of Michigan cases, one could argue

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172 By implication, we note, if SMUD had, it could have move to a race-conscious program.

173 920 F.2d 752 (11th Cir. 1991).

174 The applicable regulation "condone[s], and in some cases *require[s]*, race-conscious regulations and/or action". (*italics* added), *S.J. Groves*, *920 F.2d* at *764-765*.

175 122 Cal. App. 4th 284 at 324.

that the federal courts will not reject carefully constructed resorts to race.[176] They may well conclude that Proposition 209 does not prohibit the City of Oakland, having threaded the constitutional needle, from going ahead. There is also the risk of a lawsuit by MBEs if it failed to act. Contra Costa County faced such litigation commencing in 1998 in *L. Tarango Trucking v. Contra Costa County.* Plaintiffs contended that Proposition 209 did not supercede the Equal Protection clause and Title VI of the Civil Rights of 1964. After extensive proceedings and paying plaintiffs' substantial attorneys fees, the County settled in 2001.[177]

VI. CONSIDERATION OF RACE-NEUTRAL OPTIONS

A remedial program must address the source of the disadvantage faced by minority or woman-owned businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.[178]

On the other hand, an M/WBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier which is faced by all new businesses, regardless of ownership.[179] If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.[180] In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

The requirement that race-neutral measures be considered does not mean that they must be exhausted before race-conscious remedies can be employed. As the district court recently wrote in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*:

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176 Discrimination is the traditional concern of the Equal Protection Clause; it is the predicate for affirmative action in contracting and employment. The threshold issue in those cases was whether diversity, a more amorphous concern, could suffice as a constitutional basis for the use of race in education. The Court found that it did. It went on to render a 'split' decision on the undergraduate and law school remedies using a 'narrow tailoring' analysis. However, the make up of the Court has changed with the addition o Roberts and Alito.

177 In making this judgment, see again the language in *Hi-Voltage* about what the California Supreme Court would have done if a disparity studies had been in the record.

178 *AGCC II*, 950 F.2d at 1404.

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

180 *Id.* at 507.

> The Supreme Court has recently explained that although 'narrow tailoring does not require exhaustion of every conceivable race-neutral alternative' it 'does require serious, good faith consideration of workable race-neutral alternatives that will achieve . . . diversity[.]' *Grutter*, 123 S.Ct, at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.[181]

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, M/WBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.[182]

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.[183] Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing low MBE utilization, it is imperative to examine barriers to MBE participation that go beyond "small business problems." The impact on the distribution of contracts of programs that have been implemented to improve MBE utilization should also be measured.[184]

VII. CONCLUSION

The decision of the U.S. Supreme Court in the *Croson* case changed the legal landscape for business affirmative action programs and altered the authority of local governments to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson* and its progeny require of a disparity study if it is to serve as legal justification for a race (and gender)-conscious affirmative action program for the City of Oakland. Great care must be exercised in determining whether discrimination has been "identified." If it has, race- neutral remedies have to be considered, and any race-conscious remedy must be "narrowly tailored."

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181 *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004).

182 *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

183 *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

184 *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit's caveat in *Dade County* should be kept in mind: "Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment." For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand,, County of Cook, City of Chicago.*

VIII. LIST OF CASES

Cases

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Associated General Contractors of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco, 950 F.2d 1401 (9th Cir. 1991).

Associated General Contractors of Connecticut v. City of New Haven, 791 F.Supp. 941 (D. Conn. 1992).

Associated General Contractors of Ohio v. Drabik, 50 F.Supp. 741 (S.D. Ohio 1999).

Builders Ass'n of Greater Chicago v. City of Chicago, 298 F.Supp2d 725 (N.D.Ill. 2003).

Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001).

C&C Construction v. Sacramento Municipal Utility District (*SMUD*), 122 Cal. App. 4th 284 (Cal. App. 2004).

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

Concrete Works of Colorado v. City and County of Denver, 823 F.Supp. 821 (D. Colo. 1993).

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Concrete Works of Colorado v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, (U.S. Nov. 17, 2003) (No. 02-1673). *"Concrete Works II"*

Cone Corporation v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990).

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Craig v. Boren, 429 U.S. 190 (1976).

EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1981).

Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

Ensley Branch N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

Gratz v. Bollinger, 123 S.Ct, 2411 (2003).

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993).

Hazelwood School District v. United States, 433 U.S. 299 (1977).

Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F.Supp. 2d 1305 (S.D.Fla. 2004).

Hi-Voltage v. City of San Jose, 24 Cal. 4th 537 (Cal. 2000).

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

League of United Latin American Citizens v. Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976).

Michigan Road Builders Association v. Milliken, 834 F.2d 583 (6th Cir. 1987).

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

Monterey Mechanical Co. v. Pete Wilson et al., 125 F.3d 702 (9th Cir. 1997).

North Shore Concrete and Assoc. v. City of New York, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998).

O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992).

Ohio Contractors Ass'n v. Keip, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983).

Reynolds v. Sheet Metal Workers, Local 102, 498 F.Supp 952 (D. D.C. 1980), aff'd, 702 F.2d 221 (D.C. Cir. 1981).

RGW Construction v. San Francisco Bay Area Rapid Transit District, No. C92-2938 THE (N.D. Cal. Sept. 18, 1992).

Shaw v. Hunt, 517 U.S. 899 (1996).

S.J. Groves & Sons v. Fulton County, 920 F.2d 752 (11th Cir. 1991).

United States v. Virginia, 116 S.Ct. 2264 (1996).

Ward Connerly v. State Personnel Board, 92 Cal. App. 4th 16 (Cal. 2001).

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

Statutes

42 U.S.C. Section 14000e et seq.

Cal. Const., Article I, Section 31.

Cal. Public Contracting Code, Section 2002.

Appendix A

The main components of the new U.S. Department of Transportation rules are as follows:

1. Meeting Overall Goals

Section 26.51 requires that the "maximum feasible portion" of the overall DBE goal be met through the use of race/gender-neutral mechanisms. To the extent that these means are insufficient to meet overall goals, recipients may use race/gender-conscious mechanisms, such as contract goals. However, contract goals are not required on every USDOT-assisted contract, regardless of whether they were needed to meet overall goals.

If during the year it becomes apparent that the goals will be exceeded, the recipient is to reduce or eliminate the use of goals. Similarly, if it is determined that a goal will not be met, an agency should modify the use of race and gender-neutral and race and gender-conscious measures in order to meet its overall goals.

Set-asides may not be used for DBEs on USDOT contracts subject to part 23 except, "in limited and extreme circumstances when no other method could be reasonably expected to address egregious instances of discrimination."

2. Good Faith Efforts

The new regulation emphasizes that when recipients use contract goals, they must award the contract to a bidder that makes good faith efforts to meet the goal. The contract award cannot be denied if the firm has not attained the goal, but has documented good faith efforts to do so. Recipients must provide administrative reconsideration to a bidder who is denied a contract on the basis of a failure to make good faith efforts.

3. DBE Diversification

Section 26.33 is an effort to diversify the types of work in which DBEs participate, as well as to reduce perceived unfair competitive pressure on non-DBE firms attempting to work in certain fields. This provision requires that if agencies determine there is an over-concentration of DBEs in a certain type of work, they must take appropriate measures to address the issue. Remedies may include incentives, technical assistance, business development programs, and other appropriate measures.

4. Alternative Programs

Section 26.15 allows recipients to obtain a waiver of the provisions of the DBE program requirements if they demonstrate that there are "special or exceptional circumstances, not

likely to be generally applicable, and not contemplated in connection with the rulemaking that establish this part."

2

CONTRACTING AND PROCUREMENT ANALYSIS

I. INTRODUCTION

The City of Oakland and the Oakland Redevelopment Agency (City) have enacted ordinances establishing rules and procedures for its procurement process, which are set forth in procurement documents provided by the Office of Contract Compliance and Employment Services (OCCES) and the Public Works Agency (PWA). Mason Tillman received a total of eight separate documents describing procurement policies, procedures, and business development programs utilized by the City between July 1, 2002, to June 30, 2005. The documents provided by the OCCES are listed below:

- City of Oakland Construction Contract Process, March 1, 1995
- City of Oakland Professional Services Contract Process, April 4, 1995
- Construction Contract Process (Not Dated)
- Contracting Guidelines, Standardized Contracting Procedures, March 15, 2001
- Local and Small Local For Profit and Not For Profit Business Enterprise Program, April 29, 2004
- Oakland Municipal Code, Chapter 2.04 Purchasing Systems, October 31, 2006.
- Professional Services Process (Not Dated)
- Public Works Agency, Standard Operating Procedures for Professional Services Contracts, July 1, 1996

Mason Tillman has reviewed all of the procurement documents listed above and found them to contain conflicting information about the City's procurement standards. As a result, procurement standards as set forth in the Contracting Guidelines, Standardized Contracting Procedures, revised March 15, 2001, and in effect closer to the study period were used for contradicting procurement standards. Some of the processes described in this section are

also based on the procurement practices as described by Deborah Lusk-Barnes, the Contract Compliance and Employment Services Office Manager. [1]

II. DEFINITIONS

Goods and services procured by the City are classified under three industries. The three industries are defined below:

Construction Services are defined as any public work for new construction, remodeling, renovation, maintenance, and repair.

Goods and Other Services are defined as supplies, materials, commodities, and equipment, as well as non-professional services.

Professional and Consultant Services are defined as services which are of an advisory nature that provide a recommended course of action or personal expertise that will result in the transmittal of information to the City, either verbal or written, related to city administration and management or program management. Professional and consultant services must be performed by appropriately licensed consultants, architectural or engineering personnel, or persons possessing unique or special training, education, or skills.

III. OVERVIEW OF THE PROCUREMENT PROCESS

The City of Oakland has adopted procurement procedures to provide economic opportunity for its residents and businesses and to stimulate its economic development. The procurement of goods and other services, construction services, and professional and consultant services are subject to different advertisement, solicitation, and approval requirements. The requirements are determined by the type, circumstance, and value of the purchase.

There are two types of procurements, informal and formal. Informal procurements are purchases valued at $50,000 or less for goods and other services, less than $50,000 for construction services, and at $15,000 or less for professional and consultant services. Informal procurements are not subject to formal advertising or solicitation requirements.

Formal procurements are purchases valued more than $50,000 for goods and other services, at $50,000 or more for construction services, and more than $15,000 for professional and

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[1] The detailed requirements for procurement procedures for the City of Oakland differed significantly in the three year study period than stipulated in the new procurement plan adopted by the City in 2005.

consultant services. Formal procurements must be advertised and procured through a competitive process. Formal procurements are subject to approval by the City Council

Table 2.01 summarizes the City's procurement policies and procedures, which are described below in Section IV. Section V summarizes procurements that are exempt from the City's competitive procurement process.

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Goods and Other Services	Valued less than $5,000	None	Obtain a minimum of three quotes from certified Local Business Enterprises (LBEs), collect all required schedules and forms, verify insurance and licenses	User Department Head
	Valued at $5,000 through $14,999	Advertisement in at least one local newspaper with wide circulation and may advertise on the City's Contracting and Opportunities website at a minimum of 7 working days prior to bid opening Notify minimum of three certified Local Business Enterprises (LBEs)	Request for Proposals/Qualifications or Notice to Invite Bids	User Department Head

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Valued at $15,000 through $50,000	Advertisement in local newspapers of general circulation and may advertise on the City's Contracting and Opportunities website at a minimum of 7 working days prior to bid opening Mail notifications to all registered vendors with the User Department, Purchasing Services, and Office of Contract Compliance and Employment Services	Request for Proposals/Qualifications	City Administrator

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Valued more than $50,000 through $250,000	Advertisement in an official City newspaper at least 10 calendar days prior to bid opening and in additional local newspapers of general circulation. May advertise on the City's Contracting and Opportunities website at a minimum of 7 working days prior to bid opening Mail notifications to all registered vendors with the User Department, Purchasing Services, Contract Administration/Public Works Agency, and Office of Contract Compliance and Employment Services	Request for Proposals/Qualifications	City Council

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Valued more than $250,000	Advertisement in an official City newspaper at least 10 calendar days prior to bid opening and in additional local newspapers of general circulation May advertise on the City's Contracting and Opportunities website at a minimum of 7 working days prior to bid opening Mail notifications to all registered vendors with the User Department, Purchasing Services, Contract Administration/Public Works Agency, and Office of Contract Compliance and Employment Services	Request for Proposals/Qualifications	City Council

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Construction Services	Valued less than $50,000	Advertisement in an official City newspaper (typically the *Oakland Tribune*), Builder's Exchange, ethnic newspapers, and membership organizations Pre-bid meeting at least 15 calendar days prior to bid opening date when applicable	Competitive Sealed Bid	City Administrator
	Valued at $50,000 through $250,000	Advertisement in an official City newspaper (typically the *Oakland Tribune*), Builder's Exchange, ethnic newspapers, and membership organizations Pre-bid meeting at least 15 calendar days prior to bid opening date	Competitive Sealed Bid	City Council
	Valued more than $250,000	Advertisement in an official City newspaper (typically the *Oakland Tribune*), Builder's Exchange, ethnic newspapers, and membership organizations Pre-bid meeting at least 20 calendar days prior to bid opening date	Competitive Sealed Bid	City Council

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Professional and Consultant Services	Valued less than $5,000	None	Obtain at least three quotes/proposals from certified Local Business Enterprises (LBEs)	User Department Head
	Valued at $5,000 through $15,000	Mail notifications to all registered vendors with the User Department, Purchasing Services, Contract Administration/Public Works Agency, and Office of Contract Compliance and Employment Services Pre-proposal meeting at least 15 calendar days prior to the proposal due date, when applicable	Request for Proposals/Qualifications	User Department Head

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
	Valued more than $15,000 through $150,000	Advertisement in an official City newspaper at least 10 calendar days prior to the proposal due date Mail notifications to all registered vendors with the User Department, Purchasing Services, Contract Administration/Public Works Agency, and Office of Contract Compliance and Employment Services Pre-proposal meeting must be held at least 15 calendar days prior to proposal due date	Request for Proposals/Qualifications	City Council
	Valued more than $150,000	Advertisement in an official City newspaper at least 10 calendar days prior to the proposal due date Mail notifications to all registered vendors with the User Department and Office of Contract Compliance and Employment Services Pre-proposal meeting must be held at least 15 calendar days prior to proposal due date	Request for Proposals/Qualifications	City Council

Table 2.01 City of Oakland Procurement Process

Procurement Category	Dollar Threshold	Advertising Requirement	Solicitation Process	Procurement Approval
Emergency Purchases of Goods and Services and Construction	None	None	None	City Administrator
Emergency Purchases of Professional and Consultant Services	None	None	None	City Administrator
Exceptions to Competitive Bidding	None	None	None	City Council
Cooperative Agreement Purchases	None	None	None	City Administrator

IV. STANDARDS FOR PROCURING CITY OF OAKLAND CONTRACTS

A. Informal Contracts

1. Purchases of Goods and Other Services Valued at $50,000 or Less

Purchase orders (POs) are required for purchases of goods and other services up to the amount of $4,999. City staff must obtain a minimum of three quotes from certified Local Business Enterprises (LBEs). In addition, they must collect all required schedules and forms, verify insurance, business tax licenses, and professional licenses. If all documents are in order, the department head has the authority to approve the purchase.

For purchases of goods and other services valued at $5,000 through $14,999, the user department must advertise in at least one local paper with wide distribution (i.e., Oakland Tribune) and may advertise on the City's Contracting and Opportunities website at a minimum of 7 days prior to bid opening. The user department is also required to notify a minimum of three certified LBEs and solicit businesses using Request for Proposals/Qualifications or Notice to Invite Bids processes. The user department has the authority to grant these contracts.

Purchases of goods and other services valued at $15,000 through $50,000 must be additionally advertised in at least one local paper with wide distribution (i.e., Oakland Tribune) . The user department must also notify all registered vendors on lists maintained by the user department, Purchasing Services, and the Contract Compliance Office. The City Administrator has the authority to review and sign off on these purchases.

2. Purchases of Construction Services Valued less than $50,000

For purchases of construction contracts valued less than $50,000, the City must solicit competitive sealed bids through an Invitation for Bid (IFB). The IFB must be advertised in an official City newspaper (typically the *Oakland Tribune*), the Builder's Exchange, ethnic newspapers, and membership organizations. The user department, in conjunction with the Contract Compliance Office, is encouraged to set up a pre-bid meeting at least 15 calendar days prior to the bid opening date as necessary.

Informal construction contracts valued less than $50,000 must be approved by the City Administrator.

3. Purchases of Professional and Consultant Services Valued less than $15,000

For purchases of professional and consultant services valued less than $5,000, the City must solicit at least three quotes/proposals from certified LBEs. The user department has the authority to grant contracts at this level.

For purchases of professional and consultant services valued at $5,000 through $14,999, the user department must notify all vendors registered with the user department, Purchasing Services, Contract Administration/Public Works Agency, and the Contract Compliance Office's mailing lists. The user department is also required to set a pre-proposal meeting at least 15 calendar days prior to the proposal due date with the Contract Compliance Office whenever it is deemed applicable or beneficial. The user department has the procurement authority to purchase informal professional and consultant services valued less than $15,000.

B. Formal Contracts

1. Purchases of Goods and Other Services Valued More than $50,000

For the purchases of goods and other services valued more than $50,000, the City must advertise in an official City newspaper at least 10 calendar days prior to the bid opening date. The user department is also required to advertise in additional local newspapers of general circulation, as well as notify all registered vendors with the user department, Purchasing Services, Contract Administration/Public Works Agency, and the Contract Compliance Office's mailing lists.

Formal purchases of goods and other services valued more than $50,000 must be approved by the City Council.

2. Purchases of Construction Services Valued at $50,000 or More

For purchases of construction services valued at $50,000 or more, the City must solicit competitive sealed bids through an Invitation for Bid (IFB). The IFB must be advertised in an official City newspaper (typically the *Oakland Tribune*), the Builder's Exchange, ethnic newspapers, and membership organizations. The user department, in conjunction with the Contract Compliance Office, must set up a pre-bid meeting at least 15 calendar days prior to the bid opening date.

Formal construction contracts valued at $50,000 through $250,000 must be approved by the City Council.

3. Purchases of Professional and Consultant Services Valued at $15,000 or more

Purchases of professional and consultant services valued more than $15,000 are solicited using a Request for Proposals or Qualifications process. The user department must advertise in an official City newspaper at least 10 calendar days prior to the proposal due date and notify all registered vendors in the user department, Purchasing Services, Contract Administration/Public Works Agency, and the Contract Compliance Office's mailing lists. A pre-proposal meeting is scheduled at least 15 calendar days prior to the proposal due date.

Formal professional and consultant services purchases valued more than $15,000 must be approved by the City Council.

V. EXEMPTIONS FROM THE CITY'S PROCUREMENT PROCESS

Certain formal procurements are exempt from the City's procurement process. As described below, there are two types of exempt procurements.

A. Emergency Purchases

Emergency purchases of goods and services are permitted when a situation arises to threaten the preservation of public peace, health or safety. For goods and other services and professional services, emergency purchases are not subject to formal advertising or solicitation requirements. However, the City has an established goal of awarding 75 percent of emergency contract dollars to local firms, of which two thirds must be spent with small local businesses, whenever possible. The user department is also required to solicit from certified LBEs for all informally bid emergency work.

The City Administrator has the authority to procure emergency purchases of goods and other services for any dollar level as deemed necessary without previous specific action by the City Council. All emergency contracts awarded by the City Administrator are to be presented for informational purposes to the City Council within a reasonable time of contract execution.

B. Exceptions to Competitive Bidding

Exceptions to Competitive Bidding or waivers are purchases of goods and services under any of the following conditions:

- To contracts involving professional or specialized services such as, but not limited to, services rendered by architects, engineers and other specialized professional consultants
- When calling for bids on a competitive basis is impracticable, unavailing or impossible
- Placement of insurance coverage
- When public work is performed by the city with its own employees
- In other cases when specifically authorized by the City Council after a finding and determination that it is in the best interests of the City

All exceptions to competitive bidding must be approved by the City Council.

C. Cooperative Agreements

A cooperative agreement, also called a "piggy back" purchase, is a procurement by the City from the vendors under contract with another government agency. The products and services are procured at the same or substantially same prices. Cooperative agreements must be approved by the City Administrator.

3

HISTORY OF M/W/L/SLBE LEGISLATION AND DBE REGULATIONS

I. INTRODUCTION

The City of Oakland (City) has a Local and Small Local Business Enterprise (L/SLBE) program and Disadvantaged Business Enterprise (DBE) program governing the procurement of goods and services. Prior to the current L/SLBE and DBE Programs, the City utilized a Minority and Woman-owned Business Enterprise (M/WBE) Program.

The first section of this chapter, *Minority and Woman-Owned Business Enterprise Program,* traces the legislative history of the City's M/WBE Program spanning from its formation in 1971 to 1997, when the rules governing the program became modified to the current L/SLBE Program. The second section, *Local and Small Local Business Enterprise Program,* covers the legislative history governing the introduction of the City's L/SLBE Program, its program goals, and the Disparity Study that was commissioned to assess the efficacy of the program. The final section, *Disadvantaged Business Enterprise Program,* presents the City's implementation of the federal program to ensure nondiscrimination on the City's federally funded projects.

A. Minority and Woman-Owned Business Enterprise Program

The M/WBE Program preceded the study period. The operation of the M/WBE Program was discontinued in 1997. The legislative background of the M/WBE Program is detailed below.

Resolution 51299 was enacted by the Oakland City Council (City Council) on February 4, 1971. The Resolution promulgated the City's commitment to including all contractors,

regardless of race or gender, on City contracts and set up provisions to monitor prime contractors' adherence to non-discriminatory recruiting and hiring practices to increase subcontracting opportunities for minority contractors. The Resolution required prime contractors to submit a written plan for contracts valued at $10,000 or more, demonstrating their goal of utilizing M/WBEs within ten days of receiving the contract from the City. Additionally, the prime contractors were required to submit weekly payroll records for all subcontractors employed on the project, identifying all minority business owners and employees as part of the good faith effort criteria.

On June 29, 1972, the City Council passed Resolution 52432 to adopt additional M/WBE Program provisions. Resolution 52432 required prime contractors to meet a 33 percent MBE subcontracting goal, or provide a statement of good faith effort to meet the minority goal. The Resolution also included a provision to increase the goal to 37 percent by June 1973. In addition, the Resolution required the prime contractors to advertise their contract opportunities in the media and notify minority subcontractors and suppliers of contract opportunities through minority contractors' associations.

Resolution 57926, passed by the City Council on March 6, 1979, required M/WBE goals to apply separately for construction and professional services industries. The MBE and WBE subcontracting goal was set at 30 and 5 percent, respectively, for construction, and 40 and 15 percent for professional services contracts. On October 27, 1997, the Oakland City Council passed Resolution 96463 which suspended the M/WBE Program.

B. Local and Small Local Business Enterprise Program

1. Definition

Local Business Enterprise (LBE) - An Oakland business with a substantial presence in the City of Oakland's geographic boundaries that is fully operational for 12 consecutive months and has a valid business tax certificate.

Small Local Business Enterprise (SLBE) - A business with a substantial presence in the City of Oakland's geographic boundaries that is a fully operational for 12 consecutive months, has a valid business tax certification, and is an independent business headquartered in Oakland. The SLBE's gross revenue in most recent three years cannot exceed 30 percent of the United States Small Business Administration's small business size standards.

2. History

The City has had a LBE program since 1979. Ordinance 9739 authorized a 3 percent preference for local businesses for purchase orders. The City expanded its Program to

include construction contracts and mandated a biennial review of the by enacting Resolution 69687 on February 2, 1993. The Resolution affirmed the City's ongoing commitment to increasing disadvantaged contractors' participation on City projects

The Resolution set participation goals for certified LBEs and SLBEs at 50 percent for all construction contracts valued at more than $100,000 and all professional services contracts valued at more than $50,000. The Resolution also set a subcontracting outreach requirement for construction contracts valued at $100,000 or less and professional services contracts valued at $50,000 or less by requiring prime contractors to solicit a minimum of three L/SLBE firms. The Resolution established a 75 percent LBE goal in emergency situations that require immediate purchases of goods and services, and further mandated that at least 50 percent of these dollars be spent with SLBEs. Additionally, the Resolution established a bid preference system in which prime contractors were able to receive a maximum of five additional points in the bid evaluation for every 10 percent of contract dollars subcontracted to certified LBEs and SLBEs.

On October 28, 1997, the City Council adopted Resolution 73889 to assess the efficacy of the L/SLBE Program in response to the *Monterey Mechanical Co. v. Pete Wilson*, et al., 97 C.D.O.S. 7099 (9th Cir., 1997) decision. The Resolution mandated that the City complete a Disparity Study within twelve months to determine the legal efficacy of the L/SLBE program requirements. The Resolution also mandated the City Manager to produce quarterly reports that track minority, women, and local business participation on City contracts.

On July 29, 2003, the City Council filed a motion to modify the L/SLBE goal to 20 percent from 50 percent. The L/SLBE goal must comprise of either 10 percent LBE and 10 percent SLBE participation or 20 percent SLBE participation. This goal has not been modified since 2003.

C. Disadvantaged Business Enterprise Program

1. Definition

Disadvantaged Business Enterprise (DBE) - A business that is for-profit, small, and is at least 51% owned by one or more socially and economically disadvantaged individuals, or in the case of a corporation, 51% or more of the stock is owned by one or more socially and economically disadvantaged individuals, whose management and day-to-day business operations are controlled by one or more socially and economically disadvantaged individuals who own the business. The DBE must not have average annual gross receipt exceeding the cap defined in section 26.659B of 13 CFR Part 121 and cannot have average

annual gross receipt over the previous three fiscal years exceed $19.57 million, as adjusted for inflation by the U.S. Secretary of Transportation.

Socially and Economically Disadvantaged Individual - An individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is in the following groups: Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Women, and any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration, at such time as the SBA designation becomes effective.

2. History

The City's Disadvantaged Business Enterprise (DBE) program was first enacted by the City Council on January 10, 1984 with the passage of Resolution 61857. The DBE program, as mandated by the U.S. Department of Transportation (USDOT), is based on the USDOT, 49 CFR, Part 26 requirements to ensure nondiscrimination in the award and administration of federally funded public contracts.

The City Council established a 35 percent DBE goal for USDOT-funded projects through Resolution 61857. The annual DBE goal remained unchanged with each year's review until the fiscal year October 1, 2003 to September 30, 2004, when the City Council increased the annual DBE goal to 36.46 percent. There has been no change in the DBE goal since fiscal year of 2003-2004. Going forward, the City will have to comply with the Ninth Circuit's May 2005 decision in *Western States Paving v. Washington DOT 407f.3d 983 (Western States)*. As required by *Western Stats,* any race conscious DBE goal must be broken down on an ethnic group specific basis.

D. References

Documents reviewed for the preceding M/WBE and L/SLBE analyses were obtained from the City's Office of Contract Compliance and Employment Services. Specific references are listed below:

City of Oakland, City Council Resolution 51299 (February 4, 1971)

City of Oakland, City Council Resolution 52432 (June 29, 1972)

City of Oakland, City Council Resolution 57926 (March 6, 1979)

City of Oakland, City Council Ordinance 9739 C.M.S. (March 13, 1979)

City of Oakland, City Council Resolution 61857 (January 10, 1984)

City of Oakland, City Council Resolution 69687 (February 2, 1993)

City of Oakland, City Council Resolution 73889 (October 28, 1997)

City of Oakland. *Agenda Report: Resolution Amending Resolution No. 61857, as Amended, to Reestablish the City of Oakland's Disadvantaged Business Enterprise Program for U.S. Department of Transportation-funded Projects Between October 1, 1995 and September 30, 1996.* By Sabrina Mitchell, OPW-CC. (December 7, 1995)

City of Oakland, Office of the City Administrator. *City of Oakland Local and Small Local Business Enterprise Program Policy Manual.* (April 29, 2004), 1-30.

City of Oakland. *Disadvantaged Business Enterprise Program: For the Federal Fiscal Year October 1, 2003 to September 30, 2004.* (October 1, 2003), 1-29.

City of Oakland. *Disadvantaged Business Enterprise Race-Neutral Implementation Agreement for the City of Oakland.* (May 1, 2006), 1-8.

4

PRIME CONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As set forth in *Croson* and its progeny, a disparity study must document minority contracting history in the jurisdiction under review. The first step in a disparity study is the statistical analysis of prime contracts. In this study, purchase orders and direct purchases were categorized as prime contracts. The objective of the statistical analysis is to determine the level of minority and woman-owned business enterprise (M/WBE) prime contractor utilization compared to non-M/WBE prime contractor utilization. A prime contractor utilization analysis was undertaken on contracts awarded by the City of Oakland and Redevelopment Agency (City) between July 1, 2002 to June 30, 2005.

The contracts awarded by the City during the study period were separated into four industries for purposes of the analysis. The industries are construction, architecture and engineering, professional services, and goods and other services. Construction included public work for new construction, remodeling, renovation, maintenance, demolition and repair of any public structure or building, and other public improvements. Architecture and engineering included architecture, engineering, research planning, development, design, alteration or repair of real property, surveying and mapping, comprehensive planning, and other professional services of an architectural and engineering nature. Construction management services were also included in this category. Professional services included consulting, personal, professional, and technical services. Goods and other services included materials, as well as supplies, equipment, and non-professional services. Construction maintenance was also included in this category.

The City's utilization of prime contractors in these four industries is analyzed in this chapter.

II. PRIME CONTRACT DATA SOURCES

The prime utilization analysis included contracts, purchase orders, and direct purchases awarded by the City during the study period. Contracts, purchase orders, and direct purchases will hereafter be referred to as contracts.

The prime contractor data for the City of Oakland and for the Community and Economic Development Agency (CEDA) was extracted by the City's Purchasing Division from their Oracle-based centralized financial system. The data included the list of purchase orders and a list of payments. There were a large number of payments that did not refer to any purchase order. Some of these payments were direct purchases and others were actually issued against a contract or a purchase order. To avoid over-counting the number of awards made to each vendor, these payments were aggregated by vendor and by fiscal year.

The data for Oakland Base Reuse Authority (OBRA) is not tracked in the City's centralized financial system. This data was manually compiled by OBRA's staff from hard-copy documents.

Payments made to housing developers by CEDA were excluded from the present analysis. CEDA provides loans to not-for-profit developers that cover only a portion of each affordable housing construction project. Although the dollars paid to developers were excluded from the prime contractor analysis, these projects are included in the subcontractor utilization analysis portion of this report.

Mason Tillman cleaned and compiled the provided data and requested corrections for what appeared to be missing or incorrect information. The contracts were then classified into four industry categories defined earlier in this chapter: Construction, Architecture and Engineering, Professional Services, and Goods and Other Services using the object codes provided with the payments data. However, the object codes did not accurately describe the type of work performed by each particular contractor. For example, vendors that were paid in relation to a heavy construction project may include construction suppliers, equipment maintenance contractors, professional engineers, and government agencies. Mason Tillman had to review most of the records one by one to determine the correct industry category for each vendor. Mason Tillman excluded from this analysis expenditures to not-for-profit organizations, government agencies, and banks, as well as expenditures for rental space, subscriptions, and seminars.

III. PRIME CONTRACTOR UTILIZATION THRESHOLDS

Contracts within each of the four industries were analyzed at three dollar levels. One category included all contracts regardless of size. The second category included all contracts under $500,000. This analysis was restricted to a level where there was a demonstrated capacity within the pool of willing M/WBEs to perform. The third size category included the informal contracts under $50,000 for construction, $50,000 or less for goods and other services and $15,000 or less for architecture and engineering, and professional services which did not require advertising.

Table 4.01 Informal Contract Thresholds for City Departments

Industry	Informal Contract Thresholds
Construction	$50,000
Architecture and Engineering	$15,000
Professional Services	$15,000
Goods and Other Services	$50,000

IV. PRIME CONTRACTOR UTILIZATION

As depicted in Table 4.02 below, the City awarded 24,956 prime contracts during the July 1, 2002 to June 30, 2005 study period. These contracts included 608 for construction, 424 for architecture and engineering, 1,101 for professional services, and 22,823 for goods and other services.

The payments made by the City during the study period for all contracts awarded totaled $244,205,430. These expenditures included $77,252,468 for construction, $21,976,119 for architecture and engineering, $37,112,084 for professional services, and $107,864,759 for goods and other services.

Table 4.02 Total Prime Contracts and Dollars Expended: All Industries, July 1, 2002 to June 30, 2005

Industry	Total Number of Contracts	Total Dollars Expended
Construction	608	$77,524,468
Architecture and Engineering Services	424	$21,976,119
Professional Services	1,101	$37,112,084
Goods and Other Services	22,823	$107,864,759
Total Expenditures	**24,956**	**$244,205,430**

A. All Prime Contracts, by Industry

1. Construction Prime Contractor Utilization: All Contracts

Table 4.03 summarizes all contract dollars expended by the City on construction prime contracts. Minority Business Enterprises received 32.01 percent of the construction prime contract dollars; Women Business Enterprises received 0.12 percent; and Caucasian Male Business Enterprises received 67.86 percent.

African Americans received 50 or 8.22 percent of the construction contracts during the study period, representing $3,293,834 or 4.26 percent of the contract dollars.

Asian Americans received 37 or 6.09 percent of the construction contracts during the study period, representing $6,053,466 or 7.84 percent of the contract dollars.

Hispanic Americans received 59 or 9.7 percent of the construction contracts during the study period, representing $15,384,428 or 19.91 percent of the contract dollars.

Native Americans received none of the construction contracts during the study period.

Minority Business Enterprises received 146 or 24.01 percent of the construction contracts during the study period, representing $24,731,728 or 32.01 percent of the contract dollars.

Women Business Enterprises received 3 or 0.49 percent of the construction contracts during the study period, representing $94,280 or 0.12 percent of the contract dollars.

Minority and Women Business Enterprises received 149 or 24.51 percent of the construction contracts during the study period, representing $24,826,008 or 32.14 percent of the contract dollars.

Caucasian Male Business Enterprises received 459 or 75.49 percent of the construction contracts during the study period, representing $52,426,460 or 67.86 percent of the contract dollars.

Table 4.03 Construction Prime Contractor Utilization All Contracts, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	50	8.22%	$3,293,834	4.26%
Asian Americans	37	6.09%	$6,053,466	7.84%
Hispanic Americans	59	9.70%	$15,384,428	19.91%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	3	0.49%	$94,280	0.12%
Caucasian Males	459	75.49%	$52,426,460	67.86%
TOTAL	608	100.00%	$77,252,468	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	8	1.32%	$573,211	0.74%
African American Males	42	6.91%	$2,720,623	3.52%
Asian American Females	2	0.33%	$1,455,441	1.88%
Asian American Males	35	5.76%	$4,598,026	5.95%
Hispanic American Females	1	0.16%	$479,196	0.62%
Hispanic American Males	58	9.54%	$14,905,231	19.29%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	3	0.49%	$94,280	0.12%
Caucasian Males	459	75.49%	$52,426,460	67.86%
TOTAL	608	100.00%	$77,252,468	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	11	1.81%	$2,507,848	3.25%
Minority Males	135	22.20%	$22,223,879	28.77%
Caucasian Females	3	0.49%	$94,280	0.12%
Caucasian Males	459	75.49%	$52,426,460	67.86%
TOTAL	608	100.00%	$77,252,468	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	146	24.01%	$24,731,728	32.01%
Women Business Enterprises	3	0.49%	$94,280	0.12%
Minority and Women Business Enterprises	**149**	**24.51%**	**$24,826,008**	**32.14%**
Caucasian Male Business Enterprises	459	75.49%	$52,426,460	67.86%
TOTAL	608	100.00%	$77,252,468	100.00%

2. Architecture and Engineering Prime Contractor Utilization: All Contracts

Table 4.04 summarizes all contract dollars expended by the City on architecture and engineering prime contracts. Minority Business Enterprises received 22.62 percent of the architecture and engineering prime contract dollars; Women Business Enterprises received 8.1 percent; and Caucasian Male Business Enterprises received 69.28 percent.

African Americans received 32 or 7.55 percent of the architecture and engineering contracts during the study period, representing $355,608 or 1.62 percent of the contract dollars.

Asian Americans received 61 or 14.39 percent of the architecture and engineering contracts during the study period, representing $4,172,316 or 18.99 percent of the contract dollars.

Hispanic Americans received 8 or 1.89 percent of the architecture and engineering contracts during the study period, representing $443,880 or 2.02 percent of the contract dollars.

Native Americans received none of the architecture and engineering contracts during the study period.

Minority Business Enterprises received 101 or 23.82 percent of the architecture and engineering contracts during the study period, representing $4,971,804 or 22.62 percent of the contract dollars.

Women Business Enterprises received 106 or 25 percent of the architecture and engineering contracts during the study period, representing $1,779,597 or 8.1 percent of the contract dollars.

Minority and Women Business Enterprises received 207 or 48.82 percent of the architecture and engineering contracts during the study period, representing $6,751,401 or 30.72 percent of the contract dollars.

Caucasian Male Business Enterprises received 217 or 51.18 percent of the architecture and engineering contracts during the study period, representing $15,224,718 or 69.28 percent of the contract dollars.

Table 4.04 Architecture and Engineering Prime Contractor Utilization: All Contracts, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	32	7.55%	$355,608	1.62%
Asian Americans	61	14.39%	$4,172,316	18.99%
Hispanic Americans	8	1.89%	$443,880	2.02%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	106	25.00%	$1,779,597	8.10%
Caucasian Males	217	51.18%	$15,224,718	69.28%
TOTAL	424	100.00%	$21,976,119	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	19	4.48%	$131,351	0.60%
African American Males	13	3.07%	$224,257	1.02%
Asian American Females	16	3.77%	$213,724	0.97%
Asian American Males	45	10.61%	$3,958,592	18.01%
Hispanic American Females	1	0.24%	$18,182	0.08%
Hispanic American Males	7	1.65%	$425,698	1.94%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	106	25.00%	$1,779,597	8.10%
Caucasian Males	217	51.18%	$15,224,718	69.28%
TOTAL	424	100.00%	$21,976,119	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	36	8.49%	$363,256	1.65%
Minority Males	65	15.33%	$4,608,548	20.97%
Caucasian Females	106	25.00%	$1,779,597	8.10%
Caucasian Males	217	51.18%	$15,224,718	69.28%
TOTAL	424	100.00%	$21,976,119	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	101	23.82%	$4,971,804	22.62%
Women Business Enterprises	106	25.00%	$1,779,597	8.10%
Minority and Women Business Enterprises	**207**	**48.82%**	**$6,751,401**	**30.72%**
Caucasian Male Business Enterprises	217	51.18%	$15,224,718	69.28%
TOTAL	424	100.00%	$21,976,119	100.00%

3. Professional Services Prime Contractor Utilization: All Contracts

Table 4.05 summarizes all contract dollars expended by the City on professional services prime contracts. Minority Business Enterprises received 9.97 percent of the professional services prime contract dollars; Women Business Enterprises received 1.62 percent; and Caucasian Male Business Enterprises received 88.41 percent.

African Americans received 37 or 3.36 percent of the professional services contracts during the study period, representing $551,589 or 1.49 percent of the contract dollars.

Asian Americans received 18 or 1.63 percent of the professional services contracts during the study period, representing $1,442,711 or 3.89 percent of the contract dollars.

Hispanic Americans received 40 or 3.63 percent of the professional services contracts during the study period, representing $1,699,935 or 4.58 percent of the contract dollars.

Native Americans received 1 or 0.09 percent of the professional services contracts during the study period, representing $4,500 or 0.01 percent of the contract dollars.

Minority Business Enterprises received 96 or 8.72 percent of the professional services contracts during the study period, representing $3,698,735 or 9.97 percent of the contract dollars.

Women Business Enterprises received 69 or 6.27 percent of the professional services contracts during the study period, representing $601,671 or 1.62 percent of the contract dollars.

Minority and Women Business Enterprises received 165 or 14.99 percent of the professional services contracts during the study period, representing $4,300,405 or 11.59 percent of the contract dollars.

Caucasian Male Business Enterprises received 936 or 85.01 percent of the professional services contracts during the study period, representing $32,811,679 or 88.41 percent of the contract dollars.

Table 4.05 Professional Services Prime Contractor Utilization: All Contracts, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	37	3.36%	$551,589	1.49%
Asian Americans	18	1.63%	$1,442,711	3.89%
Hispanic Americans	40	3.63%	$1,699,935	4.58%
Native Americans	1	0.09%	$4,500	0.01%
Caucasian Females	69	6.27%	$601,671	1.62%
Caucasian Males	936	85.01%	$32,811,679	88.41%
TOTAL	1,101	100.00%	$37,112,084	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	8	0.73%	$15,891	0.04%
African American Males	29	2.63%	$535,698	1.44%
Asian American Females	4	0.36%	$70,605	0.19%
Asian American Males	14	1.27%	$1,372,106	3.70%
Hispanic American Females	36	3.27%	$502,754	1.35%
Hispanic American Males	4	0.36%	$1,197,180	3.23%
Native American Females	0	0.00%	$0	0.00%
Native American Males	1	0.09%	$4,500	0.01%
Caucasian Females	69	6.27%	$601,671	1.62%
Caucasian Males	936	85.01%	$32,811,679	88.41%
TOTAL	1,101	100.00%	$37,112,084	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	48	4.36%	$589,250	1.59%
Minority Males	48	4.36%	$3,109,484	8.38%
Caucasian Females	69	6.27%	$601,671	1.62%
Caucasian Males	936	85.01%	$32,811,679	88.41%
TOTAL	1,101	100.00%	$37,112,084	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	96	8.72%	$3,698,735	9.97%
Women Business Enterprises	69	6.27%	$601,671	1.62%
Minority and Women Business Enterprises	**165**	**14.99%**	**$4,300,405**	**11.59%**
Caucasian Male Business Enterprises	936	85.01%	$32,811,679	88.41%
TOTAL	1,101	100.00%	$37,112,084	100.00%

4. Goods and Other Services Prime Contractor Utilization: All Contracts

Table 4.06 summarizes all contract dollars expended by the City on goods and other services prime contracts. Minority Business Enterprises received 12.33 percent of the goods and other services prime contract dollars; Women Business Enterprises received 5.59 percent; and Caucasian Male Business Enterprises received 82.08 percent.

African Americans received 1,355 or 5.94 percent of the goods and other services contracts during the study period, representing $5,421,663 or 5.03 percent of the contract dollars.

Asian Americans received 821 or 3.6 percent of the goods and other services contracts during the study period, representing $4,805,933 or 4.46 percent of the contract dollars.

Hispanic Americans received 77 or 0.34 percent of the goods and other services contracts during the study period, representing $3,073,874 or 2.85 percent of the contract dollars.

Native Americans received 2 or 0.01 percent of the goods and other services contracts during the study period, representing $883 or 0 percent of the contract dollars.

Minority Business Enterprises received 2,255 or 9.88 percent of the goods and other services contracts during the study period, representing $13,302,352 or 12.33 percent of the contract dollars.

Women Business Enterprises received 1,482 or 6.49 percent of the goods and other services contracts during the study period, representing $6,025,685 or 5.59 percent of the contract dollars.

Minority and Women Business Enterprises received 3,737 or 16.37 percent of the goods and other services contracts during the study period, representing $19,328,038 or 17.92 percent of the contract dollars.

Caucasian Male Business Enterprises received 19,086 or 83.63 percent of the goods and other services contracts during the study period, representing $88,536,722 or 82.08 percent of the contract dollars.

Table 4.06 Goods and Other Services Prime Contractor Utilization: All Contracts, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1,355	5.94%	$5,421,663	5.03%
Asian Americans	821	3.60%	$4,805,933	4.46%
Hispanic Americans	77	0.34%	$3,073,874	2.85%
Native Americans	2	0.01%	$883	0.00%
Caucasian Females	1,482	6.49%	$6,025,685	5.59%
Caucasian Males	19,086	83.63%	$88,536,722	82.08%
TOTAL	22,823	100.00%	$107,864,759	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	888	3.89%	$3,666,256	3.40%
African American Males	467	2.05%	$1,755,407	1.63%
Asian American Females	130	0.57%	$412,777	0.38%
Asian American Males	691	3.03%	$4,393,156	4.07%
Hispanic American Females	39	0.17%	$2,858,799	2.65%
Hispanic American Males	38	0.17%	$215,074	0.20%
Native American Females	2	0.01%	$883	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	1,482	6.49%	$6,025,685	5.59%
Caucasian Males	19,086	83.63%	$88,536,722	82.08%
TOTAL	22,823	100.00%	$107,864,759	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1,059	4.64%	$6,938,715	6.43%
Minority Males	1,196	5.24%	$6,363,637	5.90%
Caucasian Females	1,482	6.49%	$6,025,685	5.59%
Caucasian Males	19,086	83.63%	$88,536,722	82.08%
TOTAL	22,823	100.00%	$107,864,759	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	2,255	9.88%	$13,302,352	12.33%
Women Business Enterprises	1,482	6.49%	$6,025,685	5.59%
Minority and Women Business Enterprises	**3,737**	**16.37%**	**$19,328,038**	**17.92%**
Caucasian Male Business Enterprises	19,086	83.63%	$88,536,722	82.08%
TOTAL	22,823	100.00%	$107,864,759	100.00%

B. Prime Contracts under $500,000, by Industry

1. Construction Prime Contractor Utilization: Contracts under $500,000

Table 4.07 summarizes all contract dollars expended by the City on construction prime contracts under $500,000. Minority Business Enterprises received 35.94 percent of the construction prime contract dollars; Women Business Enterprises received 0.35 percent; and Caucasian Male Business Enterprises received 63.71 percent.

African Americans received 49 or 8.58 percent of the construction contracts under $500,000 during the study period, representing $2,131,793 or 7.86 percent of the contract dollars.

Asian Americans received 34 or 5.95 percent of the construction contracts under $500,000 during the study period, representing $3,377,016 or 12.45 percent of the contract dollars.

Hispanic Americans received 50 or 8.76 percent of the construction contracts under $500,000 during the study period, representing $4,242,889 or 15.64 percent of the contract dollars.

Native Americans received none of the construction contracts under $500,000 during the study period.

Minority Business Enterprises received 133 or 23.29 percent of the construction contracts under $500,000 during the study period, representing $9,751,698 or 35.94 percent of the contract dollars.

Women Business Enterprises received 3 or 0.53 percent of the construction contracts under $500,000 during the study period, representing $94,280 or 0.35 percent of the contract dollars.

Minority and Women Business Enterprises received 136 or 23.82 percent of the construction contracts under $500,000 during the study period, representing $9,845,978 or 36.29 percent of the contract dollars.

Caucasian Male Business Enterprises received 435 or 76.18 percent of the construction contracts under $500,000 during the study period, representing $17,285,472 or 63.71 percent of the contract dollars.

Table 4.07 Construction Prime Contractor Utilization: Contracts under $500,000, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	49	8.58%	$2,131,793	7.86%
Asian Americans	34	5.95%	$3,377,016	12.45%
Hispanic Americans	50	8.76%	$4,242,889	15.64%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	3	0.53%	$94,280	0.35%
Caucasian Males	435	76.18%	$17,285,472	63.71%
TOTAL	571	100.00%	$27,131,450	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	8	1.40%	$573,211	2.11%
African American Males	41	7.18%	$1,558,582	5.74%
Asian American Females	1	0.18%	$593	0.00%
Asian American Males	33	5.78%	$3,376,424	12.44%
Hispanic American Females	1	0.18%	$479,196	1.77%
Hispanic American Males	49	8.58%	$3,763,692	13.87%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	3	0.53%	$94,280	0.35%
Caucasian Males	435	76.18%	$17,285,472	63.71%
TOTAL	571	100.00%	$27,131,450	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	10	1.75%	$1,053,000	3.88%
Minority Males	123	21.54%	$8,698,697	32.06%
Caucasian Females	3	0.53%	$94,280	0.35%
Caucasian Males	435	76.18%	$17,285,472	63.71%
TOTAL	571	100.00%	$27,131,450	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	133	23.29%	$9,751,698	35.94%
Women Business Enterprises	3	0.53%	$94,280	0.35%
Minority and Women Business Enterprises	**136**	**23.82%**	**$9,845,978**	**36.29%**
Caucasian Male Business Enterprises	435	76.18%	$17,285,472	63.71%
TOTAL	571	100.00%	$27,131,450	100.00%

2. Architecture and Engineering Prime Contractor Utilization: Contracts under $500,000

Table 4.08 summarizes all contract dollars expended by the City on architecture and engineering prime contracts under $500,000. Minority Business Enterprises received 19.06 percent of the architecture and engineering prime contract dollars; Women Business Enterprises received 16.3 percent; and Caucasian Male Business Enterprises received 64.64 percent.

African Americans received 32 or 7.73 percent of the architecture and engineering contracts under $500,000 during the study period, representing $355,608 or 3.26 percent of the contract dollars.

Asian Americans received 58 or 14.01 percent of the architecture and engineering contracts under $500,000 during the study period, representing $1,281,539 or 11.74 percent of the contract dollars.

Hispanic Americans received 8 or 1.93 percent of the architecture and engineering contracts under $500,000 during the study period, representing $443,880 or 4.07 percent of the contract dollars.

Native Americans received none of the architecture and engineering contracts under $500,000 during the study period.

Minority Business Enterprises received 98 or 23.67 percent of the architecture and engineering contracts under $500,000 during the study period, representing $2,081,027 or 19.06 percent of the contract dollars.

Women Business Enterprises received 106 or 25.6 percent of the architecture and engineering contracts under $500,000 during the study period, representing $1,779,597 or 16.3 percent of the contract dollars.

Minority and Women Business Enterprises received 204 or 49.28 percent of the architecture and engineering contracts under $500,000 during the study period, representing $3,860,624 or 35.36 percent of the contract dollars.

Caucasian Male Business Enterprises received 210 or 50.72 percent of the architecture and engineering contracts under $500,000 during the study period, representing $7,057,870 or 64.64 percent of the contract dollars.

Table 4.08 Architecture and Engineering Prime Contractor Utilization: Contracts under $500,000, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	32	7.73%	$355,608	3.26%
Asian Americans	58	14.01%	$1,281,539	11.74%
Hispanic Americans	8	1.93%	$443,880	4.07%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	106	25.60%	$1,779,597	16.30%
Caucasian Males	210	50.72%	$7,057,870	64.64%
TOTAL	414	100.00%	$10,918,494	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	19	4.59%	$131,351	1.20%
African American Males	13	3.14%	$224,257	2.05%
Asian American Females	16	3.86%	$213,724	1.96%
Asian American Males	42	10.14%	$1,067,815	9.78%
Hispanic American Females	1	0.24%	$18,182	0.17%
Hispanic American Males	7	1.69%	$425,698	3.90%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	106	25.60%	$1,779,597	16.30%
Caucasian Males	210	50.72%	$7,057,870	64.64%
TOTAL	414	100.00%	$10,918,494	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	36	8.70%	$363,256	3.33%
Minority Males	62	14.98%	$1,717,770	15.73%
Caucasian Females	106	25.60%	$1,779,597	16.30%
Caucasian Males	210	50.72%	$7,057,870	64.64%
TOTAL	414	100.00%	$10,918,494	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	98	23.67%	$2,081,027	19.06%
Women Business Enterprises	106	25.60%	$1,779,597	16.30%
Minority and Women Business Enterprises	**204**	**49.28%**	**$3,860,624**	**35.36%**
Caucasian Male Business Enterprises	210	50.72%	$7,057,870	64.64%
TOTAL	414	100.00%	$10,918,494	100.00%

3. Professional Services Prime Contractor Utilization: Contracts under $500,000

Table 4.09 summarizes all contract dollars expended by the City on professional services prime contracts under $500,000. Minority Business Enterprises received 8.79 percent of the professional services prime contract dollars; Women Business Enterprises received 2.15 percent; and Caucasian Male Business Enterprises received 89.06 percent.

African Americans received 37 or 3.39 percent of the professional services contracts under $500,000 during the study period, representing $551,589 or 1.97 percent of the contract dollars.

Asian Americans received 17 or 1.56 percent of the professional services contracts under $500,000 during the study period, representing $798,899 or 2.86 percent of the contract dollars.

Hispanic Americans received 39 or 3.57 percent of the professional services contracts under $500,000 during the study period, representing $1,101,855 or 3.94 percent of the contract dollars.

Native Americans received 1 or 0.09 percent of the professional services contracts under $500,000 during the study period, representing $4,500 or 0.02 percent of the contract dollars.

Minority Business Enterprises received 94 or 8.62 percent of the professional services contracts under $500,000 during the study period, representing $2,456,843 or 8.79 percent of the contract dollars.

Women Business Enterprises received 69 or 6.32 percent of the professional services contracts under $500,000 during the study period, representing $601,671 or 2.15 percent of the contract dollars.

Minority and Women Business Enterprises received 163 or 14.94 percent of the professional services contracts under $500,000 during the study period, representing $3,058,513 or 10.94 percent of the contract dollars.

Caucasian Male Business Enterprises received 928 or 85.06 percent of the professional services contracts under $500,000 during the study period, representing $24,907,498 or 89.06 percent of the contract dollars.

Table 4.09 Professional Services Prime Contractor Utilization: Contracts under $500,000, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	37	3.39%	$551,589	1.97%
Asian Americans	17	1.56%	$798,899	2.86%
Hispanic Americans	39	3.57%	$1,101,855	3.94%
Native Americans	1	0.09%	$4,500	0.02%
Caucasian Females	69	6.32%	$601,671	2.15%
Caucasian Males	928	85.06%	$24,907,498	89.06%
TOTAL	1,091	100.00%	$27,966,012	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	8	0.73%	$15,891	0.06%
African American Males	29	2.66%	$535,698	1.92%
Asian American Females	4	0.37%	$70,605	0.25%
Asian American Males	13	1.19%	$728,294	2.60%
Hispanic American Females	36	3.30%	$502,754	1.80%
Hispanic American Males	3	0.27%	$599,100	2.14%
Native American Females	0	0.00%	$0	0.00%
Native American Males	1	0.09%	$4,500	0.02%
Caucasian Females	69	6.32%	$601,671	2.15%
Caucasian Males	928	85.06%	$24,907,498	89.06%
TOTAL	1,091	100.00%	$27,966,012	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	48	4.40%	$589,250	2.11%
Minority Males	46	4.22%	$1,867,592	6.68%
Caucasian Females	69	6.32%	$601,671	2.15%
Caucasian Males	928	85.06%	$24,907,498	89.06%
TOTAL	1,091	100.00%	$27,966,012	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	94	8.62%	$2,456,843	8.79%
Women Business Enterprises	69	6.32%	$601,671	2.15%
Minority and Women Business Enterprises	**163**	**14.94%**	**$3,058,513**	**10.94%**
Caucasian Male Business Enterprises	928	85.06%	$24,907,498	89.06%
TOTAL	1,091	100.00%	$27,966,012	100.00%

4. Goods and Other Services Prime Contractor Utilization: Contracts under $500,000

Table 4.10 summarizes all contract dollars expended by the City on goods and other services prime contracts under $500,000. Minority Business Enterprises received 13.14 percent of the goods and other services prime contract dollars; Women Business Enterprises received 7.1 percent; and Caucasian Male Business Enterprises received 79.77 percent.

African Americans received 1,355 or 5.94 percent of the goods and other services contracts under $500,000 during the study period, representing $5,421,663 or 6.39 percent of the contract dollars.

Asian Americans received 821 or 3.6 percent of the goods and other services contracts under $500,000 during the study period, representing $4,805,933 or 5.66 percent of the contract dollars.

Hispanic Americans received 75 or 0.33 percent of the goods and other services contracts under $500,000 during the study period, representing $924,574 or 1.09 percent of the contract dollars.

Native Americans received 2 or 0.01 percent of the goods and other services contracts under $500,000 during the study period, representing $883 or 0 percent of the contract dollars.

Minority Business Enterprises received 2,253 or 9.88 percent of the goods and other services contracts under $500,000 during the study period, representing $11,153,052 or 13.14 percent of the contract dollars.

Women Business Enterprises received 1,482 or 6.5 percent of the goods and other services contracts under $500,000 during the study period, representing $6,025,685 or 7.1 percent of the contract dollars.

Minority and Women Business Enterprises received 3,735 or 16.38 percent of the goods and other services contracts under $500,000 during the study period, representing $17,178,738 or 20.23 percent of the contract dollars.

Caucasian Male Business Enterprises received 19,072 or 83.62 percent of the goods and other services contracts under $500,000 during the study period, representing $67,722,736 or 79.77 percent of the contract dollars.

Table 4.10 Goods and Other Services Prime Contractor Utilization: Contracts under $500,000, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1,355	5.94%	$5,421,663	6.39%
Asian Americans	821	3.60%	$4,805,933	5.66%
Hispanic Americans	75	0.33%	$924,574	1.09%
Native Americans	2	0.01%	$883	0.00%
Caucasian Females	1,482	6.50%	$6,025,685	7.10%
Caucasian Males	19,072	83.62%	$67,722,736	79.77%
TOTAL	22,807	100.00%	$84,901,474	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	888	3.89%	$3,666,256	4.32%
African American Males	467	2.05%	$1,755,407	2.07%
Asian American Females	130	0.57%	$412,777	0.49%
Asian American Males	691	3.03%	$4,393,156	5.17%
Hispanic American Females	37	0.16%	$709,500	0.84%
Hispanic American Males	38	0.17%	$215,074	0.25%
Native American Females	2	0.01%	$883	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	1,482	6.50%	$6,025,685	7.10%
Caucasian Males	19,072	83.62%	$67,722,736	79.77%
TOTAL	22,807	100.00%	$84,901,474	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1,057	4.63%	$4,789,415	5.64%
Minority Males	1,196	5.24%	$6,363,637	7.50%
Caucasian Females	1,482	6.50%	$6,025,685	7.10%
Caucasian Males	19,072	83.62%	$67,722,736	79.77%
TOTAL	22,807	100.00%	$84,901,474	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	2,253	9.88%	$11,153,052	13.14%
Women Business Enterprises	1,482	6.50%	$6,025,685	7.10%
Minority and Women Business Enterprises	**3,735**	**16.38%**	**$17,178,738**	**20.23%**
Caucasian Male Business Enterprises	19,072	83.62%	$67,722,736	79.77%
TOTAL	22,807	100.00%	$84,901,474	100.00%

C. Informal Prime Contracts under $50,000 or $15,000, by Industry

1. Construction Prime Contractor Utilization: Contracts under $50,000

Table 4.11 summarizes all contract dollars expended by the City on construction prime contracts under $50,000. Minority Business Enterprises received 22.91 percent of the construction prime contract dollars; Women Business Enterprises received 2.45 percent; and Caucasian Male Business Enterprises received 74.64 percent.

African Americans received 38 or 8.52 percent of the construction contracts under $50,000 during the study period, representing $399,213 or 10.39 percent of the contract dollars.

Asian Americans received 18 or 4.04 percent of the construction contracts under $50,000 during the study period, representing $148,621 or 3.87 percent of the contract dollars.

Hispanic Americans received 29 or 6.5 percent of the construction contracts under $50,000 during the study period, representing $332,505 or 8.65 percent of the contract dollars.

Native Americans received none of the construction contracts under $50,000 during the study period.

Minority Business Enterprises received 85 or 19.06 percent of the construction contracts under $50,000 during the study period, representing $880,338 or 22.91 percent of the contract dollars.

Women Business Enterprises received 3 or 0.67 percent of the construction contracts under $50,000 during the study period, representing $94,280 or 2.45 percent of the contract dollars.

Minority and Women Business Enterprises received 88 or 19.73 percent of the construction contracts under $50,000 during the study period, representing $974,618 or 25.36 percent of the contract dollars.

Caucasian Male Business Enterprises received 358 or 80.27 percent of the construction contracts under $50,000 during the study period, representing $2,868,178 or 74.64 percent of the contract dollars.

Table 4.11 Construction Prime Contractor Utilization: Contracts under $50,000, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	38	8.52%	$399,213	10.39%
Asian Americans	18	4.04%	$148,621	3.87%
Hispanic Americans	29	6.50%	$332,505	8.65%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	3	0.67%	$94,280	2.45%
Caucasian Males	358	80.27%	$2,868,178	74.64%
TOTAL	446	100.00%	$3,842,796	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	6	1.35%	$101,916	2.65%
African American Males	32	7.17%	$297,297	7.74%
Asian American Females	1	0.22%	$593	0.02%
Asian American Males	17	3.81%	$148,028	3.85%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	29	6.50%	$332,505	8.65%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	3	0.67%	$94,280	2.45%
Caucasian Males	358	80.27%	$2,868,178	74.64%
TOTAL	446	100.00%	$3,842,796	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	7	1.57%	$102,508	2.67%
Minority Males	78	17.49%	$777,830	20.24%
Caucasian Females	3	0.67%	$94,280	2.45%
Caucasian Males	358	80.27%	$2,868,178	74.64%
TOTAL	446	100.00%	$3,842,796	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	85	19.06%	$880,338	22.91%
Women Business Enterprises	3	0.67%	$94,280	2.45%
Minority and Women Business Enterprises	**88**	**19.73%**	**$974,618**	**25.36%**
Caucasian Male Business Enterprises	358	80.27%	$2,868,178	74.64%
TOTAL	446	100.00%	$3,842,796	100.00%

2. Architecture and Engineering Prime Contractor Utilization: Contracts $15,000 or less

Table 4.12 summarizes all contract dollars expended by the City on architecture and engineering prime contracts $15,000 or less. Minority Business Enterprises received 18.38 percent of the architecture and engineering prime contract dollars; Women Business Enterprises received 34.27 percent; and Caucasian Male Business Enterprises received 47.35 percent.

African Americans received 25 or 8.09 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $114,202 or 7.47 percent of the contract dollars.

Asian Americans received 43 or 13.92 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $158,759 or 10.39 percent of the contract dollars.

Hispanic Americans received 1 or 0.32 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $7,935 or 0.52 percent of the contract dollars.

Native Americans received none of the architecture and engineering contracts $15,000 or less during the study period.

Minority Business Enterprises received 69 or 22.33 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $280,896 or 18.38 percent of the contract dollars.

Women Business Enterprises received 83 or 26.86 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $523,889 or 34.27 percent of the contract dollars.

Minority and Women Business Enterprises received 152 or 49.19 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $804,785 or 52.65 percent of the contract dollars.

Caucasian Male Business Enterprises received 157 or 50.81 percent of the architecture and engineering contracts $15,000 or less during the study period, representing $723,816 or 47.35 percent of the contract dollars.

Table 4.12 Architecture and Engineering Prime Contractor Utilization: Contracts $15,000 or less, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	25	8.09%	$114,202	7.47%
Asian Americans	43	13.92%	$158,759	10.39%
Hispanic Americans	1	0.32%	$7,935	0.52%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	83	26.86%	$523,889	34.27%
Caucasian Males	157	50.81%	$723,816	47.35%
TOTAL	309	100.00%	$1,528,602	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	17	5.50%	$63,760	4.17%
African American Males	8	2.59%	$50,442	3.30%
Asian American Females	13	4.21%	$41,969	2.75%
Asian American Males	30	9.71%	$116,791	7.64%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	1	0.32%	$7,935	0.52%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	83	26.86%	$523,889	34.27%
Caucasian Males	157	50.81%	$723,816	47.35%
TOTAL	309	100.00%	$1,528,602	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	30	9.71%	$105,728	6.92%
Minority Males	39	12.62%	$175,168	11.46%
Caucasian Females	83	26.86%	$523,889	34.27%
Caucasian Males	157	50.81%	$723,816	47.35%
TOTAL	309	100.00%	$1,528,602	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	69	22.33%	$280,896	18.38%
Women Business Enterprises	83	26.86%	$523,889	34.27%
Minority and Women Business Enterprises	**152**	**49.19%**	**$804,785**	**52.65%**
Caucasian Male Business Enterprises	157	50.81%	$723,816	47.35%
TOTAL	309	100.00%	$1,528,602	100.00%

3. Professional Services Prime Contractor Utilization: Contracts $15,000 or less

Table 4.13 summarizes all contract dollars expended by the City on professional services prime contracts $15,000 or less Minority Business Enterprises received 11.96 percent of the professional services prime contract dollars; Women Business Enterprises received 9.73 percent; and Caucasian Male Business Enterprises received 78.31 percent.

African Americans received 32 or 3.78 percent of the professional services contracts $15,000 or less during the study period, representing $115,154 or 5.52 percent of the contract dollars.

Asian Americans received 12 or 1.42 percent of the professional services contracts $15,000 or less during the study period, representing $81,555 or 3.91 percent of the contract dollars.

Hispanic Americans received 31 or 3.66 percent of the professional services contracts $15,000 or less during the study period, representing $48,275 or 2.31 percent of the contract dollars.

Native Americans received 1 or 0.12 percent of the professional services contracts $15,000 or less during the study period, representing $4,500 or 0.22 percent of the contract dollars.

Minority Business Enterprises received 76 or 8.98 percent of the professional services contracts $15,000 or less during the study period, representing $249,484 or 11.96 percent of the contract dollars.

Women Business Enterprises received 66 or 7.8 percent of the professional services contracts $15,000 or less during the study period, representing $203,010 or 9.73 percent of the contract dollars.

Minority and Women Business Enterprises received 142 or 16.78 percent of the professional services contracts $15,000 or less during the study period, representing $452,494 or 21.69 percent of the contract dollars.

Caucasian Male Business Enterprises received 704 or 83.22 percent of the professional services contracts $15,000 or less during the study period, representing $1,634,170 or 78.31 percent of the contract dollars.

Table 4.13 Professional Services Prime Contractor Utilization: Contracts $15,000 or less, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	32	3.78%	$115,154	5.52%
Asian Americans	12	1.42%	$81,555	3.91%
Hispanic Americans	31	3.66%	$48,275	2.31%
Native Americans	1	0.12%	$4,500	0.22%
Caucasian Females	66	7.80%	$203,010	9.73%
Caucasian Males	704	83.22%	$1,634,170	78.31%
TOTAL	846	100.00%	$2,086,664	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	8	0.95%	$15,891	0.76%
African American Males	24	2.84%	$99,263	4.76%
Asian American Females	3	0.35%	$8,016	0.38%
Asian American Males	9	1.06%	$73,539	3.52%
Hispanic American Females	31	3.66%	$48,275	2.31%
Hispanic American Males	0	0.00%	$0	0.00%
Native American Females	0	0.00%	$0	0.00%
Native American Males	1	0.12%	$4,500	0.22%
Caucasian Females	66	7.80%	$203,010	9.73%
Caucasian Males	704	83.22%	$1,634,170	78.31%
TOTAL	846	100.00%	$2,086,664	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	42	4.96%	$72,182	3.46%
Minority Males	34	4.02%	$177,302	8.50%
Caucasian Females	66	7.80%	$203,010	9.73%
Caucasian Males	704	83.22%	$1,634,170	78.31%
TOTAL	846	100.00%	$2,086,664	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	76	8.98%	$249,484	11.96%
Women Business Enterprises	66	7.80%	$203,010	9.73%
Minority and Women Business Enterprises	**142**	**16.78%**	**$452,494**	**21.69%**
Caucasian Male Business Enterprises	704	83.22%	$1,634,170	78.31%
TOTAL	846	100.00%	$2,086,664	100.00%

4. Goods and Other Services Prime Contractor Utilization: Contracts $50,000 or less

Table 4.14 summarizes all contract dollars expended by the City on goods and other services prime contracts $50,000 or less. Minority Business Enterprises received 12.12 percent of the goods and other services prime contract dollars; Women Business Enterprises received 8.23 percent; and Caucasian Male Business Enterprises received 79.64 percent.

African Americans received 1,347 or 5.96 percent of the goods and other services contracts $50,000 or less during the study period, representing $4,577,145 or 7.6 percent of the contract dollars.

Asian Americans received 804 or 3.56 percent of the goods and other services contracts $50,000 or less during the study period, representing $2,316,957 or 3.85 percent of the contract dollars.

Hispanic Americans received 72 or 0.32 percent of the goods and other services contracts $50,000 or less during the study period, representing $404,530 or 0.67 percent of the contract dollars.

Native Americans received 2 or 0.01 percent of the goods and other services contracts $50,000 or less during the study period, representing $883 or 0 percent of the contract dollars.

Minority Business Enterprises received 2,225 or 9.84 percent of the goods and other services contracts $50,000 or less during the study period, representing $7,299,515 or 12.12 percent of the contract dollars.

Women Business Enterprises received 1,468 or 6.49 percent of the goods and other services contracts $50,000 or less during the study period, representing $4,957,283 or 8.23 percent of the contract dollars.

Minority and Women Business Enterprises received 3,693 or 16.33 percent of the goods and other services contracts $50,000 or less during the study period, representing $12,256,798 or 20.36 percent of the contract dollars.

Caucasian Male Business Enterprises received 18,922 or 83.67 percent of the goods and other services contracts $50,000 or less during the study period, representing $47,951,705 or 79.64 percent of the contract dollars.

Table 4.14 Goods and Other Services Prime Contractor Utilization: Contracts $50,000 or less, July 1, 2002 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	1,347	5.96%	$4,577,145	7.60%
Asian Americans	804	3.56%	$2,316,957	3.85%
Hispanic Americans	72	0.32%	$404,530	0.67%
Native Americans	2	0.01%	$883	0.00%
Caucasian Females	1,468	6.49%	$4,957,283	8.23%
Caucasian Males	18,922	83.67%	$47,951,705	79.64%
TOTAL	22,615	100.00%	$60,208,502	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	882	3.90%	$2,987,578	4.96%
African American Males	465	2.06%	$1,589,567	2.64%
Asian American Females	130	0.57%	$412,777	0.69%
Asian American Males	674	2.98%	$1,904,180	3.16%
Hispanic American Females	34	0.15%	$189,456	0.31%
Hispanic American Males	38	0.17%	$215,074	0.36%
Native American Females	2	0.01%	$883	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	1,468	6.49%	$4,957,283	8.23%
Caucasian Males	18,922	83.67%	$47,951,705	79.64%
TOTAL	22,615	100.00%	$60,208,502	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	1,048	4.63%	$3,590,694	5.96%
Minority Males	1,177	5.20%	$3,708,821	6.16%
Caucasian Females	1,468	6.49%	$4,957,283	8.23%
Caucasian Males	18,922	83.67%	$47,951,705	79.64%
TOTAL	22,615	100.00%	$60,208,502	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	2,225	9.84%	$7,299,515	12.12%
Women Business Enterprises	1,468	6.49%	$4,957,283	8.23%
Minority and Women Business Enterprises	**3,693**	**16.33%**	**$12,256,798**	**20.36%**
Caucasian Male Business Enterprises	18,922	83.67%	$47,951,705	79.64%
TOTAL	22,615	100.00%	$60,208,502	100.00%

V. HIGHLY USED PRIME CONTRACTORS

A. Highly Used Prime Contractors, All Industries

As presented in Table 4.02, the City awarded 24,596 contracts worth $244,205,430 during the July 1, 2002 to June 30, 2005 study period. As depicted in Table 4.15 below, the 24,596 City contracts were awarded to 5,018 vendors.

Table 4.15 Total Prime Contracts, Utilized Vendors, and Dollars Expended: All Industries, July 1, 2002 to June 30, 2005

Total Contracts	24,956
Total Utilized Vendors	5,018
Total Expenditures	$244,205,430

The 24,956 contracts were awarded disproportionately to the 5,018 utilized vendors. The City awarded 60 percent of the contract dollars to less than 2 percent of the 5,018 utilized vendors. As depicted in Table 4.16 below, of the 5,018 utilized vendors, 88 vendors received 60 percent or $146,953,160 of the total expenditures while the remaining 4,930 vendors received 40 percent or $97,252,270 of the total expenditures.

Table 4.16 Distribution of All Contracts

Vendors	Total Dollars	Percent of Dollars	Number of Contracts
12 Vendors Received	$61,741,570	25%	184
50 Vendors Received	$122,430,483	50%	2,020
88 Vendors Received	$146,953,160	60%	4,741
4,930 Vendors Received	$97,252,270	40%	20,215
5,018 Vendors Received	$244,205,430	100%	24,956

More than 61 million dollars, or 25 percent of all dollars, were awarded to only 12 vendors who represent less than a quarter of a percent of all vendors. Table 4.17 below is a profile of the twelve most highly used prime contractors.

Table 4.17 Profile of Top Twelve Highly Used Prime Contractors

Rank	Vendor	Industry	Number of Contracts	Ethnicity	Gender	Dollars
1	Andes Construction	Construction	23	Hispanic	Male	$8,258,032
2	Ray's Electric	Construction	18	Caucasian	Male	$7,184,346
3	Gallagher & Burk, Inc.	Construction	27	Caucasian	Male	$6,561,722
4	Motorola	Goods & Other Services	6	Caucasian	Male	$6,154,437
5	Swinerton Builders, Inc.	Construction	1	Caucasian	Male	$6,010,063
6	McGuire and Hester	Construction	14	Caucasian	Male	$5,013,159
7	CSAC Excess Insurance	Goods & Other Services	3	Caucasian	Male	$4,743,627
8	AJW Construction	Construction	14	Hispanic	Male	$4,419,057
9	ValleyCrest Landscape Development	Construction	2	Caucasian	Male	$3,911,038
10	Arthur Young Debris Removal	Construction	67	Caucasian	Male	$3,237,974
11	Bay Area Parking Company	Goods & Other Services	6	Caucasian	Male	$3,158,114
12	Zakskorn Construction	Construction	3	Caucasian	Male	$3,090,002
	Total		**184**			**$61,741,570**
Twelve Firms Received						**25.28%**

B. Highly Used Prime Contractors By Ethnicity and Gender

The utilization pattern by ethnic group indicates a similar pattern with most contracts awarded to only a few firms. Tables 4.18 through 4.23 below profiles the highly used prime contractors by ethnic group. Most notable of the highly used Hispanic American prime contractors in Construction, over 80 percent of dollars awarded went to the two construction companies profiled in Table 4.17.

Table 4.18 Highly Used African American Prime Contractors

Industry	Number of Vendors	Percent of Dollars
Construction	5	95.59%
Architecture and Engineering	5	99.21%
Professional Services	5	94.66%
Goods and Other Services	5	66.45%

Table 4.19 Highly Used Asian American Prime Contractors

Industry	Number of Vendors	Percent of Dollars
Construction	5	97.31%
Architecture and Engineering	5	89.11%
Professional Services	5	98.89%
Goods and Other Services	5	67.08%

Table 4.20 Highly Used Hispanic American Prime Contractors

Industry	Number of Vendors	Percent of Dollars
Construction	5	98.36%
Architecture and Engineering	5	100%
Professional Services	5	100%
Goods and Other Services	5	94.34%

Table 4.21 Highly Used Native American Prime Contractors

Industry	Number of Vendors	Percent of Dollars
Construction	---	---
Architecture and Engineering	---	---
Professional Services	1	100%
Goods and Other Services	2	100%

Table 4.22 Highly Used Caucasian Female Prime Contractors

Industry	Number of Vendors	Percent of Dollars
Construction	3	100"%
Architecture and Engineering	5	78.79%
Professional Services	5	84.25%
Goods and Other Services	5	36.63%

Table 4.23 Highly Used Caucasian Male Prime Contractors

Industry	Number of Vendors	Percent of Dollars
Construction	5	54.71%
Architecture and Engineering	5	56.24%
Professional Services	5	23.61%
Goods and Other Services	5	21.57%

VI. SUMMARY

The City's prime contractor utilization analysis examined the $244,205,430 expended on the 24,956 contracts awarded between July 1, 2002 to June 30, 2005. The $244,205,430 expended included $77,252,468 for construction, $21,976,119 for architecture and engineering, $37,112,084 for professional services, and $107,864,759 for goods and other services. A total of 24,956 contracts were analyzed, which included 608 for construction,

424 for architecture and engineering, 1,101 for professional services, and 22,823 for goods and other services.

The 24,956 contracts were awarded disproportionately to the 5,018 utilized vendors. The City awarded 60 percent of the contract dollars to less than 2 percent of the 5,018 utilized vendors. Of the 5,018 utilized vendors, 88 vendors received 60 percent or $146,953,160 of the total expenditures while the remaining 4,930 vendors received 40 percent or $97,252,270 of the total expenditures.

The utilization analysis was performed separately for informal and formal contracts. The informal levels included contracts under $50,000 or $15,000 for each industry. The analysis of formal contracts was limited to contracts under $500,000 for each industry. *Chapter 8: Prime Contractor Disparity Analysis* presents the statistical analysis of disparity in each of the four industries.

5

SUBCONTRACTOR UTILIZATION ANALYSIS

I. INTRODUCTION

As discussed in *Chapter 4: Prime Contractor Utilization Analysis*, a disparity study documents Minority and Women Business Enterprise (M/WBE) contracting history in the jurisdiction under review. A finding of subcontractor disparity is required to implement a race-based program targeted to benefit M/WBE subcontractors. In order to analyze subcontractor disparity, it is imperative to determine the level of M/WBE and non-M/WBE subcontractor utilization on City of Oakland and Redevelopment Agency (City) contracts during the July 1, 2003 to June 30, 2005 study period.

II. SUBCONTRACTOR UTILIZATION DATA SOURCES

Extensive efforts were undertaken to obtain subcontractor records for the City's construction, architecture and engineering, and professional services contracts. Goods and other services contracts traditionally do not include significant subcontracting activity and they were not included in the analysis.

Two sources, City project files and prime contractor and subcontractor expenditure surveys, were used to reconstruct all construction, architecture and engineering, and professional services prime contracts valued at $100,000 or more. Mason Tillman visited the City's Contract Compliance Division, Public Works Department, Community and Economic Development Agency, and Oakland Base Reuse Authority to reconstruct subcontractor data from various documents found in the project files. The documents include but are not limited to contract documents, contract compliance status report, subcontractor affidavit for final payment, contractor utilization plan, and prevailing wage documents. The second

source was prime contractors who were surveyed by Mason Tillman to determine their subcontractors. The prime contractors were asked to provide the name, award, and payment amounts for each subcontractor. Subcontractors were then surveyed to verify the payments that were received from the prime contractors.

City staff from all agencies described above provided indispensable assistance throughout this process. In addition to providing access to their records, they encouraged the prime contractors and subcontractors to respond to each survey. City staff also assisted in locating subcontractor contact information and payment data which Mason Tillman was not able to locate.

III. SUBCONTRACTOR UTILIZATION ANALYSIS

As depicted in Table 5.01 below, Mason Tillman was able to reconstruct and analyze 868 subcontracts for the 147 prime contracts valued at $50,000 and more that were awarded between July 1, 2003 and June 30, 2005, the two-year study period for the subcontractor analysis. The 868 subcontracts included 634 construction subcontracts, 171 architecture and engineering subcontracts, and 63 professional services subcontracts.

On the subcontracts identified, $88,736,187 total dollars were expended of which $82,246,610 were for construction subcontracts, $4,161,398 were for architecture and engineering subcontracts, and $2,328,179 for professional services subcontracts.

Table 5.01 Total Subcontract Awards and Dollars: All Industries, July 1, 2003 to June 30, 2005

Industry	Total Number of Subcontracts	Total Dollars Expended
Construction	634	$82,246,610
Architecture and Engineering	171	$4,161,398
Professional Services	63	$2,328,179
Total	868	$88,736,187

A. Construction Utilization: All Subcontracts

1. Construction Subcontracts

Table 5.02 depicts construction subcontracts awarded by prime contractors. Minority Business Enterprises received 22.61 percent of the construction subcontract dollars; Women Business Enterprises received 5.48 percent; and Caucasian Male Business Enterprises received 71.91 percent.

African American Businesses received 94 or 14.83 percent of the construction subcontracts during the study period, representing $8,082,982 or 9.83 percent of the subcontract dollars.

Asian American Businesses received 24 or 3.79 percent of the construction subcontracts during the study period, representing $4,395,336 or 5.34 percent of the subcontract dollars.

Hispanic American Businesses received 67 or 10.57 percent of the construction subcontracts during the study period, representing $6,114,828 or 7.43 percent of the subcontract dollars.

Native American Businesses received none of the construction subcontracts during the study period.

Minority Business Enterprises received 185 or 29.18 percent of the construction subcontracts during the study period, representing $18,593,146 or 22.61 percent of the subcontract dollars.

Women Business Enterprises received 28 or 4.42 percent of the construction subcontracts during the study period, representing $4,506,028 or 5.48 percent of the subcontract dollars.

Minority and Women Business Enterprises received 213 or 33.6 percent of the construction subcontracts during the study period, representing $23,099,174 or 28.09 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 421 or 66.4 percent of the construction subcontracts during the study period, representing $59,147,436 or 71.91 percent of the subcontract dollars.

Table 5.02 Construction Utilization: All Subcontracts, July 1, 2003 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	94	14.83%	$8,082,982	9.83%
Asian Americans	24	3.79%	$4,395,336	5.34%
Hispanic Americans	67	10.57%	$6,114,828	7.43%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	28	4.42%	$4,506,028	5.48%
Caucasian Males	421	66.40%	$59,147,436	71.91%
TOTAL	634	100.00%	$82,246,610	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	24	3.79%	$1,516,623	1.84%
African American Males	70	11.04%	$6,566,358	7.98%
Asian American Females	6	0.95%	$697,164	0.85%
Asian American Males	18	2.84%	$3,698,172	4.50%
Hispanic American Females	7	1.10%	$673,145	0.82%
Hispanic American Males	60	9.46%	$5,441,683	6.62%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	28	4.42%	$4,506,028	5.48%
Caucasian Males	421	66.40%	$59,147,436	71.91%
TOTAL	634	100.00%	82,246,610	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	37	5.84%	$2,886,933	3.51%
Minority Males	148	23.34%	$15,706,213	19.10%
Caucasian Females	28	4.42%	$4,506,028	5.48%
Caucasian Males	421	66.40%	$59,147,436	71.91%
TOTAL	634	100.00%	$82,246,610	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	185	29.18%	$18,593,146	22.61%
Women Business Enterprises	28	4.42%	$4,506,028	5.48%
Minority and Women Business Enterprises	**213**	**33.60%**	**$23,099,174**	**28.09%**
Caucasian Male Business Enterprises	421	66.40%	$59,147,436	71.91%
TOTAL	634	100.00%	$82,246,610	100.00%

B. Architecture and Engineering Utilization: All Subcontracts

Table 5.03 depicts architecture and engineering subcontracts awarded by prime contractors. Minority Business Enterprises received 43.2 percent of the architecture and engineering subcontract dollars; Women Business Enterprises received 4.75 percent; and Caucasian Male Business Enterprises received 52.06 percent.

African American Businesses received 17 or 9.94 percent of the architecture and engineering subcontracts during the study period, representing $269,560 or 6.48 percent of the subcontracting dollars.

Asian American Businesses received 26 or 15.2 percent of the architecture and engineering subcontracts during the study period, representing $1,475,869 or 35.47 percent of the subcontracting dollars.

Hispanic American Businesses received 4 or 2.34 percent of the architecture and engineering subcontracts during the study period, representing $52,091 or 1.25 percent of the subcontracting dollars.

Native American Businesses received none of the architecture and engineering subcontracts during the study period.

Minority Business Enterprises received 47 or 27.49 percent of the architecture and engineering subcontracts during the study period, representing $1,797,520 or 43.2 percent of the subcontract dollars.

Women Business Enterprises received 17 or 9.94 percent of the architecture and engineering subcontracts during the study period, representing $197,609 or 4.75 percent of the subcontract dollars.

Minority and Women Business Enterprises received 64 or 37.43percent of the architecture and engineering subcontracts during the study period, representing $1,995,129 or 47.94 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 107 or 62.57 percent of the architecture and engineering subcontracts during the study period, representing $2,166,269 or 52.06 percent of the subcontract dollars.

Table 5.03 Architecture and Engineering Utilization: All Subcontracts, July 1, 2003 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	17	9.94%	$269,560	6.48%
Asian Americans	26	15.20%	$1,475,869	35.47%
Hispanic Americans	4	2.34%	$52,091	1.25%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	17	9.94%	$197,609	4.75%
Caucasian Males	107	62.57%	$2,166,269	52.06%
TOTAL	171	100.00%	$4,161,398	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	5	2.92%	$47,935	1.15%
African American Males	12	7.02%	$221,626	5.33%
Asian American Females	7	4.09%	$332,344	7.99%
Asian American Males	19	11.11%	$1,143,525	27.48%
Hispanic American Females	1	0.58%	$3,143	0.08%
Hispanic American Males	3	1.75%	$48,948	1.18%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	17	9.94%	$197,609	4.75%
Caucasian Males	107	62.57%	$2,166,269	52.06%
TOTAL	171	100.00%	4,161,398	100.00%
Minority and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Females	13	7.60%	$383,422	9.21%
Minority Males	34	19.88%	$1,414,098	33.98%
Caucasian Females	17	9.94%	$197,609	4.75%
Caucasian Males	107	62.57%	$2,166,269	52.06%
TOTAL	171	100.00%	$4,161,398	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	47	27.49%	$1,797,520	43.20%
Women Business Enterprises	17	9.94%	$197,609	4.75%
Minority and Women Business Enterprises	**64**	**37.43%**	**$1,995,129**	**47.94%**
Caucasian Male Business Enterprises	107	62.57%	$2,166,269	52.06%
TOTAL	171	100.00%	$4,161,398	100.00%

C. Professional Services Utilization: All Subcontracts

Table 5.04 depicts professional services subcontracts awarded by prime contractors. Minority Business Enterprises received 27.35 percent of the professional services subcontract dollars; Women Business Enterprises received 18.04 percent; and Caucasian Male Business Enterprises received 54.61 percent.

African American Businesses received 7 or 11.11 percent of the professional services subcontracts during the study period, representing $518,707 or 22.28 percent of the subcontracting dollars.

Asian American Businesses received 3 or 4.76 percent of the professional services subcontracts during the study period, representing $116,479 or 5 percent of the subcontracting dollars.

Hispanic American Businesses received 1 or 1.59 percent of the professional services subcontracts during the study period, representing $1,559 or 0.07 percent of the subcontracting dollars.

Native American Businesses received none of the professional services subcontracts during the study period.

Minority Business Enterprises received 11 or 17.46 percent of the professional services subcontracts during the study period, representing $636,745 or 27.35 percent of the subcontract dollars.

Women Business Enterprises received 6 or 9.52 percent of the professional services subcontracts during the study period, representing $420,077 or 18.04 percent of the subcontract dollars.

Minority and Women Business Enterprises received 17 or 26.98 percent of the professional services subcontracts during the study period, representing $1,056,822 or 45.39 percent of the subcontract dollars.

Caucasian Male Business Enterprises received 46 or 73.02 percent of the professional services subcontracts during the study period, representing $1,271,357 or 54.61 percent of the subcontract dollars.

Table 5.04 Professional Services Utilization: All Subcontracts, July 1, 2003 to June 30, 2005

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	7	11.11%	$518,707	22.28%
Asian Americans	3	4.76%	$116,479	5.00%
Hispanic Americans	1	1.59%	$1,559	0.07%
Native Americans	0	0.00%	$0	0.00%
Caucasian Females	6	9.52%	$420,077	18.04%
Caucasian Males	46	73.02%	$1,271,357	54.61%
TOTAL	63	100.00%	$2,328,179	100.00%
Ethnicity and Gender	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
African American Females	2	3.17%	$15,929	0.68%
African American Males	5	7.94%	$502,778	21.60%
Asian American Females	0	0.00%	$0	0.00%
Asian American Males	3	4.76%	$116,479	5.00%
Hispanic American Females	0	0.00%	$0	0.00%
Hispanic American Males	1	1.59%	$1,559	0.07%
Native American Females	0	0.00%	$0	0.00%
Native American Males	0	0.00%	$0	0.00%
Caucasian Females	6	9.52%	$420,077	18.04%
Caucasian Males	46	73.02%	$1,271,357	54.61%
TOTAL	63	100.00%	2,328,179	100.00%
Minority and Gender	***Number of Contracts***	***Percent of Contracts***	***Amount of Dollars***	***Percent of Dollars***
Minority Females	2	3.17%	$15,929	0.68%
Minority Males	9	14.29%	$620,816	26.67%
Caucasian Females	6	9.52%	$420,077	18.04%
Caucasian Males	46	73.02%	$1,271,357	54.61%
TOTAL	63	100.00%	$2,328,179	100.00%
Minority and Women	**Number of Contracts**	**Percent of Contracts**	**Amount of Dollars**	**Percent of Dollars**
Minority Business Enterprises	11	17.46%	$636,745	27.35%
Women Business Enterprises	6	9.52%	$420,077	18.04%
Minority and Women Business Enterprises	**17**	**26.98%**	**$1,056,822**	**45.39%**
Caucasian Male Business Enterprises	46	73.02%	$1,271,357	54.61%
TOTAL	63	100.00%	$2,328,179	100.00%